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From Editors Desk

Delhi Law Review is proud to complete its thirty third volume of publication. Over the years, its has strived to keep pace with changing laws and the views of established legal scholars on issues arising thereof.

This year too me and my editorial team continued its mission of advancing scholarship by inviting writers to write on topics of contemporary significance.

With the endeavour to present view on latest legislations within and outside country we are successful in presenting diverse selection of stimulatingly articles from scholars and students, both within and outside our faculty.

During last two years me & my team has tried to dedicate ourselves to keep up the standard of this a Faculty Level Journal and hope that in coming team will strive to honour the efforts of the present team and will further enhance the academic scholarship of this leading law Journal of the country (India).

On a final note the outgoing editorial team would like to send its best wishes to the next years new editorial team.

I thank contributors and the editorial team for their efforts to bring out this volume. (2014).

As usual I in the capacity of editor once again hold myself responsible for editing errors, if any.

With regards,

Prof. S.C. Raina

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JUDICIAL DELAYS:
Structural Changes Required

Ashwani Kr Bansal*

By making these submissions I put my neck in the noose.
Don't pull the same, ignore mine but make your suggestions.
Let us save the judicial system from being cast away.

Court delays constantly attract the attention of Union and state Governments as also Parliament and legislatures in India. Delays are projected as denial of justice or manifestation of injustice and/or inefficiency in the judicial or grievance redressal system. Thankfully, political parties and members of Parliament & state legislatures do not attack judges and lawyers but it is a fact that judicial delay is not on the active agenda of any socio-political pressure group or any formidable section of the population.

Statistics have become familiar. Three million cases are pending in courts out of which 2.6 million are in lower courts. The Government is involved or responsible for about 60 % litigation. The average time spent in the final disposal of a case is considered around 15 years. I would wish to study the pendency in two parts, one - adversarial litigation between private individuals and second the litigation between government department and private individuals.

The narrative of court delays in India has been sought to be handled alone by higher judiciary by setting standards for lower judiciary, fixing targets, creating infrastructure, raising the number of judges etc. The legislature has made piecemeal amendments to procedural laws, obeyed more in default than in providing expeditious disposal of cases. One serious question is whether Judiciary would crack the problem or a government can gather guts to do it in Parliament.[1] I suggest for judiciary and Government (in Parliament) should achieve *de te'nt* rather than power struggle between two sets of elite and display concern for the people.

Academicians, intellectuals, judges, or government bodies seldom talk about Judicial delays in their writings or notes but recommend small adjustments like augmenting number of judges or filling in vacancies and have not suggested any structural changes or any alternative narrative. It is submitted that the gigantic

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* Head and Dean, Faculty of Law University of Delhi

1 Related question is whether the vote bank politics would allow any political party to nail it.

problem pushing the judicial system on the verge of collapse would require revolutionary changes be they achieved by judicial or by legislative process.

The political economy of the beneficiaries of delays or pendency of such a large number of cases and particularly government litigation would have to be studied and corrected. Presently, there does not appear any political or legal compulsion to tackle the issue.

Who gets benefited by the delays?

The serious question about delays is: who are the beneficiaries of pendency of delayed disposal? Are they willing and prepared to end the pendency? It comprises not only the whole lot of defendants, but the whole class of Advocates and Lawyers and allegedly the judges.

Delays in decision-making or judicial delays both help the status quo and operate against the change within the ruling elite and holders of bureaucratic power. It helps stop elevation of persons down the ladder to the elite and sometimes the fall from elite to lower rung is delayed.

Unless the political party or its allies in power are convinced that there would be no damage to its Vote Bank or its return to power in next general elections, no formation is likely to attend to the pendency of cases to provide a permanent solution but would always engage in populist drum beating about the same. Judicial Delay and Cost of litigation are off-springs of the needs of elite, bureaucracy and individuals helming the government.

Anatomy of Delays

Let us accept that the judicial delay is by-product of Governance, which includes government and Judiciary both. A concerted action is required from both for which a *de tent* between judiciary and government has to be achieved, if welfare of the nation is to be achieved.

Mal-governance in the Government starts with the fact that the government officers and executives are given immunity for their actions done in good faith. In fact, the provision of good faith protection extends full protection to the actions done carelessly or in bad faith. If the person against whom wrong is committed (faulted) decides to get it corrected, it is a decision having serious ramifications. Faults of Government Officers can be cured only in those cases where the sufferer decides to correct the system at a great collateral cost. Mostly, the faulted persons move forward accepting the outcome after ordinary or due protests[2]. Individuals would not afford to lose the opportunities which would pass by in the process. Fighting corruption or wrong decisions of higher officers is a herculean task and affects the personal – official and physical health adversely. The family is also impacted

[2] Sometimes the case is filed to display an ego to peers but otherwise accepting and not putting all efforts.

adversely. On the other hand oppressive officers indulge in litigation at government cost obliging friendly advocates with remunerative fee.

Is it for Individuals to correct Government?

The question is whether it is the responsibility of the population to correct the system or is it the duty of the system to remove capacity of wrong actions from the system? All persons who face hostile and/or careless actions on the part of executives or officers tend to compromise or use the network to correct the decision or settle or succumb settling for lower benefit. If anyone chooses to fight, he is referred to as problematic liable to suffer in career growth or promotions.

Even the files are tempered with and the papers and notes which might favour such faulted person can be removed at the behest of high-headed officers. If the faulted person is an incumbent in the same organization, his actions, in relation to other official matters, are also sought to be controlled by holding his/her personal files.

Cost of Litigation: Individual spends own money

It should always be kept in mind that private person has to go to the Court at his own expense as against the government department and all its officers utilizing Government /Public funds and that private person may not be able to obtain the best of legal advice. The officers playing with government money to persist their wrongs and also obliging friendly advocates is the biggest menace in the legal system of the country.

There should be parity between private individuals and government departments in relation to litigation. The costs of litigation of the government[3] include:

i) the loss of time of executives and officers in preparing against the case,
ii) the time spent by departmental representatives in attending office of lawyer and courts
iii) the fee of lawyers paid by government,
iv) the opportunity lost for doing alternative productive work.

Cost to Private Party: The similar cost in an escalated form is applicable to individuals. The loss of opportunity and belying legal expectations because of highhandedness of officers is a mental dampener and in real terms causes much bigger harm. An early reasoned order or review of action would be soothing and can encourage population and would add to the faith in the judicial system.

New Litigation Policy of 2015

It is well known that the government is the largest litigator. In August 2015 new Litigation Policy was mooted by the government and it sought to discipline the officers and executives of the government. Litigation policy for the first time has

[3] It is drawn from public funds, many a time private person sitting as head of a public body deploys public fund to suppress more competent and qualified persons.

declared a span of 3 years as sufficient for resolving any litigation of the government with the individuals.

Litigation Policy desires to encourage government counsels to go to courts prepared, armed with necessary documents on the first day of the hearing itself. They should also not be allowed to ask for rescheduling of hearings on flimsy grounds. However, after 2009 till Aug 2015, there has not been any public debate and lawyers, judiciary or government have not commented on this issue.

The litigation policy calls for cost- benefit analysis before filing of a case. It says the government should avoid moving court, if legal costs outweigh financial gains arising out of a favourable judgment. The government often ends up spending huge amounts of money to deny a small financial benefit to an employee

The policy makes provision for a ***nodal officer*** in each department whose word should be final in legal matters as well as decisions on whether to move court in appeal. It is felt that officers play safe in not admitting claims of individuals in matters involving legal interpretation and leave it to the courts to take the final call. Nodal officers are expected to curb this practice of officers.

It is thought that the kind of power which would vest in him, (the nodal officer) would emerge stronger than the Head or the Secretary, which is not likely to be tolerated by senior officers. Thus the office of nodal officer would become a mirage similar to an ombudsman. The effort and courage required to imp.:ment this is easier said than done.

Alternative Narrative

This paper shall propose that existing courts be confined only to private litigation between adversaries. All litigation between the government and individuals a separate hierarchy of Administrative Courts may be introduced as follows and government litigation may be shifted out from existing court system. The hierarchy of administrative courts to utilize administrative system as quasi judicial Officers or judicial appeal officers trained in law, a mix or parallel to French system may be evolved.

From the existing courts system 25% courts would be made into administrative courts.[4] And 75% would continue as ordinary courts, thus giving 40% private cases about double the courts in one go or gradually as is deemed fit. The target of resolving government litigation in 3 years period would be achieved by reforming the government action and reducing the new filings against the government by 50%, by a changed system of decision making and putting in place in-house administrative courts, which would be drawn from existing courts.[5]

[4] It is explained that for 40% private work I am suggesting 75% courts. 60 % litigation would be handled by 25% courts.

[5] It is proposed that together with 25% courts there shall assist all government officers to resolve present 60% litigation, as they would be ordered to apply law in a straight manner or otherwise take personal responsibility for your wrong action as an officer.

In each Government department, there would be provided administrative court for resolving the legal disputes of individuals with the Government within the 60 days notice period of section 80 CPC.

Making officers and executives accountable and Corruption

It is normally thought as if the government officers are accountable, but in the fact they are not; only the courts make them accountable.[6] The officers and executives of the government departments need to be made responsible for not only the expenditure incurred by the government in litigation, but also for the losses suffered by private individuals for making them to go to court and then for delay in courts.

The individual suffers the losses on account of greed or inaction of the government executives. It is recommended that as the officers remain very busy, it would not be proper to impose personal liability in first instance.

The fixation of responsibility would be invoked only after the faulted individual escalates the matter to the higher up or serves a notice of 60 days under section 80 C. P.C . If the noting of officers/ executives are found to be wrong by the administrative courts later in the contested case, instead of government department the officers/executives would have to be personally responsible or a method of sharing responsibility should be evolved.[7]

The principle of personal responsibility of the officers and executives would revolutionize the internal working of the government.[8] The law may provide a right to individuals an opportunity to invoke legal rights in a given time frame, the personal responsibility of the officers/executives would commence, for both intentional or careless wrong. Presently all Institutional Heads display a tendency to keep legally trained personnel away, else they would ask for completing legal formalities.

Suggestions: Adding further sub-sections to 80 CPC, Introducing Personal Responsibility of Incumbents and Administrative Courts.

Sixty days notice under section 80 of CPC and introducing a similar time frame in writ jurisdiction has to be used as sufficient time for Government to arrange its house in order. On the receipt of a Notice under Section 80 C.P.C. or in relation to other writ proceedings, all the incumbents who handled the file will be deemed to be under notice to come clean and submit a fresh appraisal in relation to their

[6] The extent of wrong decision making is small, but corruption through proposing actions which are wrong is quite large.

[7] The reaction of bureaucracy and executives would be required to be contained. The party in power would need to contemplate and be cautious before taking steps. This can be slowly built up through judicial Process which may be more acceptable and would build better image of judiciary.

[8] The courage and conviction required against the backfiring of initiative as the executives/officers may stop taking action at all. The officers/executives have to be encouraged to withdraw the wrong noting by creating an environment in which no slur is held against them for correcting their input.

noting, which if found wrong or ambiguous, their personal responsibility will be fixed.

Proposed Method

In each ministry or government department there would be created an office having the powers of the court in the name of Administrative court This court would be activated by a notice under section 80 CPC.

On receipt of such a notice the relevant file and all relevant papers would be summoned by the Administrative court from the department which should reach Administrative court within 03 working days.

The officer helming the Administrative court would be assisted by law clerks/ representative of the department well versed in law. This representative of the department would also assist the faulted person[9] and would allow him access to all papers relating to his case and the grounds on which the department's action is justified.

The supporting staff of legal clerks would scrutinize the whole file and would ask pointed questions from all or any of the incumbents through whose hands the file had passed while arriving at the decision . All the replies would be submitted within the next 04 days.

Thereafter the presiding officer of the Administrative court would scrutinize the questions, replies, the whole file and the possibility of deciding correctly finding answers to all pleas. The objective would be fair play and not defeating the right asserted. He should form a conclusion or an understanding, ---

(i) If the officers are not conceding the request only because it is arguable, then the Administrative court would make its observation and

(ii) Ask the Head of the department why the request cannot be granted. The department would controvert the points raised by defaulted person akin to a reply in the court within 4 days.

(iii) On receipt of such a statement, the Administrative court would hold an enquiry by calling the individual in 4 days. It would draw its recommendations and ask the department why it cannot be made into a proposed decree and if the department does not accept the recommendation, its officers would be personally responsible.
The Administrative court may make the / ruling absolute irrespective of it going in favour of the faulted person or the department.

(iv) The department would be allowed to proceed or contest in the court only if the ruling as proposed by the Administrative court is not acceptable to the faulted person. *The department may be allowed to insist hearing in courts, in that case all officers and executives would be personally responsible in case they lose.*

[9] Who issues the notice u/s 80, who wants to take up the case against the government department.

In such a situation if the matter is not finalized within 60 days notice period, on the expiry of the notice the matter may start in the court and commence from the level where it had already been reached by the departmental action, with the rider that the officers would personally be liable.

In a nutshell, the purpose is that this 60 days notice period has to be utilized for putting the house of government department in order and no adjournment should be allowed to the department.

Applicability to Writ Jurisdiction

With suitable modifications, the same procedure can be applied mutatis mutandis in relation to the filing of the writs. In the first 2 or 3 hearings of the writ at the admission stage, the court would take notice of the case and may give or refuse temporary relief. Thereafter the proceedings would work in the same manner as suggested above in case of notice under section 80 CPC and shall progress further from the level of acceptance or denial of claim of individual with the rider of personal responsibility.

Making Officers/ Executives Personally Liable

As soon as the officers and executives of the government are made personally responsible for all their actions and noting(s) in the files, half the battle would be won. Initially a liberal view for casual or carefree including careless actions of officers may be taken. But when an objection to the noting is raised, and the executive or the officer does not correct his/her action, then the good faith exemption in favour of incumbents should be declared inoperative. The officers/employees would be liable to compensate the costs as determined in the beginning of the paper.

The above actions would have the double advantage of eradicating corruption and delays. As the government officers and executives would be up in arms, disciplining the bureaucracy supported executives would be a tough call for the government and therefore the whole reform may be achieved by judicial process supported by Parliament.

In case, the dispute does not get resolved and goes to the judicial hearing, it will be the duty of the courts to determine which of the noting of noted incumbent led to the wrong result which forced the petitioner/plaintiff to launch the proceedings.

The second superior person which should have corrected the noting of the incumbent down below, and would also have to answer why he did not come to know of the flaw in the former noting. An encouraging system of coming clean without asking too many questions may be put in place. If incumbents fail and later on their wrong is established, they would have to compensate for the losses caused to the individual petitioner/ plaintiff or to the Government.

Office procedures for changing the note on advise of superior. If an incumbent down below in the hierarchy insist on his wrong noting and states to his superior Officers to over-rule the noting, there would not have congenial atmosphere, so

solutions to the practical problems would have to be found informally within the office system. Wrong appreciation of facts and rules and the resistance on the part of the incumbents to give fair hearing and appreciation of facts contribute to miscarriage as also delays.

Administrative Reforms in Office Procedure

The administrative system needs overhaul. It does not require to be substantiated that no Officer even the Section Officer, makes any noting directly on the file. There is a preparation on the part of the Section Officers, Under Secretaries and Dy. Directors to put the blame for every wrong on Assistants and Senior Assistants. These practices come handy to evade the responsibility.

No response to submissions: The governmental administrative system is made to operate in a manner that the representation/points made by the petitioners or applicant are not responded to even on the file. The department continues its own discourse completely ignoring the points made by individual. There is no administrative direction to the Officers that the subordinate staff should meet all the arguments and facts of the applicant/petitioner/appellant.

The Departmental incumbents continue in their own jargon. It has to be the duty of the Department to give reasons/replies even if the Legal Assistants or Law Officers have to be engaged in the Department. This needs to be made mandatory by prescribing in the rules for office procedure. There is a need to make it mandatory to give reply to the petitioner/ applicants on all points.

Till the time the Law Officers or the persons belonging to Law Profession, Law Academics and judges are not utilized sufficiently in the offices, the wrong decisions and actions would continue. In case of blatant wrongs, necessarily the proceedings before the courts would have to be filed in which the delays should be compensated.

LEGAL CONTROL OF MEDICAL DEVICES: A Comparative Study of Laws among U.S., U.K., Japan and India

Prof. N. K. Chakrabarti[*]
Dr. Shreya Chatterjee[**]

Introduction

The Global Harmonization Task Force was adopted in 1992 which included European Union, United States, Australia, Japan, and Canada[1] to provide for a uniform regulatory mechanism and also in order to amplify the access to safe, effective, and clinically beneficial medical technologies across the globe. In this paper an attempt has been made to make a comparative study of laws of United States, United Kingdom, Japan and India on medical devices. This discussion has been divided into following headings for discussion:

1. Conceptualizing Medical Devices
2. Essential aspects of medical Devices Law
3. Legal Control of Medical Devices in USA
4. Legal Control of Medical Devices in United Kingdom
5. Legal Control of Medical Devices in Japan
6. Legal Control of Medical Devices in India
7. Comparative Analysis of Medical Devices Law
8. Concluding Remarks

Conceptualising Medical Devices

The Global Harmonization Task Force (GHTF) has also provided with a definition of medical devices as[2]:

> "Any instrument, apparatus, implement, machine, appliance, implant, in vitro reagent or calibrator, software, material, or other similar or related article, which is thereby intended to be used by the manufacturer for human beings for one or more of the specific purposes of[3]:

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[1] About GHTF available at http://www.ghtf.org/about/ (last visited on 09/09/2013)
[2] *Id.*
[3] Information document concerning the definition of the term "Medical Device" available at http://www.ghtf.org/sg1/sg1-final.html (last visited on 15/09/2013)

1. "Diagnosis, prevention, monitoring, treatment, or alleviation of disease or compensation for an injury
2. Investigation, replacement, modification, or support of the anatomy or of a physiological process
3. Supporting or sustaining life
4. Control of conception
5. Disinfection of medical devices
6. Providing information for medical purposes by means of in vitro examination (such as reagents, calibrators, sample collection kits, control materials, and related instruments) of specimens derived from the human body and which does not achieve its primary intended action in or on the human body by pharmacological, immunological, or metabolic means, but which may be assisted in its function by such means."

The Medicines and Healthcare products Regulatory Agency (MHRA)[4] has excluded materials used for disinfecting medical devices from the definition. However, in India medical devices has been considered as drugs[5]. The Drugs and Cosmetics Act, 1940 which has been amended and introduced in the Rajya Sabha on 29th August, 2013 has also provided with the definition of manufacturer and medical devices: According to the Bill "Medical Device" means:[6]

"(i) any instrument, apparatus, appliance, implant, material or other article, whether used alone or in combination, including the software, intended by its manufacturer to be used specially for human beings or animals for one or more of the specific purposes of,—
(a) Diagnosis, prevention, monitoring, treatment or alleviation of any disease or disorder;
(b) Diagnosis, monitoring, treatment, alleviation of, or assistance for, any injury or handicap;
(c) Investigation, replacement or modification or support of the anatomy or of a physiological process;
(d) Supporting or sustaining life;
(e) Disinfection of medical devices;
(f) Control of conception and which does not achieve its primary intended action in or on the human body or animals by any pharmacological or immunological or metabolic means, but which may be assisted in its intended function by such means;
(g) An accessory to such an instrument, apparatus, appliance, material or other article;

[4] Directives Bulletin No. 3: Guidance on the operation of EU vigilance system in UK. 2008

[5] Guidelines for Import and Manufacture of Medical Devices available at http://www.cdsco.nic.in/medical%20device%20A42.html (last visited on 17/09/2013)

[6] Drugs and Cosmetics Act, 1940, Bill No. LVIII of 2013 available at: http://www.drugscontrol.org/Bill%20No.%20LVIII%20of%202013.pdf (last visited August 15, 2013)

(h) A device which is reagent, reagent product, calibrator, control material, kit, instrument, apparatus, equipment or system whether used alone or in combination thereof intended to be used for examination and providing information for medical or diagnostic purposes by means of in vitro examination of specimens derived from the human body or animals;
(i) Any new medical device;"

It has also provided with the definition of "manufacturer" which includes[7]:

"(i) in relation to any drug (except human blood and its components, or any cosmetic) includes any process or part of a process for making, altering, ornamenting, finishing, packing, labeling, breaking up or otherwise treating or adapting any drug or cosmetic with a view to its sale, export, stocking or distribution but does not include the compounding or dispensing of any drug, or the packing of any drug or cosmetic, in the ordinary course of retail business;
(ii) in relation to human blood and its components includes any process or part of a process of collection, processing, storage, packing, labeling and testing for its use, sale, export or distribution for transfusion in human beings;
(iii) in relation to any medical device, includes any process or part of process for making, assembling, altering, ornamenting, finishing, packing, labeling, or adapting any medical device with a view to its sale or stock or export or distribution but does not include assembling or adapting a device already on the market for an individual patient;"

Essential Aspects of Medical Device Laws

In order to make a comparative study with regard to law of medical devices in US, UK. Japan and India the following essential aspects of the respective law will be discussed:

Classification of Medical Devices

Medical devices are classified in various countries depending upon their design complexity, their intended use and characteristics, and the risk factor involved with the device. The authorities also recognize that some devices are provided in combination with drugs, and regulation of these combination products takes this factor into consideration. So we can say that the classification is made on the basis of the following essentials[8] points:

- "The risk which is associated with the medical device
- The intended purpose for the device by the manufacturer.
- The device's indications for use."

[7] *Id.*

[8] Principles of medical devices classification available at http://www.ghtf.org/GHTF/SG1/N15:2006 (last visited on 17/09/2013)

Medical Device Tracking

The main purpose of medical devices is to provide better health care facilities to the public. Medical devices when marketed should be tracked up to the end-user of the product for the useful life of the device and to facilitate patient notification or recall at the time of any defect or problem suffered by the public with the device.

Adverse Event Reporting

Adverse event reporting (ADR) is an important mechanism to improve and protect the health and safety of patients. Medical devices sometimes pose threat to the health and safety to a patient which should be immediately reported to prevent further cases. It is presently adopted by most countries to provide better health care facilities. Though the GHTF (Global Harmonization Task Force) has tried to adopt a uniform system for all cases of adverse events yet it has not been adopted by the member countries.

An adverse event reporting is usually made under the following circumstances:

- "If there is an event related to a medical device which has resulted in any injury to the patient and the manufacturer becomes aware of it.
- If it is assessed that the harm caused has been due to the manufacturer's device
- If the event resulted or might have resulted to death or serious injury of a patient, user, or other person."

Every country has its specified time frame to report an adverse event.

Not-reportable incidents or events

It is not necessary that all events are reported, the countries have identified various instances of device failure which are not to be reported. The events include:

- "If the adverse event has been caused is due to a patient's pre-existing condition
- The product was released in the market and used by the patient after the service life of the product.
- If the medical device has complied with the necessary safety standards and operated correctly.
- If the deficiency present in the device had a negligible likelihood of causing death or serious injury and has also been established and documented as acceptable after risk assessment
- If the side effects are expected and foreseeable from the manufacturer's labeling, are clinically well known, and are documented in the device master record, with an appropriate risk assessment
- If the adverse event was caused by errors of use and abnormal use"

Records

With regard to medical devices record for each batch of product which would also include its distribution and also all other information which are important with regard to the final product forms a very essential aspect. The records should be

maintained at the time any action is taken with regard to a medical device and all relevant information with regard to the device should be traceable.

Enforcement Actions

To ensure the safe, beneficial and quality medical devices in the market it is necessary that there is a specific legislation to deal with it. Though India doesn't have a specific legislation to deal with medical devices and medical devices are considered as drugs most of the countries have adopted specific legislation dealing with medical devices. It also has penal provisions in case a person suffers as a result of medical device. Though the GHTF has tried to adopt a uniform system of regulation yet it has still not been accepted.

Import of Medical Devices

Import of medical devices plays a pivotal role for providing better health care facilities in every country. Medical devices are usually imported across the globe as one of the main aim of medical science is to adopt the most recent developments in research.

Recall and Removal

When a medical device is released in the market it has to confirm with certain safety standards, however if an adverse report is made the manufacturer has to justify the defect if he is unable to do it then the there is recall of the product from the market as it has failed to meet the safety standards.

The recalls have been classified on the same principles on the basis of the risk factors associated with the devices in most of the countries.

Legal Control of Medical Devices in United States

The US Food and Drug Administration's Centre for Devices for Radiological Health (USFDA/CDRH) governs the regulatory regime of Medical Devices. The basic framework governing the regulation of medical devices is established in the Medical Device Amendments to the Federal Food, Drug, and Cosmetic (FFD&C) Act[9]. The Medical Device Amendments were enacted on May 28, 1976. The FFD&C Act was again amended with respect to the regulation of medical devices by the Safe Medical Devices Act of 1990 and the Medical Device Amendments of 1992[10]. New provisions governing the export of FDA regulated products, including medical devices, were established in the FDA Export Reform and Enhancement Act of 1996[11].

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[9] Federal Food and Drug Administration available at http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Overview/default.htm (last visited on 7/09/2013)

[10] *Id.*

[11] *Id.*

The FFD&C Act was amended by the Food and Drug Administration Modernization Act of 1997 (the Modernization Act) which was signed into law on November 21, 1997 by President Clinton which contained provisions related to all products under FDA's jurisdiction[12].

The Medical Device User Fee and Modernization Act of 2002 (MDUFMA), P.L. 107-250, amends the Federal Food, Drug, and Cosmetic Act to provide FDA important new responsibilities, resources, and challenges. MDUFMA was signed into law October 26, 2002. MDUFMA has three particularly significant provisions[13]:

- "It establishes fees for premarket reviews of medical devices;
- It permits establishment inspections by accredited persons (third-parties); and
- It provides new regulatory requirements for reprocessed single-use devices".

With regard to legal control of medical devices we may focus on the following aspects:

Classification of Medical Devices

In the United States the FDA has classified its products under 3 categories depending on the "risk and evaluation" necessary for safety and effectiveness. Most Class I devices (e.g stethoscope, elastic bandage and examination gloves) are low-risk category and subject to "general controls" such as test of sterility. Class II devices (eg computed tomographic scam, infusion pumps and surgical drapes) are devices with moderate risk factors and usually have general and specific controls. Class III devices (heart valves, deep brain stimulators, cardio-verterdefibrillators and silicone gel-filled breast implants) usually have general controls and premarket approval.

It is noteworthy to me mentioned that Class II devices usually have to pass through review pathway under Section 510(k) which deals with premarket notification. Under this process the FDA and the manufacturer rely on the similarities between the device at issue and a previously cleared device. If a device is "substantially equivalent" to a previously cleared device additional clinical data are not required. However the device has to go through performance standards and post-marketing surveillance. Class III devices which poses a great risk factors usually pass through clinical studies evaluating the safety and effectiveness of the device, which is referred to as Premarket Approval (PMA) application. However changes made to a device which already has PMA does not require clinical studies to be made.

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[12] *Id.*

[13] Overview of IVD Regulation available at http://www.fda.gov/medicaldevices/deviceregulationandguidance/ivdregulatoryassistance/ucm123682.htm#18 (last visited on 9/9/2013)

Medical Device Tracking

Medical device tracking is one of the activities of the FDA during post market surveillance. If the device meet statutory requirements as stipulated in the FDA act and a tracking order has been issued by FDA then it requires tracking. Implantable Medical devices are also listed for tracking. The manufacturer, distributor and user facility are required to submit the tracking information. The critical information whether the device has or has not been distributed to a patient must be provided by the manufacturer. The manufacturer and the distributor need to maintain a written record for the useful life of the device.

Adverse Event Reporting

Adverse event reporting is essential for the safety of patients. Medical device reporting (MDR) regulations under the FDA requires the manufacturers and importers of medical devices to report serious injuries, deaths, and malfunctions. The foreign manufacturer however is not required to follow FDA regulations. If in certain circumstances it is employed, the reports are to be forwarded by the agent which will be viewed as an employee of a foreign firm.

Remedial action exemption (RAE) can be requested by the manufacturer along with or after the submission of any initial reports on events, which can be a 5 day one or a 30 day one. The RAE can be requested when the information received by the FDA is erroneous and false and has not resulted in any death or serious injury or in case the medical device has been manufacturer by another manufacturer.

Reporting of adverse events under The FDA can be made by the manufacturer, whether domestic or foreign, but also by the user facility and distributor. The manufacturer is required to submit four reports depending on the event reported which includes:

- "A 30-day reports for death, serious injury, or malfunctions;
- A 5-day reports for events requiring immediate remedial action (FDA form 3500A);
- A baseline report (FDA form 3417) to provide basic data on the device, subject to MDR report (30 or 5 days)
- A annual certification (FDA form 3381)".

If a patient suffers from death or serious injury it has to be reported within 10 days in Form 3500A to the FDA by the user facility and distributor. A semi-annual report has to be submitted by the user-facility to the FDA (form 3419) initially for a period of seven months. A single report has to be submitted for a patient in form 3500A though it has been reported from various sources. Form 3500 would ensure submission of voluntary reports at any time for adverse events, product problems, and product use errors.

According to the FDA the manufacturer is required to submit five MDR reports, ie,

1. In the case of death, serious injury, and malfunction a 30 day report is submitted. The reporting of events is done through complaint information.

2. A report within 5 days is submitted in the case of severe, unusual, or unexpected events and events which require immediate remedial action for which FDA has made a written request.
3. When an adverse report is made for the first time with regard to a medical device a Baseline report is made under form 3500A which provides basic device identification information. The report can be submitted by model type (one baseline report for each model) or by device family (one baseline report for all models in that family).
4. In case of additional information with regard to a medical device a Supplemental report is to submitted using form 3500A within 1 month. However depending on the nature of the event the FDA shall make follow-ups
5. With regard to Annual certification a number of certifying authorities has to be designated by the manufacturer. The certifying authorities would sign a certification statement for his or her identified organizational component or site. This certification would help in reducing the unintentional reporting errors that have been submitted during the 12-month period.

Records

Manufacturers are required to establish and maintain written procedures for implementation of the MDR regulation, which include the following:

1. "Evaluated information that determines the reportability of an event.
2. All reports and information of the medical device (MDR) submitted to FDA in either written or electronic form.
3. Any information that was evaluated during the preparation of annual certification report(s).
4. Systems that ensure access to information that facilitates timely follow-up and inspection by FDA.
5. Investigation protocol that would be followed."

The records related to an event (whether reportable or not) must be maintained for 2 years from the date of the event or a period equivalent to the expected life of the device, whichever is longer.

Enforcement Actions

The FDA (Federal Drug Administration) is the body responsible for regulation of Medical Devices. It has a separate division which deals with medical devices.

Import of Medical Devices

Import of Medical Devices is an important aspect of the medical device industry in the United States and the Medical Device regulation provides control mechanism on import of medical device.

Recall and Removal

In the United States recalls of medical devices are usually conducted in a voluntary manner by the manufacturer, but under circumstances where the manufacturer or importer doesnot recall a device voluntarily even after there are risk factors

involved then the respective authority issues a recall order to the manufacturer. The recall order however does not include market withdrawal or a stock recovery.

The recalls have been classified on the same principles (associated relative health hazard) by FDA

1. "Class I devices which involve severe adverse health consequences or death.
2. Class II devices where there are temporary or medically reversible health consequences
3. Class III devices which have the minimum risk factor and where the product will not likely cause adverse health consequences."

Class I or class II recalls are considered to be urgent safety-related recalls, whereas class III recalls are considered to be routine non safety-related recalls

The FDA has also recognized the essential of recall strategy which includes the classification of recall, the need of initiating the recall, determination of the level of recall which includes wholesale, retail, hospital or consumer level, the significance of the hazard to the health and safety of the consumer, the mode of distribution of the goods and the level to which the distribution takes place.

The manufacturer must also specify the method used and the level of consignees' communication for recall. These levels have been specified by the FDA as below:

1. "Level A: 100% of the total number of consignees to be contacted
2. Level B: some percentage, ie, 10%–100% of the total number of consignees to be contacted on a case-by-case basis
3. Level C: 10% of the total number of consignees to be contacted
4. Level D: 2% of the total number of consignees to be contacted
5. Level E: no effectiveness checks".

The manufacturer marketing devices in the United States should also submit regularly a recall status report, whose frequency is decided by the FDA. The reporting interval is usually between 2 and 4 weeks.

Legal Control of Medical Devices in United Kingdom

All Medical devices that are placed on the market in the UK have to comply with two sets of device-specific legislation[14]:

- European Union laws – the Medical Devices Directives and Regulations
- UK laws – the Medical Devices Regulations

Each member state of the EU implements the Directives into their own national law; in the UK these are the Medical Devices Regulations 2002 (as amended) and they are issued under the Consumer Protection Act 1987[15]. EU regulations apply directly to the UK and do not need to be transposed. The legislation places

[14] MHRA Regulating Medicines and Medical Devices available at http://www.mhra.gov.uk/Howweregulate/Devices/ (last visited on 09/09/2013)

[15] *Supra* n 15

obligations on manufacturers to ensure that their devices are safe and fit for their intended purpose before they are CE marked and placed on the market in any EU member state.

There are currently four sets of UK regulations implementing all of the EU medical devices directives and amendments to date[16]:

- "Statutory Instruments 2002 No. 618 (Consolidated legislation)
- The Medical Devices (Amendment) Regulations 2003 No. 1697 (Amendments to cover the re-classification of breast implants and additional requirements covering devices utilising materials from TSE susceptible animal species)
- Medical Devices (Amendment) Regulations 2007 No. 400 (Amendment to cover the re-classification of total hip, knee and shoulder joints)
- Medical Devices (Amendment) Regulations 2008 No. 2936 which transpose Directive 2007/47/EC into UK law"

Medical Device Classification

The MHRA[17] (Medicines and Healthcare products Regulatory Agency) has classified medical devices into three groups:

1. General medical devices
2. AIMD (Active Implantable Medical Devices)
3. In vitro diagnostic medical devices

The general medical devices were then further classified into four classes which includes Class I (Dressings) which have a low risk factor involved. The product requires a premarket notification before it is released in the market for sale. The next category includes Class IIa (X-ray Film, which has a low-medium risk, Class IIb (Blood-bags, contact lens) which have a medium-high risk and Class II (Bone Cement and cardiac stents) which have the highest risk factor involved. The devices require a certification by notified body for their release. Also, the MHRA classified medical devices within a series of 18 rules depending on functions, parts of body treated, and properties of medical devices. If more than one rule applies to a medical device, the higher would be its classification.

Medical Device Tracking/Conformity Assessment

The manufacturers in Europe before placing a product in the market undergo a proper assessment of the product according to the directive. Conformity Assessment(CE) is usually made for products having risk factors involved, they also have to obtain certification from a notified body that are designated by independent conformity assessment organizations which are also monitored by member states to undertake this function. However products having a low risk factor can be introduced with a CE mark on the basis of self declaration of

[16] Available at http://www.mhra.gov.uk/Howweregulate/Devices/Legislation/index.htm (last visited on 17/09/2013)

[17] European Commission, Enterprise and Industry: Medical Devices available at http://ec.europa.eu/enterprise/sectors/medical-devices/index_en.htm (last visited on 12/09/2013)

conformity. The level of assessment is directly proportionate to the risk involved with the products. A database is further created for scrutiny of each individual device at the highest level

When a product is released in the market it should contain the CE marking either on the product or on the packaging. The presence of such a mark proves that the manufacturer has affirmed that his product meets the relevant essential requirements in the Directive and is fit for its intended purpose as specified by the manufacturer. It is mandatory for all devices, (except custom-made devices, those intended for clinical investigations, humanitarian use devices and IVD devices for performance evaluation) being placed on the EU market whether used in private or public hospitals and nursing homes or sold in retail outlets to have a CE marking.

Adverse Event Reporting

There have been some provisions made with regard to reporting of adverse incidents. In the case of serious events it has to be immediately reported to the Competent Authority. The relevant information related to adverse events is collected evaluated centrally and, where necessary, made available to other member states. The main purpose of such reporting is to make sure that similar incidents don't occur in other countries of the European Union. The safety of patients is always a priority in the directive. Further The MHRA also has a voluntary system, which is operated by its Adverse Incident Centre (AIC), which is based on user reporting of all device-related adverse incidents. It operates alongside the manufacturer's vigilance system.

In case there is an incident of non compliance with the directives and regulations, assessment and investigation is usually made. The competent authorities resolve the issues related to non-compliance or breach of legal requirements which is indicated in the post-market surveillance activity. Where it is a case of immediate risk there is an attempt made to bring the manufacturer into compliance voluntarily by the MHRA. However if voluntary compliance is not possible then it will have a range of formal enforcement powers available to use under the Consumer Protection Act including the ability to remove or suspend devices from the market and prosecute offenders.

According to the MHRA[18] directives when there is a report of adverse incident it is immediately entered into the AITS database via a user-reporting system. A reference number is also provided for assessing grievance of the user of the medical device. It is then accordingly allocated into one of the five investigation categories, ie, 'urgent in depth, in depth, standard, information, and others'[19]. Tracking of incident reports is usually conducted by the manufacturer or authorized representative. When an in-depth investigation of a medical device is made, a Medical Device Alert is usually issues. A standard investigation is conducted

[18] Directives Bulletin No. 3: Guidance on the operation of EU vigilance system in UK. 2008. September

[19] *Id.*

through a series of standardized letters issued directly by the adverse incident center[20].

It has been announced in June 2013[21] by The Medicines and Healthcare products Regulatory Agency (MHRA) that four NHS trusts have been assigned to develop a new tracking system for high risk medical devices which carry a high risk factor that will improve the monitoring of medical devices such as breast implants, heart valves and pacemakers[22]. This initiative was taken as a result of an adverse event of PIP Breast implant.

The new tracking system would incorporate unique device identifiers into hospital patient electronic records and national Hospital Episode Statistics databases. An analysis by the Clinical Practice Research Datalink (CPRD) will enable the MHRA to better assess the performance of high-risk medical devices and to trace patients in the event of a device recall or safety alert, without the need for multiple device registries.

An adverse incident is "an event that causes, or has the potential to cause, unexpected or unwanted effects involving the safety of device users (including patients) or other persons."

If a patient is injured as a result of medical device failure or misuse, a medical device failure has resulted in hindrance to a patient's treatment or a patient's health detoriates as a result of device failure an adverse reporting can ' made by clinicians, healthcare workers, patients and members of the public. Reports may need to be submitted via, or copied to, medical device liaison officers and/or patient safety managers.

In United Kingdom[23], a report is to be prepared by the manufacturer when he becomes aware of any incident within the required time frames specifying type of incident which has occurred from a medical device. The time frame usually includes[24]:

1. "When there is a Serious threat to the public from a medical device within two days after the date of awareness
2. In case of death or serious deterioration in state of health within 10 elapsed calendar days after the date of awareness
3. Other incidents should be reported immediately after assessing the link between the device and the event within 30 days.

[20] *Id*

[21] Press release: New tracking system for high-risk medical devices in development as the MHRA responds to review on PIP breast implants scandal available at http://www.mhra.gov.uk/NewsCentre/Pressreleases/CON286824 (last visited on 15/09/2013)

[22] *Id*

[23] New medical devices vigilance guidance system MEDDEV version5available at http://www.mhra.gov.uk/Publications/Regulatoryuidance/Devices/DirectivesBulletins/CON2033888 (last visited on 17/09/2013)

[24] *Id*

4. The Manufacturer should provide with a written acknowledgment of user reports from MHRA to manufacturer within three working days of receiving user report
5. A voluntary report may be submitted at any time, and may also include events other than death, serious injury, or malfunction as defined."

The report by the manufacturer in the case of adverse event is prepared and used for initial, follow-up, and final incident reports. An oral report should immediately be followed by a written report. The initial report submitted by the manufacturer is recorded and analysed, however the final report should also contain the detailed information about the adverse incident. Incidents are preferably reported on form MORE, ie, MHRA's Manufacturers' On-line Reporting Environment.

However in United Kingdom,[25] the manufacturer or authorized representative can report incidents by submission of following reports:

1. "Initial reporting of adverse event to MHRA for record and evaluation
2. Periodic summary reporting: these reports are submitted in an agreed format and frequency for the device and incident between the manufacturer and MHRA after submission of one or more initial reports.
3. Trend reports: these reports must be submitted when there is a significant increase in the rate of already reportable events, incidents that are usually exempted from reporting, and events that are usually not reportable.
4. Final reports"

The manufacturer makes a detailed investigation of the various reports which has been submitted as complaints. The manufacturer submits periodic reports to the MHRA providing details about the investigation performed after the initial report in consultation with the user.

Records

The manufacturers under MHRA aim at developing a "Medical device Quality Management System", which would serve as a documented procedure for a feedback system and for operating in compliance with the standards. The documented procedure aims at providing early warnings of quality problems in medical products and precautionary steps are to be taken to correct it. A proper documented record system should be kept with all details of the adverse event. The record should also detail about the evaluation made and the consequent action taken. Review of complaints is conducted through various modes which includes user surveys, review of literature relevant for the purpose, post market clinical follow up which would usually depend on the nature of the device. The record is usually maintained during the lifetime of the product and contains the manufacturing date, serial number, batch number of the product.

[25] *Supra* n 2

Enforcement of Actions

The MHRA for the purpose of enforcement of the UK medical device regulations, it investigates the complaints with regard to products which have been marked CE or has not been marked. It also makes inspection of the facility of the manufacturer in the event of breach of regulation. The MHRA also makes investigation of the results of vigilance reports. The MHRA has been provided with a wide range of enforcement powers under the Consumer Protection Act 1987, Medical Device Regulations 2002, and General Product Safety Regulations 2005 in the United Kingdom.

Import of Medical Devices

United Kingdom also has a huge market with regard to the import of medical devices.

G.Recall and Removal

The guidelines of MHRA[26] and GHTF have termed recall a FSCA (Field safety corrective actions to reduce the risk of harm to patients, operators, or others or to minimize the recurrence of the event. The FSCA usually include the following actions:

1. "Return of a medical device to the manufacturer or its representati (which is termed recall)
2. Modification of the device
3. Exchange of device
4. Complete destruction of the device
5. Advice given by manufacturer regarding the use of the device".

The MHRA has also recommended timescales to issue a FSCA. The FSCA could include the following:

- "The return of a medical device to supplier;
- Modification of the device
- The exchange or destruction of the device
- Retrofit by the purchaser of manufacturer's modification or design change
- The advice provided by the manufacturer on the use of the device."

A field safety notice (FSN) is distributed by the manufacture in the official language. The Field Safety Notice includes the following items:

1. A clear title like "Urgent Safety Notice" on the notice itself, on the envelope if sent by mail, and as the subject line if sent by email or fax
2. The notice should clearly mention about the recipient of the notice.
3. The FSN should include a detailed description of the device which includes model, batch, or serial number.

[26] Recalls, corrections and removals (devices) Statutory Instrument 2002 No.618: The Medical Device Regulations 2002. available from: http://www.fda.gov (last visited on 15/09/2013)

4. A notice should mention in factual statement the reasons for the FSCA.
5. A clear explanation in the notice of the risk related to the failure of the device and, where there is a appropriate probability of occurrence.
6. The recommended action to be taken by the recipient of the FSN
7. The time frames by which the action should be taken by the manufacturer and user, where appropriate.
8. The selected address for the recipient of the FSN to use to obtain further information.

The notice must also include a request to inform customers or patients who received the product. It should include the details of any affected device which have been transferred to other organizations. If a device has been destroyed the information has to be provided to the manufacturer so that follow-up can take place and a request for a copy of the FSN to be passed on to the organization to which the device has been transferred.. FSN approved by MHRA is usually made within two days of the FSCA agreement.

Legal Control of Medical Device in Japan

In Japan the Ministry of Health, Labor and Welfare (MHLW) is responsible for food, medical care, labour policy and standards and social welfare. The Pharmaceutical and Food Bureau regulates pharmaceuticals and medical devices. The Pharmaceuticals and Medical devices agency registers medical devices. In Japan the Pharmaceutical Affairs Law covers regulations on pharmaceuticals, medical devices and cosmetics.

Medical Device Classification

Medical devices in Japan have been classified under 3 categories depending upon the risk involved to the human body. The three categories include General Medical Devices (Class I) Controlled Medical Device (Class II) and highly advanced Medical Devices.

Medical Device Tracking

Labeling of Medical Devices is every essential and detailed in Japan which must include the name of the product, manufacturer/seller name and address, weight, volume, medical devices number or production indication. Medical Devices have to be labeled in a proper and descriptive manner before they are released in the market. The Act doesnot have any specific provision related to tracking yet medical devices are tracked even in Japan.

Adverse Event Reporting

When manufacturers and marketers are informed of any adverse reactions with regard to medical devices and drugs it is immediately reported to the Ministry. Since October 27, 2003 electronic adverse reporting have been accepted. Marketers, wholesalers of medical devices and drugs collect the samples and examine information on efficacy, safety and proper use of drugs and medical

devices. Such information is further provided to health professionals and pharmacists.

The PMDA provides for a detailed information of adverse incidents which has earlier occurred and have been reported and it also provides for notifications for revisions to package inserts as the "PMDA Medical Safety Information" site in an easily understandable manner and widely disseminated[27]. There is a large scale encouragement for the safe use of drugs and medical devices amongst the health care professionals and manufacturers.

The Marketing Authorization Holder shall inform the Minister and PMDA within the specified time period under the following cases:

(1) When there is a incident of death due to the defect present in a medical device in Japan or places where the device have been exported and in cases where there is occurrence of cases attributable to infection diseases which is suspected to be associated with the use of the medical device. However the death should happen within a period of 15 days after the use of the medical device.

(2) When there is instance of disability, potential leading to death it is to be reported within 30 days period.

Records

Pharmaceuticals and Medical Devices Agency, Japan keeps an updated information with regard to all incidents which have resulted in death, serious injury or risk to the public with regard to medical devices.

Enforcement Actions

Pharmaceuticals Affairs Law regulates Medical Devices in Japan.

Import of Medical Devices

The Pharmaceutical Affairs Law (PFL) of Japan requires a license for importing any medical device into the market in Japan for sale. Licenses are also issued according to the risk category. The Ministry of Health, Labour and Welfare prescribes certain standards of medical devices quality management methods and post-marketing safety management methods in the ordinances. A product has to confirm with the prescribed standards. Marketing authorization holder having the required license may give over the import services to third parties who donot have the required license for marketing authorization when importing medical devices from other countries. However it is not allowed that an importer purchases medical devices on its own and then sells it to the marketing authorization holder. In case substantial modification is made by the party entrusted with import services to the medical devices packaging and labeling or even in the case of storing it manufacturing license is further required.

[27] Pharmaceuticals and Medical Devices Agency, Japan available at http://www.pmda.go.jp/english/service/j-macs.html (last visited on 17/09/2013)

Companies manufacturing medical devices in Japan requires license. There are four categories which include "Sterilized Medical Device", "Non-sterilized medical device", "Medical devices only packaged, labeled or stored", "Biologically derived Medical Device". In case of violation of the PFL a manufacturer may face criminal proceedings.

In order to export medical devices in Japan the law stipulates that the foreign manufacturers should receive accreditation from the Ministry or Health, Labour and Welfare. In case of pharmaceutical products a foreign manufacturer can obtain license by nominating a manufacturer in Japan who can go through the procedure of manufacture and sale under the PFL. Manufacture and sale of medical devices also requires approval for each item from the Ministry of Health, Labour and Welfare for Highly advanced Controlled Medical Devices which have certain risk factors involved. A product may revoke its approval in case there are health hazards involved. Controlled Medical devices requires certification standards from the abovementioned Ministry. However for General Medical Devices there is no requirement of manufacture and sale approval, but the Pharmaceuticals and Medical Devices agency must be notified of manufacture and sale after self-certification has been completed.

Recall and Removal

In the year 2000 a notification was issued in March clarifying the "recall" of drugs and medical devices. The notification has also emphasized the necessity of complete recalls by the manufacturers and marketers. The term recall would mean the retrieval of drug products from the market or repair of the specific medical device. The Pharmaceuticals Affairs Law has made provision for the appointment of "pharmaceuticals inspectors " who has the duty of carrying out inspection issues orders in the case of violation of the legislation. The recall orders are also issued by them. Class I medical devices which pose a greater risk are given more importance followed by Class II and Class III devices.

Legal Control of Medical Device in India

The Central Drugs Standard Control Organization (CDSCO) is the key medical regulatory organization in India[28]. In the Indian regulatory system, medical devices are considered as drugs by the Ministry of Health and Family Welfare[29]. As the CDSCO is in charge of implementing and enforcing the DCA Drugs and Cosmetics Act (DCA), it is the only government body that regulates medical devices in any way. The Government of India (GOI) looking at the fast developing medical device industry had showed its concern for having a regulatory system which would improve India's health care sector and support the domestic industry. The government had for the first time showed its intention in the year 2005 and began issuing guidelines in 2006.

[28] See www.medicaldevices.org

[29] Guidelines for import and manufacture of medical devices available at http://www.cdsco.nic.in/medical%20device%20A42.html (last visited on 20/09/2013)

In the year 2005, the Central Licensing Approving Authority took control of manufacturing of devices in India. It declared 10 devices which include:

> "Cardiac stents, drug-eluting stents, catheters, intraocular lenses, bone cements, heart valves, scalp vein sets, and so on, to be considered drugs and included another 19 sterile medical devices (on March 20, 2009 [on hold]) such as extension tubes, arterial venous fistulas and spinal needles, volume measuring sets, heart lung packs, and so on, under the provisions as such".

In order to achieve a centralized regulatory authority in the year 2006 a legislation was drafted for medical devices and. It provided for establishing a Medical Devices Authority for India which would provide for an efficient regulatory framework specifically for medical devices. The regulatory mechanism emphasize on the quality, safety, efficacy, and availability of medical devices that are used in India, whether produced in India or elsewhere and exported from India. It was recommended that the provisions of this Act would come into force by December 31, 2009, but the bill was not passed by the Rajya Sabha.

Medical Device Classification

India does not have a classification of devices on the basis of risk involved. The CDSCO has notified few devices, such as "cardiac stents, drug-eluting stents, catheters, intraocular lenses, bone cements, heart valves, scalp vein sets, disposable hypodermic syringes" and so on, to be considered drugs and are regulated in India. Only 14 notified medical devices are regulated, rest of the devices is not regulated.

Medical Device Tracking

A formalized tracking system for devices traceability is lacking in India. The manufacturer has to provide with the batch number and lot number for easy traceability of the device. However, in a recent press release by the FICCI[30], Dinesh Trivedi, the Health Minister had promised that a National Health Portal would be set up which would share information on standardization and protocols in the public domain. The new mechanism would also aim at storage of medical records in a electronic form for access by pathologists and doctors for diagnosis and treatment of patients.

Adverse Event Reporting

With the growth of the pharmaceutical industry in India at a rate of 12-14% per annually it is very necessary that we have a system where adverse effects from drugs which also include medical products are also reported. ADR is usually done in the case of death, disability, required intervention to prevent permanent impairment or damage[31]. A form is available at CDSCO which can be used by

[30] National Workshop: Medical Device Regulations in India; 2010 July 12; New Delhi: FICCI

[31] Adverse Drug Event Reporting Form available at http://cdsco.nic.in/adr3.pdf (last visited on 2/09/2013)

health care professionals which includes doctors, nurses and pharmacists to report adverse events.

According to the recent amendments directed by the CDSCO[32] it is the duty of the manufacturer of report within 10 days in the case of report of unanticipated death or serious injury or a serious public health threat. Other reportable events are to be made within 30 days. Due to uncertainty of the reportable events, the manufacturer must report within the expected time frame.

The Pharmacovigilance Programme(2010-2015) initiated by The Central Drugs Standard Control Organization (CDSCO), under the Ministry of Health and Family welfare, India is aimed at for protecting the health of the patients by assuring drug safety[33]. The main goal of the programme is safeguarding the health of the citizens by outweighing the risk factors. It will be administered and monitored by the Steering Committee and Strategic Advisory Committee. Technical support will be provided by the Signal Review Panel, Core Training Panel and the Quality Review Panel.

The main Objectives to be achieved by the committee within the period of 2010-2015[34] include monitoring Adverse Drug Reactions (ADRs) , creating awareness amongst health care professionals about the importance of ADR reporting , monitoring benefit-risk profile of medicines, generating independent, evidence based recommendations on the safety of medicines, providing support to the CDSCO for formulating safety related regulatory decisions for medicines, communicating findings with all key stakeholders and creating a national centre of excellence at par with global drug safety monitoring standard.

Another initiative taken is collaborating with World Health Organization-Uppsala Monitoring Centre (UMC) which would provide technical support to more than 94 countries worldwide[35]. The objective would be to establish a 'Centre of Excellence' for Pharmacovigilance in India.

Records

In India records for medical devices are maintained mandatorily for importers only.

Enforcement Actions

In India we do not have a specific legislation for medical devices. Medical Devices are regulated under the Drugs and Cosmetics Act, 1940. Though a number of efforts have been taken to regulate medical devices separately, BUT we have not yet been able to achieve it. Presently any deficiency from medical devices is covered by The Law of Contracts, in general, and by The Sale of Goods Act in particular as well as The Law of Torts.

[32] See http://CDSCO-AER/Meddevice

[33] Pharmacovigilance Programme of India (PvPI) for Assuring Drug Safety available at http://www.cdsco.nic.in/pharmacovigilance.htm (last visited on 15/09/2013)

[34] *Supra* n 2

[35] *Supra* n 2

Import of Medical Devices

In India import of Medical devices is regulated by Drugs and Cosmetics Act and rules. For the import of medical devices in India a registration certificate in Form 41 and Import licence in Form 10 are required as per the provisions of the Act. It is necessary that the manufacturing site and the products are registered with the Indian Drug regulatory agency (Central Drug Standard Control Organization) for the import of medical devices. However devices which are not notified donot require registration.

Recall/Removal

In India the CDSCO has not provided with any specific rules dealing with recall of medical devices. However there is a mandatory specification with regard to importers of medical devices.

Comparative Study of Laws in a Tabular Form

SNo	Subject Matter	United States	United Kingdom	Japan	India
1.	Classification of Medical Devices	Class I(Low risk Class II(Moderate risk) Class III(High Rish Category)	General medical devices AIMD (Active Implantable Medical Devices) In vitro diagnostic medical devices	General Medical Devices (Class I) Controlled Medical Device (Class II) and highly advanced Medical Devices	India doesnot have a classification of devices on the basis of risk involved. The CDSCO has notified certain devices as drugs.
2.	Medical Device Tracking	Medical device tracking is one of the activities of the FDA during post market surveillance	According to the MHRAdirectives when there is a report of adverse incident it is immediately entered into the AITS database via a user-reporting system. A reference number is also provided for assessing grievance of the user of the medical device	Labeling of Medical Devices is every essential and detailed in Japan which must include the name of the product, manufacturer/seller name and address, weight, volume, medical devices number or production indication	A formalized tracking system for devices traceability is lacking in India. The manufacturer has to provide with the batch number and lot number for easy traceability of the device

SNo	Subject Matter	United States	United Kingdom	Japan	India
3.	Adverse event reporting	Medical device reporting (MDR) regulations under the FDA requires the manufacturers and importers of medical devices to report serious injuries, deaths, and malfunctions.	There have been some changes made with regard to reporting adverse incidents in the Directives. In the case of serious events it has to be immediately reported to the Competent Authority	Since October 27, 2003 electronic adverse reporting have been accepted. Marketers, wholesalers of medical devices and drugs collects the sample and examines information on efficacy, safety and proper use of drugs and medical devices. Such information is further provided to health professionals and pharmacists	A form is available at CDSCO which can be used by health care professionals which includes doctors, nurses and pharmacists to report adverse events within 10-30 days depending on the risk associated.
4.	Records	Manufacturers are required to establish and maintain records in the following manner: 1. Evaluated information that determines the reportability of an event. 2.All reports and information of the medical device (MDR) submitted to FDA in either written or electronic form. 3.Any information that was evaluated during the preparation of annual	The manufacturers under MHRA aim at developing a "Medical device Quality Management System", which would serve as a documented procedure for a feedback system and for operating in compliance with the standards	Pharmaceuticals and Medical Devices Agency, Japan keeps an updated information with regard to all incidents which have resulted in death, serious injury or risk to the public with regard to medical devices	In India records for medical devices are maintained mandatorily for importers only

SNo	Subject Matter	United States	United Kingdom	Japan	India
		certification report(s). 4. Systems that ensure access to information that facilitates timely follow-up and inspection by FDA. Investigation protocol that would be followed			
5.	Enforcement Actions	The FDA (Federal Drug Administration) is the body responsible for regulation of Medical Devices	The MHRA for the purpose of enforcement of the UK medical device regulations, it investigates the complaints with regard to products which have been marked CE or has not been marked	Pharmaceuticals Affairs Law regulates Medical Devices in Japan.	In India we donot have a specific legislation for medical devices. Medical Devices are regulated under the Drugs and Cosmetics Act, 1940
6.	Import of Medical Devices	Import of Medical Devices is an important aspect of the medical device industry in the United States	United Kingdom also has a huge market with regard to the import of medical devices.	The Pharmaceutical Affairs Law (PFL) of Japan requires a license for importing any medical device into the market in Japan for sale	For the import of medical devices in India a registration certificate in Form 41 and Import licence in Form 10 are required as per the provisions of the Act
7.	Recall and Removal	Recall of Medical Devices is conducted	The guidelines of MHRA and GHTF have termed recall a	In the year 2000 a notification was issued in March clarifying the	In India the CDSCO has not provided with any

SNo	Subject Matter	United States	United Kingdom	Japan	India
		according to the risk associated with the device.	FSCA (Field safety corrective actions to reduce the risk of harm to patients, operators, or others or to minimize the recurrence of the event	"recall" of drugs and medical devices. The notification has also emphasized the necessity of complete recalls by the manufacturers and marketers	specific rules dealing with recall of medical devices

Conclusion

It was proposed by The Central Drug Authority (CDA) that all the existing powers which were present with CDSCO at present would now be under a newly created body. The CDA would control the regulation, licensing, surveillance and monitoring of medical products. It would also ensure that there is implementation of laws regulation medical devices in India. The CDA would also conduct clinical trials for drugs, devices and cosmetics after the collection of fees. Various committees or subcommittees would also be convened for the efficient discharge of functions. The chief executive officer and legal representative of the CDA would be the Drug Controller General. He would be assigned the duty of the day-to-day administration of the authority. The CDA would further provide for classifying medical devices and notifying standards and guidelines at regular intervals. It would also provide with a mechanism for conformity assessment by using direct or third party notified bodies and stipulates the procedure and guidelines for testing laboratories.

The Parliamentary Committee headed by Amar Singh suggested in the year 2008 that a separate chapter be added to the Amended Drugs and Cosmetics Bill of 2007. It would provide for a financially self-sustaining regulatory body specifically dealing with administration of medical devices. It has been observed by the Committee that it was neither feasible nor desirable to disband all existing entities and create a centrist structure like the USFDA in India. Though the Committee agreed with many provisions of the CDA Bill and it recommended that establishing the much publicized CDA at this stage would prove to be ineffectual. It recommended the establishment of a "Central Drug Administration" in India. To conclude what is the present state of affairs of the legal control of medical devices in India, the author is of the view that present thinking by the Parliament to include medical device within the definition of drugs and to have with the same regulatory body is in wrong direction and that will not be successful.

TRANSFER PRICING
Balancing The International Tax Issue and The Arms Length Principle

*Prof. Kanwal DP Singh**

Introduction

Tax revenue is essential for every government to discharge not only its sovereign functions but also for development, and redistribution of incomes to nation building activities. International taxation refers to the global tax rules that apply when different countries of the world interact. Income is now earned globally whether it is individuals or corporate. It is seen that a corporate or high net-worth individuals create entities to evade taxes. They maintain anonymity, earn huge profits globally but hardly pay taxes. Fairness and efficiency of tax systems is dependent not only on the tax laws of any country, but on the cumulative effects of the international tax laws. Domestic tax systems often conflict on cross-border transactions due to lack of harmonisation between them. Large entities, with multi-national operations, devise means to transfer profits from one taxing country to another with either lower rates or nil taxation. Taxes are not governed internationally and there is no separate global tax law that governs cross border transactions. There is also no international tax court or administrative body for it. All taxes are levied under respective domestic laws.

Domestic laws are generally governed by customary international law and treaties[1].The principles of international taxation are influenced by tax equity and tax neutrality. It works to maintain the economic sovereignty of all the nations. These international conventions promote fairness by distributing tax burdens on domestic and foreign taxpayers. It enhances the domestic competitiveness. Different countries are at different levels of social and economic growth with varying fiscal needs. This creates economic distortions and also encourages international tax competition. To understand Transfer pricing regime in India we need to understand the basic terminology which is explained as under:

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1 Brian Arnold and Michael McIntyre, International Tax Primer (Kluwer Law International, 2002) pp. 2-7

International Taxation: *(Section 92 B of the Income Tax Act 1961)*

"International transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents. These transactions are of the nature of[2]

1) purchase, sale or lease of tangible or intangible property,
2) provision of services,
3) lending or borrowing money, or
4) any other transaction having a bearing on the profits, income, losses

These transactions also include a mutual agreement or arrangement between two or more associated enterprises for the allocation, apportionment, or any contribution for any cost or expense.

Tax Havens

The word 'haven' means harbour and thus it is a place of safe retirement[3]. 'Tax haven' therefore indicates a place to avoid taxes. Tax havens are typically very small communities with independent tax authorities. They charge little or no tax on transactions within their jurisdiction and thus create a potential for substantial financial flows through their country. Each transaction receives preferential tax treatment. The Gordon Report lists as following characteristics of the Tax Haven[4]:

1. Low or nil tax on all or certain types of income and capital.
2. Bank and commercial secrecy.
3. Opportunities of multilateral tax planning
4. Political and economic stability.
5. Geographical location and climate etc.

OECD definitions point out that the term tax havens is a relative term. Any country might be a tax haven to a certain extent, and many a times high tax countries also attract economic activities of certain types and in certain locations[5]. Revenue losses from individual taxes are more likely to be associated with evasion and corporate tax avoidance can arise from either legal avoidance or illegal evasion[6]. The simple function of a tax haven is to help people with investing accounted money in developed countries[7].

2 http://www.incometaxindia.gov.in/Pages/international-taxation/transfer-pricing.aspx (last visited on July 3 2015)

3 Odhams Dictionary of English Language

4 Richard Gordon, "*Tax Haven and their uses by the United States Taxpayers—an Overview*," IFA Cahiers Vol. 86B, General Report 2012, pp 27-34

5 Committee on Fiscal Affairs: Tax Haven: Measures to Prevent Abuse by Tax Payers Report (OECD, 1987) Para 27.1. available at http://www.un.org/esa/ffd/documents/DoubleTaxation.pdf (last accessed on July 15 2015)

6 Jane G. Gravelle, *Tax Havens: International Tax Avoidance and Evasion*, January 15, 2015, Congressional Research Service, pp. 2-3

7 Rashmin C. Sanghvi, Tax Havens, Paper Presentation at The Income Tax Appellate Tribunal Residential Training Programme Maharashtra Judicial Academy, Mumbai

contd...

Double Taxation Avoidance Agreement

India has comprehensive DTAA (Double Taxation Avoidance Agreement) with 83 countries. Under the Income Tax Act 1961 of India, there are two provisions, Section 90 and Section 91, which provide specific relief to taxpayers to save them from double taxation. Section 90 is for taxpayers who have paid the tax to a country with which India has signed DTAA, while Section 91 provides relief to tax payers who have paid tax to a country with which India has not signed a DTAA. Thus, India gives relief to both kinds of taxpayers. The Double Taxation Avoidance Agreements are being misused by investors to avoid paying taxes by routing investments through various countries which have tax treaty with India

Associated Enterprises (AEs): As per section 92A of the Income tax Act 1961 AEs are those when:

1. One of them participates in the control or management or capital of the other directly through an intermediary;
2. Same persons participate in the control or management or capital of both the enterprises directly or through intermediaries.

There are also laid down parameters for enterprises to qualify as AEs.

Indian transfer pricing regulations are exhaustive and broadly based on the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. The Indian TP regulations provide charging of an arm's-length price for all international transactions between associated enterprises. Indian TP regulations provide anti-avoidance provisions and penalty provisions. In India the first year assessments of transfer pricing (AY 2002-03) yielded incremental taxes of over Rs. 600 crores.[8] This clearly reflects that transfer pricing is set to become key focus area.

Arm Length Price

The arm's length principle is found in Article 9 of the OECD Model Tax Convention and is the framework for bilateral treaties between OECD countries. This is an international standard[9], to adjust the price of the transaction. This principle is called the arms-length standard (ALS). This requires the firms to set transfer prices according to their hypothetical equivalent, and empowers taxing authorities to reset prices, and reallocate income. Under Indian Law it is enshrined in section 92 C of the Income tax act 1961

Computation of Arm Length Price

The arm's length price in relation to an international transaction or specified domestic transaction is determined by different methods. Any method that is most

Aug12, 2012 available at www.rashminsanghvi.com (last accessed on Aug 2 2015)

8 Reported in *Economic Times*, Mumbai edition on Saturday, 2 April 2005

9 OECD Transfer Pricing Guidelines for MNE's and tax administrators 31-33 (2010)

appropriate looking at the nature of transaction or class of transaction or class of associated persons may be applied. To the above rule there are two provisos

1) Where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices.
2) If the variation between the arm's length price[10] and price at which the international transaction or specified domestic transaction has actually been undertaken is not more than three per cent, then the price at which the international transaction or specified domestic transaction has actually been undertaken shall be deemed to be the arm's length price :

Assessing Officer can determine the arm's length price in relation to the international transaction or specified domestic transaction on the basis of such material or information or document available with him if

(*a*) The price charged or paid is not on basis of market fluctuations (*b*) any information and document relating to an international transaction or specified domestic transaction has not been kept and maintained by the assessee in accordance with the rules in laid down in Section 92 D of the Act

(*c*) The information used in computation of the arm's length price is not reliable or correct

(*d*) If the assessee has failed to furnish, any information or document which he was required to furnish by a notice

Overview of Transfer Pricing

One party transfers to another goods or services, for a price. This price is known as transfer price. This may be arbitrary and dictated. It may have no relation to cost and added value and may have been decided separately from the market forces. Transfer price is, thus, a price which represents the value of goods or services between independently operating units of an organization. But, the expression 'transfer pricing' generally refers to prices of transactions between *associated enterprises* which are ascertained in a different way. In such cases profits accruing to an enterprise can be increased by setting high transfer prices to siphon profits from subsidiaries domiciled in high tax countries. The prices can be lowered to move profits to subsidiaries located in low tax jurisdiction.

This can be explained with an example. A group which manufactures products in high tax countries may decide to sell them at a low profit to its affiliate sales company based in a *tax haven* country. That company would in turn sell the product at an *arm's length price* and the resulting (inflated) profit would be subject to little or no tax in that country. The result is revenue loss and also a drain on foreign exchange reserves. It involves two or more countries with differing tax rates and legislation. Profits are realised in the country which has the most favourable tax regime and it results into reduction of tax

10 Reuven S. Avi-Yonah, *The Rise and Fall of Arm's Length: a Study in the Evolution of U.S. International Taxation*, 15 VA. TAX REV (1995) 89, 95

liability. Such manipulations cannot be caught by tax officials as they are not empowered to investigate beyond shores.[11] Globalization has resulted in multiple tax jurisdictions of a single corporate. Due to this multi-national enterprises (MNEs) have started shifting profits to relatively low-tax jurisdictions through intra-firm transfer pricing. This has resulted in the transfer pricing problem. [12] Relatively high-tax jurisdictions loose out revenue. Transfer pricing (TP) legislation is used as a tool to curb tax avoidance. TP regulations in India have led to increased tax controversies in the country. The business environment has seen tax controversies in computational errors in arithmetic margins, selection of the most appropriate methods etc.[13] These TP regulations aim towards a regime that ultimate tax payable in India is artificially reduced. While transfer pricing is a necessary tax provision to get share of revenue from international transactions, it needs to be with sensitivity. Transfer pricing has become an important international taxation issue for both tax administrations and taxpayers[14]. Multinationals find national boundaries of no relevance whereas revenue authorities need to guard the tax base of their respective countries. In India, the Finance Act, 2001 substituted section 92 and introduced new sections 92A to 92F in the Income-tax Act, relating to computation of income from an international transaction[15]. Prior to this amendment, the Act provided the assessing officer with powers for making adjustment to the income from a transaction if it was understated. The legislative intent behind the introduction of detailed transfer pricing provisions was to save the revenue base.

Effectiveness of Use of Arms Length Principle

The implementation of Arms Length Price was justified at the outset for the preservation of the corporate tax base. Soon it became a global standard. Governments and international institutions developed a clear set of policy justifications for its continued use. The model rules for transfer pricing were promulgated by the Organization for Economic Cooperation and Development, called the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrators (the "Guidelines"). The Guidelines function as model rules and all OECD member countries have agreed to incorporate the OECD standards into their own tax laws.

There is an assumption that arms-length prices reflect economic reality of intra-firm transactions, though not stated explicitly in the Guidelines. It is the

[11] *Iljin Automotive (P.) Ltd* v. *Asstt. CIT* (2011) 16 taxmann.com 225 (Chennai)

[12] Glen Retwald, *Proposed Framework for Resolving the Transfer Pricing Problem*, Duke Journal of Comparative and International Law Vol 23:425, p. 426

[13] In *Gharda Chemicals Ltd.* v. *Dy. CIT* (2010) 35 SOT 406 (Mumbai trib.)

[14] Sayantan Gupta, *Transfer Pricing: An International Tax issue, Balance of Interest Between Tax Payer and Tax Administrator*, Company Law Journal (2009)2 Comp LJ

[15] In India, the void in the Income-tax Act, 1961 ('the Act') relating to detailed transfer pricing regulations was finally filled with Finance Act, 2001 introducing detailed transfer pricing provisions as an anti-avoidance measure into Chapter X of the Act with effect from 1 April 2001

first and most significant justification for the regime. Some experts also feel that the structure of MNEs distorts natural prices, even if it happens inadvertently. It is felt that this principle corrects that distortion. Another functional justification is given for Arm's length principle. The Guidelines recognize that taxation of MNEs is a global problem requiring collective action. The OECD itself represents collective movement so this principle is a broadly accepted standard, integrated into individual states tax laws as well as bilateral treaties. It is widely and uniformly implemented. It is especially useful for avoiding double taxation, which is the central objective of bilateral tax treaties. When one taxing authority makes an adjustment to the income of an entity using Arms Length Principle the fact that other tax jurisdictions where the MNE does business allocate income using the same standard reduces the chances of conflicting allocations that lead to double taxation. This price setting is principally achieved by looking to comparable uncontrolled prices and transactions.[16]

Inspite of all these justifications Arms length price is an inadequate solution mainly on the following grounds. First, it contradicts the economic reality as it treats relatedness of the parties as incidental, rather than integral to the transaction. Secondly, a hypothetical arms-length transfer price does not reflect economic reality. Moreover there is lack of administrability.

Determining a particular price requires recourse to three sets of rules. The first set has variety of methods for computation. A second set of rules is there to choose which of the methods should be used in a particular case (the best method rule). Thirdly, there are regulations that provide a list of factors for evaluating the degree of comparability between controlled and uncontrolled transactions in light of all the facts and circumstances.

From the above it can be seen that there is no hierarchy or priority of methods Regulations provide only the best method rule, which simply requires that the best method among those given for a particular form of transaction be used. A method is "best" only on grounds of comparability, quality of data, and reliability of assumptions under that method. There have been highly subjective judgments in relation to arms-length price for an intra-firm transaction. Compliance with these subjective judgments is a source of concern and enormous administrative expense on the part of MNEs. It requires careful documentation which is difficult and burdensome. There is a disconnect between the assumptions about the nature of intra-firm transactions and the economic reality of those transactions. There are lot of chances that with increased globalization, this disconnect will only widen.

The Economic Fallacy

OECD Guidelines provide that TP egulations correct distortions of "real" prices, in intra-firm transactions, and levels the competitive playing field between related and independent entities. Setting the transfer price to the hypothetical

[16] John J.A. Burke, *Rethinking First Principles of Transfer Pricing Rules*, 30 VA. TAX REV. (2011) 613, 627

market price may or may not put the MNE on equal footing with other players. The treatment of the relatedness of parties as incidental to intra-firm transactions is the economic fallacy. If MNEs are treated as related only for tax purpose then the purpose of their integration is lost. The assumption that adjusting internal prices of MNEs can put them on equal economic footing with comparable independent entities is therefore erroneous.

The Administrative Failure

If we look at the problem of allocating the MNE corporate tax base, transfer pricing does not provide any reasonable measure of allocation. Furthermore, it is ambiguous and difficult to ascertain metric, especially in comparison to easily ascertainable, real measures of economic activity.

Arms-length prices between related entities has no direct relationship to the burdens/benefits of those entities in their respective jurisdictions. Transfer prices are a legal fiction with no real economic substance outside of tax adjustments. The arms length method relies on completely fictional accounting figures, which MNEs are required to maintain for compliance purposes, rather than real measures of economic activity

Reforms and Alternatives

Substantial reforms seem inevitable in the allocation of global corporate income through transfer pricing. The potential reforms should be based on (i) real economic factors (ii) should look into the relative benefits and burdens on a particular tax jurisdiction (iii) and consider the entity as a whole. Reforms and alternatives to Arm's Length principle fall into two broad categories: unilateral reforms, changes that can be implemented by individual national taxing authorities, and multilateral reforms, which require collective action. [17]

Multilateral Reform

The core aspect of any reform is to take the economic reality of the MNE as an integrated enterprise. The corporate tax base of MNEs needs to be defined on a global level. There needs to be a mutual agreement to avoid double taxation. The starting point for the most complete approach to reform, therefore, is the global consolidated tax base.

Unilateral Reform

The Arms length Price approach has a widespread adoption. As a result, any unilateral reform will have to be carried out within existing international framework of Arms Length pricing. There could be modifications to current law to

[17] Susan C. Morse, *Revisiting Global Formulary Apportionment*, 29 VA. TAX REV (2010) 593, 594

include formulary apportionment[18], a system which allocates income based on the proportion of fixed economic factors in a given jurisdiction.

Indian Scenario

OECD has been supporting efforts of tax administration in India to effectively administer and implement Transfer Pricing policies. A useful reference is generally made to OECD guidelines, for the purpose of resolving disputes of transfer pricing in India, subject, however, to statutory regulations.[19] While transfer pricing itself is not an unlawful activity, it has rendered legal distinction between tax avoidance and tax evasion superfluous[20].

Advanced Pricing Agreement (APA)

It is an agreement between the tax payer and the tax authority to fix an appropriate Transfer Pricing methodology for a set of transactions over a fixed period of time[21]. It is for a specified number of years mentioning the criteria for determining transfer prices for future transactions between related enterprises. For this agreement open-market conditions and assumptions are important[22]. APAs may be bilateral, unilateral or even multilateral. Many countries in the world have adopted APAs. In India also Central Board of Direct taxes (CBDT) can enter into an advance price agreement with any person, determining the arms length price in relation to an international transaction.[23]The APA is not binding if there is any change in law or facts having bearing on such APA[24]. In India the current transfer pricing regulations are laid down explicitly[25].Taxable income

[18] Reuven S. Avi-Yonah, A Kimberly, Clausing & Michael C. Durst, *Allocating Business Profits for Tax Purposes: A Proposal To Adopt a Formulary Profit Split*, 9 FLA. TAX REV. (2009) 497, 508-09

[19] Taxmann's Publication's, Guide to Transfer Pricing, p.11

[20] Price water cooper's publications available at http://www.pwc.in/en_IN/in/assets/pdfs/publications/2014/navigating-tax-controversy-in-india-october-2014.pdf (last accessed on Aug 22, 2015)

[21] Samir Gandhi & Rakesh Alshi, Here Are a Few Ways to Refine Transfer Pricing Regime, The Economic Times, January 17 2007, available at http://articles.economictimes.indiatimes.com/2007-01-17/news/28420414_1_transfer-pricing-advance-pricing-arrangement-apa/2

[22] *Supra* note 7

[23] OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration 2010*, OECD Publishing, Paris (2010), available at http://www.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations_20769717

[24] Deepshikha Sikarwar, *Advance Pricing Arrangements are the Way to go for India*, The Economic Times, October 18, 2007, http://articles.economictimes.indiatimes.com/2007-10-18/news/27679074_1_transfer-pricing-comparables-multiple-year (last visited on July 29 2015)

[25] Deloitte, *Transfer Pricing Law and Practice in India – A fine Print Analysis*, 2nd ed., CCH India, New Delhi (2009) p. 22

enhanced as a result of transfer pricing adjustments does not qualify for various tax concessions/holidays prescribed by the Income Tax Act[26].

Currently the penalties for default with respect to transfer pricing are very high. Penalties to the tune of 100 to 300% of the additional tax and 2% penalty of international transactions for documentation are very commonly levied on defaulting parties[27]. In *Shell India Markets Private Limited v. CIT (Bombay High Court)*[28] it has been observed that these penalties are significantly high and the Multinational companies have been complaining that Indian tax authorities are arm twisting them to derive more tax revenue.[29] In the Vodafone case[30] it was held that Transfer pricing rules are machinery provisions to arrive at the arm's length price of a transaction between associated enterprises.[31] These rules do not enhance the scope of the substantive charging provisions and transfer pricing is not about taxing notional income. The entire exercise of determining the arm's length price is only to arrive at the real income earned[32]

Flaws in the Indian System

At present, Indian transfer pricing regulations do not have a specific provision dealing with the transfer pricing of intangibles. Sub-section (2) of Section 92 of the Act only talks of intra-group arrangements. Also, the five prescribed transfer pricing methods are not adequate to deal with the transfer pricing issues related to intangibles. Therefore according to OECD principles, certain approaches for evaluating the arm's length character of transactions involving intangibles should be evolved. A time has come to re-examine the provisions, settle disputes and apply law fairly .Alignment of Indian regulations to OECD guidelines and reduction in the penalties would enhance India's reputation as FDI destination

[26] Rajat Mittal & Adhitya Srinivasan, *Transfer Pricing Regulation: A Comparative Study*, available at http://www.itatonline.org/articles_new/index.php/transfer-pricing-regulations-a-comparative-study/ (last visited on July 17 2015)

[27] Press Trust of India, *Transfer Pricing Disputes to be Solved within Tax Dept*, Business Standard, July 6 2009, available at http://www.business-standard.com/india/news/transfer-pricing-disputes-to-be-solved-within-tax-dept/66783/ (last visited on July Aug 12 2015)

[28] 2014 WTD 6-3, available at- itatonline.org

[29] Sarbapriya Ray, *International Affairs and Global Strategy*, ISSN 2224-574X (Paper) ISSN 2224-8951 (Online), Vol 2, 2011, available at www.iiste.org

[30] *Vodafone International Holding* v. *Union of India* Civil Appeal no 733 Of 2012 S.L.P. (C) No. 26529 of 2010

[31] See http://www.legalserviceindia.com/article/l304-Double-Taxation-Avoidance-Agreements.html (last visited on July 14 2015)

[32] *Ibid.*

Recommendations and Conclusion

It is hoped that the regulatory authorities would enhance tax base and reduce tax evasion resulting from transfer pricing manipulation by implementation of the following recommendations:

1. The tax authorities should be educated with knowledge sharing process and there should be an open platform where not only the tax authorities of the country but also the tax professionals can interact. It will increase the capabilities of handling international taxation issues.
2. The Data base should be developed to include judgements, articles, notifications by CBDT which will strengthen the grip of the tax authorities and professionals in this field.
3. There should be express guidelines given to the Assessing officer and the Assessee in respect of choosing the most appropriate method for computation of Arms Length Price between two entities. It will put an end to unnecessary litigation.
4. In computation of Arms Length Prices between entities, the parent company takes a plea of not knowing the market rates of the country in which its subsidiary company is providing services. Arms Length Price should be the market price of that existing jurisdiction. Transparency and minimising litigation should be the main aim.
5. The Associated Enterprises practically are puppets of their parent companies which are incorporated in local territories in a controlled legal environment. Key decisions are wholly controlled by the parent company, therefore the transactions can never be at Arm's Length, but will always be a biased price.
6. Compliance should be encouraged. Efforts should be made for better tax planning rather than following penalty policy. It will save time and resources.
7. Corporate tax and tariff rates of should be brought down to comparable level with countries across the world. It will in turn reduce the incentives to shift out income. This will also result in an increase in the tax revenue of the country.
8. Regulatory authorities should engage in information exchange so that there is better transparency and better governance, amongst multinational corporations.
9. The Dispute Resolution Panel should have local Commissioners to reduce the expenses of the Revenue department and also deliver effective decisions through good management of governance.

It is clear that transfer pricing using Arms Length mechanism for allocating the income of MNEs is unsustainable in its administration and for the purposes of revenue collection. Reform based on some form of formulary apportionment is the best alternative method to allocated MNE income. It should be based on real, readily ascertainable economic factors. A reform based on formulary apportionment should consider more than destination-based sales, as this is only one economic factor of the benefit/burden in a particular jurisdiction.[33]

[33] Raquel Alexander, Steven W. Mazza & Susan Scholz, *Measuring Rates of Return for Lobbying Expenditures: An Empirical Analysis under the American Jobs Creation Act*, contd...

Formulary apportionment reform proposals can be fair and efficient but such prospective reforms are uncertain. Taxes are the price of civilization, and corporate taxes, perhaps, are the price of secure, functioning markets, the corporate taxpayers with the greatest pull over tax policy are preoccupied by a culture of tax avoidance. In other words, it is not clear that the cultural moment is ripe for international tax reform based conceptually on benefits enjoyed and burdens imposed by MNEs, even if that is the most coherent basis for the allocation of the global corporate tax base.[34]

Regardless of present cultural attitudes relative to taxation, there is a growing consensus, that Arm's length principle is outmoded. The reason for the persistence of this system is that the costs of exit exceed the benefits of implementing a new system. The few large organizations that benefitted from the system will lose more in transition and the rest will gain. This will result in political asymmetry. In the Indian Scenario, transfer pricing has also evolved. Indian tax authorities should be more welcoming towards the foreign transactions and not see the foreign entities as tax evaders. All nations have to achieve a fine balance between loss of revenues in the form of outflow of tax and try to make their country an attractive investment destination by giving flexibility in transfer pricing.

25 J.L. & POL. (2009) 401

[34] Henry Ordower, *The Culture of Tax Avoidance*, 55 ST. LOUIS U. L.J. 47 (2011) 101

Law on Freedom to Communicate and the Transformation of Techno-Legal Culture

*Dr Durgambini Patel**

If it is left to me to decide whether we should have a government without newspapers or newspapers without a government, I would not hesitate a moment to prefer the latter.

—Thomas Jefferson

Introduction

Law is a subsystem operating in a given society created to mould, control and regulate social behaviours of the population. It is a normative science. The efficacy and ultimate impact of enforcing law depends up on various alternative forces operating in a society, namely the regulatory orders emerging from culture (socio-political), tradition and religion. Every launch of new technological and communication device for human use produces varied and dynamic consequences in different societies due to the dissimilarities in various social and political systems around the world. The legal control of freedom of speech and expression in the post independent period in India has been of dynamic nature and constantly in flux due to the impact of innovations in science and technology that changes the human interactions and relations in the society and poses new challenges and issues to be tackled by law. We are in the age of social networking in the virtual cyber space that is borderless posing ever changing challenges to the traditional laws of each legal system. Law must keep pace with ever changing techno-culture so that peace, order and harmony are maintained by recognising new rights and obligations. The 21st century witnessed two important legislations in India that have strong bearing on the freedom of speech and expression prevailing in forms of communication and media. They are the Information Technology Act, 2000 and the Right to information Act, 2005.The former is technology driven law.

Free Speech and Expression *vis-a-vis* Information Technology Act

The invention of affordable personal computing in the late 1960s, along with new communication technologies, has made a huge impact on economic and social life of the people across the globe. Many commentators describe this as a third

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industrial revolution that is creating an informed society. Richard Susskind argues that "beyond automating and streamlining traditional ways of providing legal advice ... information technology ... will eventually help re-engineer the entire legal process and result in a major change in the predominant ways that legal services are delivered and justice is administered."[1](1996:2-3). The advent of modern technology of communication with reference to computer and the internet has opened up new challenges to the field of Law. There are new ways of functioning and administration that have been recognised. The Information Technology. Act 2000 has conferred legal recognition upon electronic forms of governance. commerce and education. The function of law with reference to technological developments is to promote the boon and to mitigate the bane. Besides, a technological innovation also gives rise to new power structure and reformulates existing socio-economic equations by introducing social change. This can be evident from the circulation of views and opinions on networking sites that spread like a fire, sometimes to create disharmony and sometimes to strengthen unity.

Law and social change are dynamic processes and are supplementary and complimentary to each other. Law has dual role to play in the context of society. In some situations law plays a pivotal role as an instrument of social change. This is especially so in case of social reform laws. With reference to technological developments the change is ahead of the law that has to keep pace with the changed circumstances. In other words, technology driven changes exerts pressure on existing laws demanding need for change. The passing of the Information Technology Act, 2000 was initially to introduce and regulate e-commerce but eventually due to the misuse of technology there was a need to restructure the law to eradicate the menace created due to new techno-culture[2].The electronic revolutions made the existing commercial and criminal laws incompatible and redundant in many spheres. With the intention to overcome the technology related shortcomings, the 2008 amendment Act was brought into force from October 2009. The new Act imposed additional and various forms of liabilities on users and service providers etc[3]. The Central Government was conferred with wide and sweeping powers to implement greatest possible security in cyber space to

[1] Encyclopedia of Law & Society, *American and Global Perspectives*, David S. Clark (ed) Vol.3 Sage Publications New Delhi 2007, p.1470

[2] IT Amendment Act, 2008, Statement of Objects and Reasons: 'A rapid increase in the use of computer and internet has given rise to new forms of crimes like publishing sexually explicit materials in electronic form, video voyeurism and breach of confidentiality and leakage of data by intermediary, e-commerce frauds like personation commonly known as Phishing, identity theft and offensive messages through communication services. So, penal provisions are required to be included in the Information Technology Act, the Indian Penal Code, the Indian Evidence Act and the Code of Criminal Procedure to prevent such crimes'.

[3] Chapter 14 to 17 of the amended IT Act has criminalized certain activities on cyberspace that puts restriction on freedom of speech expression on internet such as sending offensive messages, violation of privacy, transmitting obscene and offensive material, child pornography, etc.

intercept, monitor and decrypt any communication, giving rise to apprehension that freedom of expression will be under constant threat. The Amendment Act regulates civil society using cyber and mobile devices as a form of communication. With reference to curtailment of free communication of information, Sections 69A and 69B of the present Act empowers the State to issue directions for blocking from public access any information through any computer resource. The Government is however required to prescribe by making subordinate regulations the procedure and safeguard in this regards.[4] Some civil liberty groups have criticised the Amendment Act, 2008 as 'draconian' due to high degree of limitations and shackles upon freedom of speech and expression that may cause danger to cyberspace affecting communication, interaction and exchange of ideas and opinion.[5]

Nexus between Free Speech and Expression and Right to Information Act, 2005

As a corollary to hold an opinion that can be expressed, it is essential to receive and seek information without undue interference so that it enables one to formulate opinion that can be expressed. Therefore, to exercise freedom of expression in true sense, it is essential to have right to receive information as with out the co-relation between these two aspects, the freedom of expression and freedom to communicate would become meaningless. In today's context, in India the statutory right to obtain information under the Right to Information Act, 2005 has enabled to enrich the freedom of speech and expression.

Though statutory recognition to right to information was attributed after the enforcement of the Right to Information Act in 2005, right to know was already recognised as a part of freedom of speech and expression. To express a thought one needs to acquire information unless there is free flow of information, speech and expression is in a curtailed form and undermines the democratic principles of transparency and openness. In *S.P. Gupta* v. *President of India*[6] the Supreme Court observed that the concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands.

Need and Significance of Freedom of Speech and Expression in Communication Media

The endeavour for equality and justice for all is based on the democratization of communication, and is guided by the following principles: principle of human

[4] By 2003 notification Computer Emerging Response Team has been created to check and balance the likelihood of misuse of this power

[5] http://businesstoday.intoday.in/story/section-66a-of-information-technology-act/1/190309.html (last visited on 28.11.2014)

[6] AIR 1982 SC 149

dignity, principle of freedom, principle of truth telling, principle of justice, principle of peace, and principle of participation.[7] These principles enable to foster sound and sturdy communication to enrich democratic processes.

In every society, there exist customary norms emerging from religion, custom and tradition. While determining the scope and extent of the restrictions[8] under the criteria of public order, decency[9] and morality, customary norms emerging from tradition, culture and religion play a significant role. While determining the freedom of press/media with reference to free speech, expression and communication the social ethos of a legal system needs to be taken into consideration. To disseminate revolutionary ideas that may emerge as pioneering morality in the context of modernism, it is essential that there is a strong backing of rationality, objectivity and reasonability.

In an organised civil society based on democratic values, enjoyment of freedom of speech and expression is a necessary component. In modern times press is recognised as fourth estate of the State through which the civil society can not only exercise check and balance on the working of Government, but also make the Government accountable and answerable to the will of the people; this vital role of press in democracy requires the press to emerge as a responsible institution that protects public interest by keeping watch on abuse of power by the State and its machineries. Therefore, the restrictions prescribed in Article 19(2) of the Constitution acts as a *Lakshman Rekha* that cannot be crossed.

M.R. Masani, in his article, 'The importance of a free press in a democracy' states that there are various institutions in a free society which we cherish as essential precondition to maintenance of freedom, they are: 1. The government, because without the government there would be anarchy in which life is nasty, brutish and short. 2. The opposition, because without effective opposition there is no democracy. 3. The Judiciary, an independent Judiciary free from Executive and Legislature and 4. Though not the least important, the Press.[10]

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7 Michael Traber as quoted in, Anil K. Dixit, *Press Laws and Media Ethics*, Reference Press, New Delhi, 2006, ISBN: 81-8405-010-0, p. 3-4

8 Article 19(2) of the Constitution deals with reasonable restrictions-sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

9 In judging whether particular work is obscene, regard must be had to contemporary mores and national standards. Test for judging work should be that of ordinary man of common sense and prudence, and not of out of ordinary or hypersensitive man. The definition of obscenity differs from culture to culture, between communities within a single culture, and also between individuals within those communities. Many cultures have produced laws to define what is considered to be obscene, and censorship is often used to try to suppress or control materials that are obscene under these definitions, in *Ajay Goswami* v. *Union of India* MANU/SC/5585/2006.

10 Noorani A.G., *Freedom of the Press in India*, (ed.) (1970), p. 69 as cited in Sita Bhatia, *Freedom of Press Politico-Legal Aspects of Press Legislations in India*, Rawat Publications, Jaipur and New Delhi, 1997 ISBN 81-7033-423-9, p. 21

Media as a means of expression is a measure through which public opinion is expressed. An articulated public opinion is a necessary component of democracy that can exert pressure on Government to enable it to work for the benefit of the people and to support in achieving goals of good governance and responsible Government.

A democratic political society or Government which is founded on the consent of the people and the contribution of their idea to public question can rest only in free debate, and free exchange of ideas amongst the people. Truth can emerge only through the unhampered interplay of competing ideas. Here the press has a vital role to play. Widest dissemination of information from diverse sources is necessary for public education which is the foundation for democratic society. It is by means of a free discussion and criticism that the Government remains responsive to the will of people, peaceful exchange is encouraged and errors of Government are peacefully corrected and eliminated through the process of popular Government.[11]

The media while exercising its freedom, it must act judiciously and is accountable for public good. It must function with great integrity and bring the truth on the basis of proof of fact before the public, who shall in turn participate in political process for the benefit of the nation.

A free press can be of utility to the nation provided it is independent from political interference and is impartial in dissemination of information. The system of paid news is ethical and moral assassination and misuse of the freedom of media. In democratic legal system no right is absolute but coupled with reasonable restrictions. The essence of restriction on freedom of press is a corollary to the fact that they possess a right. The prevalence of rule of law in a democratic polity postulates that nobody is above law but is governed by laws. Absolutism of any right, power or freedom is unknown to democracy. Freedom cannot be fraudulently used. The restriction of Freedom of Press categorised with reference to various stakeholders can be said to be; for individuals- defamation, State- sedition, incitement, security of State etc, Courts- contempt, Parliament – privileges, Public in general–public order and decency.[12]

However, in contrast to the Constitutional restrictions in every legal system on the rights of free press, the Blackstone commentaries, 1765 stressed upon unbridled and unfettered exercise of freedom of press. The commentaries state that freedom of press is liberty and is indeed essential to the nature of free state. Every free man has an undoubted right to state before the public whatever sentiment he pleases; to forbid this is to destroy the freedom of press: if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity (rashness or boldness). The implications of the statement is that in free society there

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11 Sita Bhatia, *Freedom of Press Politico-Legal Aspects of Press Legislations in India*, Rawat Publications, Jaipur and New Delhi, 1997 ISBN 81-7033-423-9, p. 23

12 For detailed information refer part 3 on Restrictions on the Freedom of Press, *Halsbury's Law of India* vol.24 Media ,Technology and Communication Lexisnexis Butterworths New Delhi 2005(reprint 2007).

shall not be prior restrictions whatsoever, however, in case a person violates the law of the land while exercising freedom of the press he must face the consequences.[13]

The Law of Freedom of Press in India

In the *Express Newspapers* v. *Union of India*,[14] the court made it amply clear that what is known as freedom of the press is nothing but the freedom of expression of every citizen guaranteed under Art 19(1) (a) of the Constitution resulting into the analogy that Freedom of Press is not absolute but governed by the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. No statutory law can curtail the freedom except for those specifically mentioned in Article 19 (2). While pointing out the importance of the freedom, the court opined that widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. The purpose of the freedom is to prevent the public authorities from assuming the guardianship of the public mind. An institution of press is like a citizen holding the Freedom with necessary restriction which will make it legally liable if there is violation.

Freedom of speech and expression (Freedom of Press) can be seen as primordial right and most viable and essential to exercise every fundamental right guaranteed in part III of the Constitution, to voice, protest and express their violation and to protect and promote their fundamental rights. While pointing out the importance and significance of free speech and expression with specific reference to right to receive information and to circulate and publish the information by the press, in a *suo motu* petition the Supreme Court, in *Re: Ramlila Maidan Incident*[15] opined that it is significant to note that the freedom of speech is the bulwark of democratic Government. This freedom is essential for proper functioning of the democratic process. The freedom of speech and expression is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy of liberties, giving succour and protection to all other liberties. It has been truly said that it is the mother of all other liberties. Freedom of speech plays a crucial role in the formation of public opinion on social, political and economic matters. It has been described as a "basic human right", "a natural right" and the like. With the development of law in India, the right to freedom of speech and expression has taken within its ambit the right to receive information as well as the right of press.

The Universal Declaration of Human Rights and International Covenant on Civil and Political Rights[16] indicates that everyone has the right to freedom of

[13] Blackstone, William. *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769* Chicago: University of Chicago Press, 1979
[14] AIR 1956 SC 57
[15] 2012 AIR SCW 3660, p. 3673
[16] Article 19, Universal Declaration of Human Rights, 1948, International Covenant on Civil and Political Rights 1966

opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers. The International Covenant on Civil and Political Rights further states about the significances of restrictions upon the said rights. It states that this article carries with it special duties and responsibilities. It may therefore be subjected to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order or of public health or morals.

Legislations Restricting Freedom of Press/Media

Apart from Article 19(1)(a) read with Article 19(2), of the Constitution, there exist other statutory enactments that have direct bearing on the freedom of the press, in so far as to determine the nature, scope and extent of the right. The legislations that impose reasonable restrictions on the freedom are the censorship and obscenity laws, relevant provisions in IPC[17] relating to obscenity declare some information to be curtailed in public interest on the grounds of public morality, decency[18], sovereignty and integrity of nation. Though widely criticised, the Official Secrets Act, 1923 which still prevails to a certain extent post passing of the Right to Information Act in 2005, has also limited the freedom of press in matters relating to the official secrets. Media in relation to official secrecy is regulated by the Official Secrets Act, 2003 which is the central legislation.

Other restrictions on the freedom of press such as security and integrity of nation, sedition, incitement to disaffection, treason, incitement to communal or caste hatred, threat to peace and public order are to be understood in light of several statutory enactments which deal with right of self protection of the State. This right is of a State as an artificial person to preserve and to maintain its own existence from internal as well as external threats. The statutory provision dealing with this right are found in the Indian Penal Code, 1860, etc. The Code of Criminal Procedure, 1972, the National Security Act, 1980, the restriction on freedom of Press with reference of public order is found in the substantive and procedural Criminal Laws and also in Minor Acts. The laws in India extensively deals with statutory provision relating to contempt of Court, defamation, and parliament privileges that put restrictions upon the use of the right to speech and expression in the Indian legal system. The press and the media are also prohibited from publication of objectionable and harmful advertisement. The Drugs and Magic Remedies Act, 1954 specifically prohibits publication of any material which may cause harm and are *per se* objectionable misleading and false. However, it is essential to note here that no statutory limitation can be in contradiction to Art.

[17] Sections 292 to 294 of the Indian Penal Code ,1860 prohibits sale of obscene material, separate provision for sale of obscene material to young persons and prohibiting of obscene literature including acts and songs.
[18] Various Laws dealing with Censorship, Indecent Representative of Women, Cinematography Laws are some examples

19(2) of the Constitution, as that will be struck down by the courts on the grounds of unconstitutionality.

Different Stance of Democratic States on Freedom of Press

In United Kingdom, with an unwritten Constitution, there is no free speech but in a negative way there is freedom of expression subject to the limitations imposed by law. Restrictions such as defamation, sedition, incitement to disaffection, treason, incitement to racial hatred, law relating to obscenity and pornography, and contempt of court[19] are some of the laws that become applicable in case the boundaries of freedom of press are overstepped for which the court action invites application of the general laws. However, on the other hand in the United States (with a written constitution) the first amendment of the Constitution guarantees freedom of press. The amendment states that the congress shall make no laws abridging the freedom of press. The First Amendment to the United States (US) Constitution, a bell-wether in the pursuit of expanding the horizon of civil liberties. The Amendment provides for the freedom of speech of press in the American Bill of Rights. This Amendment added new dimensions to the right to freedom and purportedly, without any limitations. The expressions used in wording the Amendment have a wide magnitude and are capable of liberal construction. It reads as: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The effect of use of these expressions, in particular, was that the freedom of speech of press was considered absolute and free from any restrictions whatsoever.

Shortly thereafter, as a result of widening of the power of judicial review, the US Supreme Court preferred to test each case on the touchstone of the rule of 'clear- and-present-danger'[20]. However, application of this rule was unable to withstand the pace of development of law and, therefore, through its judicial pronouncements, the US Supreme Court applied the doctrine of 'balancing of interests'. The cases relating to speech did not simply involve the rights of the offending speaker but typically they presented a clash of several rights or a conflict between individual rights and necessary functions of the Government. Justice Frankfurter often applied the above-mentioned Balancing Formula and concluded that "while the court has emphasized the importance of 'free speech', it has recognized that free speech is not in itself a touchstone. The Constitution is not

[19] On May 8 2008, the Criminal Justice and Immigration Act 2008 abolished the common law offences of blasphemy and blasphemous libel in England and Wales, with effect from 8 July 2008

[20] Justice Oliver Wendell Holmes Jr. writing for the U.S. Supreme Court in *Schenck* v. *United States*, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919), stated: "The question in everycase is wether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

unmindful of other important interests, such as public order, if free expression of ideas is not found to be the overbalancing considerations."[21]

Therefore, there is prohibition upon the legislative power from interfering with freedom of press. The limitation on free speech has been incorporated into the law by judicial decisions in contrast to the Indian Constitution, wherein the restrictions are in the Article (19(2)) itself. The American judiciary has declared the concept of unqualified freedom as a myth and recognised the value of reasonable restrictions. However, at the same time the guarantees of freedom of expression and press are not restricted by censorship laws if the matter is of public interest and absolutely essential for general public. In most democratic constitutions the rigours of control have certain variations in their application and procedure; however, the modern democratic states are heading towards free press to greater extent due to expansion of the human rights jurisprudence and right to information concept of good, open, transparent and accountable governance by the Governments of democratic legal systems.

Conclusion

The media must be well aware of the legal and ethical implications in day to day functioning of their profession. They must operate with high degree of public responsibility and professionalism, and must possess the awareness of general laws of the land that may get attracted in case of their actions and inactions. Independence of media that does not act with ulterior motives to please the political power or is not a puppet in the hands of business houses is the need of the day. They must be answerable and accountable to the people and must be engines or carriers of social good, which shall be their ultimate goal.

For human survival, welfare and healthy social life, free and fair communication is an essential ingredient equivalent to food and shelter for physical survival. Communication wellbeing is an important factor for social wellbeing. Communication is a device of socialisation giving bliss and mental stability to human beings. Both, communication wellbeing and social wellbeing are consider as an important aspect of health, which in turn is recognised as one of the important human rights. Social Isolation is a negative aspect of "Social Wellbeing." The World Health Organization includes the concept of positive "Social Wellbeing" in its definition of "Health." "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." WHO, 1948.[22] To achieve qualitative wellbeing and dignified survival, there should be equilibrium between social health (derived from communication and freedoms) and physical health and mental health.

[21] Discussed in *Re: Ramlila Maidan Incident,* 2012 AIR SCW 3660, p.3673, See also, T. M. Scanlon, *Adjusting Rights and Balancing Values,* Fordham Law Review Vol 72, Issue 5, 2004, p. 1477 available at http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3961&context=flr (last visited on 1/1/2015)

[22] http://blog.asha.org/2011/01/04/communication-wellbeing-and-social-wellbeing-an-aspect-of-health/ (last visited on 22nd December 2014)

In the Indian legal system, freedom of press has been enlarged and expanded in a dynamic way by the judiciary, from time to time. This has enabled to pave an appropriate path for progressive and conducive development of the freedom of press. India stands on a different level when it comes to legal restrictions on the freedom of speech and expression. Many a times the restriction in actual practice seems to be more rigid as compare other democratic and free legal societies. However, the reasonable restrictions upon the freedom are the need of the nation which is diverse in culture, language and religion. An extremely heterogeneous country which is a developing democracy, has several social, political and economical factors relating to peaceful co-existence and integration, demands that the freedom in question needs to be use cautiously and carefully so that there is no threat to communal harmony, peace, security and integrity of the nation.

There are certain threats to the concept of independent and accountable media, such as political and governmental interference, corruption with reference to paid news, threats by terrorist and underworld to media houses. The lustrous desire of media houses to gain popularity by engaging in media trials and commercialisation of news also creates alarming situations. Sensationalism for claiming breaking news for undue popularity and publicity by some media houses tarnishes the reputation of the media. The independence of press many a times is severely questionable with reference to their impartiality due to their ownership and management by big business houses and political parties, who influence the news coverage.

Law of the land says Justice Bhagawati, should be governed by two fundamental principles "open justice" and "freedom of press". The three great institutions the Parliament, the Press and the Judiciary are regarded as safeguards of justice and liberty and they embody the spirit of the Constitution, yet the Press shall keep the right balance between freedom and the abuse of it. Nothing shall outweigh national security and integrity.[23]

[23] Ram K Choudhary & Tapash G Choudhary, *Judicial Reflections of Justice Bhagawati*, Eastern Law House, New Delhi, 2008 ISBN 978-81-7177-211-7, p. 162

Analyzing the Concept of Consent in Indian Rape Law

Vageshwari Deswal*

Introduction

The term *rape* originates in the Latin term *rapere* (supine stem *raptum*), that translates as "to snatch, to grab, to carry off"[1]. The offence of rape in its simplest term is the ravishment of a woman, without her consent, by force, fear or fraud. It is the most morally and physically reprehensible crime in a society, as it is an assault on the body, mind and privacy of the victim. While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Sexual violence, apart from being a dehumanizing act, is an unlawful intrusion on the right of privacy and sanctity of a woman. It is a serious blow to her supreme honour and offends her self-esteem and dignity as well. It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries, but leaves behind a scar on the most cherished position of a woman, i.e. her dignity, honour, reputation and chastity.[2]

A woman who is ravished suffers not only a physical injury but a deep sense of some deathless shame. Even though time eventually heals the physical scars, but the mental scars never go[3]. Rape was recognized as a crime under Section 375 of the Indian Penal Code in the year 1860, amended in the year 1983 and further amended in 2013.

How Law Defines Rape

Rape can be committed by a man against a woman. The term 'person' under clause 'a' to'd' of Section 375 expands the scope of the term 'Rape' to include all kinds of violations of a female body whether done by a man himself and also in cases where the man uses any other man, woman or transgender as an agent for the purposes of carrying out any of the acts mentioned under Clause 'a' to 'd' of Section 375. Man for the purposes of this section is a male human being of any age[4].

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[1] Keith Burgess-Jackson, *A Most Detestable Crime: New Philosophical Essays on Rape*, Oxford University Press, New York, 1999, p.16.

[2] *State of Punjab* v. *Ramdev Singh*, AIR 2004 SC 1290

[3] *Bhupinder Sharma* v. *State of Himachal Pradesh*, 2003 Supp(4) SCR 792

[4] Indian Penal Code, 1860 S. 10

Following the 2013 amendments, rape is no longer restricted to penile-vaginal penetration. Any of the following acts, if committed without the consent or against the will of the woman, would amount to rape

- Penetration of penis, to any extent, into the vagina, mouth, urethra or anus of a woman or making her to do so with him or any other person; or
- Insertion to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or making her to do so with him or any other person; or
- Manipulation of any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or making her to do so with him or any other person; or
- Application of his mouth to the vagina, anus or urethra of a woman, or making her do so with him or any other person.

Thus, penetration though essential to constitute the offence of rape need not necessarily be vaginal. It may be the penetration of any orifice of the female anatomy. Digital Rape i.e. penetration of the vulva, vagina, or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent would also amount to rape. After the amendments in 2013, insertion of any body part or object into the female's cavity has been recognized as rape.

What Constitutes Consent

The Indian Penal Code, 1860 does not define the term 'consent' in very clear terms. It just mentions what cannot be regarded as consent[5]. A person, who is drugged, intoxicated or under the influence of anesthesia, unsoundness of mind, coma or paralysis is incapable of giving consent to the act. An act done without consent is not necessarily against the will, while an act done against the will is always without consent. A consent obtained by fear, force or fraud of any type is not consent for the purposes of exemption from liability under Section 375. Explanation 2 to Section 375 makes it clear that the consent should be voluntarily given and the participation must be a willful participation. Consent is certainly "an act of reason, accompanied with deliberation, the mind of weighing, as in a balance, the good and evil on each side". Consent supposes three things - a physical power, a mental power and a free and serious use of them. These ensure only the avoidance of intimidation, force, undue influence etc. It does not mean that use of these factors shall result in an intelligent, wise and righteous decision. In other words, it should not be a mere act of helpless resignation, non resistance and passive giving in. In the case of *State of Himachal Pradesh* v. *Mango Ram*[6] the Supreme Court rightly observed that, "Whether there was consent or not is to be ascertained only on a careful study of all relevant circumstances."

Section 90 of the IPC provides that consent is presumed to be given only when it is not given under fear of injury or misconception of fact. Thus, a person is presumed to have consented only when the consent was given freely, voluntarily and without the influence of any fear, force or fraud operating on the mind of the victim. To constitute 'consent' under Sec 375, there must be an intelligent and mature understanding of the nature and consequences of sexual act. If a girl passively submits or does not resist the advances of the accused, because of fear, it cannot be presumed to be consent for the purposes of Section 375. Absence of injuries on the person of the accused or the prosecutrix is not per se sufficient to indicate her consent.[7] Proviso to Section 375 clarifies that non-resistance is not to be construed as consent. Bringing out the difference between consent and passive submission, the High Court of Maharashtra said in the historic *Mathura* Case, "Mere passive or helpless surrender of the body and its resignation to the other's lust induced by threats or fear cannot be equated with the desire or will, nor can furnish an answer by the mere fact that the sexual act was not in opposition to such desire or volition."[8]

Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.[9] Thus, consent on the part of a woman as a defence to an allegation of rape, requires voluntary participation after having fully exercised the choice between resistance and assent.[10] Absence of injuries on the aggressor or the aggressed may not, by itself, clinch the issue as to whether it was a case, of consent or no consent and this circumstance is to be judged in the light of the other evidence in coming to a conclusion. The consent given by the victim must also be voluntary and a mere act of helpless resignation in the face of inevitable compulsion when the volitional faculty is crowded by fear cannot be deemed to be consent within the meaning of Section 375 of the Code.[11] Similarly when her consent is obtained by putting her or any person in whom she is interested in fear of death or grievous hurt, such consent would be no defence.[12]

[5] Indian Penal Code, 1860 S. 90: **Consent known to be given under fear or misconception**—A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or
Consent of insane person—if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or
Consent of child—unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

[6] JT 2000 (9) SC 408
[7] *State of UP* v. *Padam Singh*, 1996 ALHC 169 (All)
[8] *Tukaram v. State of Maharashtra*, AIR 1979 SC 185
[9] Indian Penal Code, 1860 S. 375 Explanation 2
[10] *State of Orissa* v. *Khudiram Sahu*, (1986) 2 Crimes 639 at p. 640
[11] *Ibid.*
[12] Indian Penal Code, 1860 S. 375 Cl. 3

In cases where the woman consents because she believes the man to be her lawfully wedded husband such as where the man either conceals the fact of his being already married to some other woman from her and undergoes marriage ceremonies with her thereby making the woman believe that she is lawfully wedded to him; or in cases where the man undergoes fake marriage ceremonies and dupes the woman into believing them to be correct, or where the woman believes that he is some other man to whom she is lawfully wedded, the consent is no defence. In these cases the woman agrees to cohabit with the man on the mistaken belief that she is lawfully wedded to him.

Also in cases where the woman is unable to understand the nature and consequences of that to which she consents by reason of unsoundness of mind or intoxication, resulting from administration of any stupefying or unwholesome substance, her consent is deemed as no consent. In cases where the woman is unable to move, in coma or otherwise unable to resist or express herself i.e. When she is unable to communicate consent the accused will be held guilty of rape if he commits any of the acts mentioned under Section 375 with her.

Mere non-resistance to intercourse in consequence of misapprehension will not amount to consent. In a case, where a medical man, to whom a girl of fourteen years of age was sent for professional advice, had criminal connection with her, she making no resistance from a bona fide belief that he was treating her medically, he could be convicted for rape.[13] Similarly in *Queen* v. *Flattery*[14] the accused professed to give medical advice for money, and a girl of nineteen consulted him with respect to illness from which she was suffering, and he advised that a surgical operation should be performed and, under pretense of performing it, had carnal intercourse with her, it was held that he was guilty of rape. In another case the accused, who was engaged to give lessons in singing and voice production to a girl of sixteen years of age had sexual intercourse with her under the pretense that her breathing was not quite right and he had to perform an operation to enable her to produce her voice properly. The girl submitted to what was done under the belief, willfully and fraudulently induced by the accused that she was being medically and surgically treated by the accused and not with any intention that he should have sexual intercourse with her. It was held that the accused was guilty of rape[15].

Consent of a girl below 18 years of age is immaterial and sexual intercourse with a girl below eighteen years of age would necessarily amount to rape even if she had consented to the same.

Construing *Mens Rea* in Rape

According to law, in cases of rape presence of *mens rea* can be established only by determining that the accused knew that the act was being committed without her consent or against her will. A reasonable belief on the part of the accused that the

[13] *Reg.* v. *William*, (a) (1850) Crl. Law Cases 220 (Vol. IV)
[14] (1877) 2 QBD 410
[15] *The King* v. *Williams*, (1923) 1 KB 340

woman consented, would establish lack of *mens rea* required to constitute rape. However such belief should be reasonable i.e. the accused should have reasonable grounds for bona-fide believing that the woman had consented. It has been established in a number of cases that mere silence or non-resistance on part of victim would not constitute consent.

The question that how is consent to be interpreted was discussed at length in the case of *DPP* v. *Morgan*[16] (1975, House of Lords). In this case the defendant invited the other three defendant, much younger men to his house and suggested that they have sex with his wife telling them that she was kinky and any apparent resistance on her part would be a mere pretense. Accordingly they did have intercourse with her despite her struggles and protests. She kept screaming until a hand was placed on her mouth. They were subsequently charged with rape and the husband was charged for abetting and aiding rape. The wife deposed that she resisted and did not consent. At trial the three men pleaded that they had honestly believed that Mrs. Morgan had consented to sexual intercourse.

The trial judge directed the jury that the defendants would not be guilty of rape if they honestly believed that the woman was consenting and that belief in consent was reasonably held. But the jury nonetheless convicted all four and they appealed. In appeal, the House of Lords found honest, mistaken belief in the victim's consent need not be reasonable to rebut a charge of rape. While the defendants won their legal argument, their convictions were upheld and the judges found that no reasonable jury would have ever acquitted the defendants even had they been correctly directed by the trial judge as to the law.

The accused were finally convicted, but two judges dissented and held that a honest and reasonable belief of the woman's consent would negative the *mens rea* and make the accused innocent. They further observed that

- When a defendant had sexual intercourse with a woman without her consent, genuinely believing nevertheless that she did consent, he was not to be convicted of rape.
- A man, who has intercourse with a woman believing on inadequate grounds that she is consenting to it, does not commit rape in ordinary parlance or in law.
- In rape the prohibited act is intercourse without the consent of the victim and the mental element lies in the intention to commit the act without caring whether the victim consents or not.
- A failure on part of prosecution, to prove this element involves an acquittal because an essential element is lacking.

Thus, according to law, presence of *mens rea* is established only by determining that the man was aware of the woman not consenting to the act. Where he reasonably believes that the woman consented, he lacks the *mens rea* required to constitute rape. The judges observed that the defendant must possess a reasonable belief to assert mistake of fact as negating the intent required for the crime.

[16] 2 All E.R. 347 (H.L. 1975)

It is the unavoidable but onerous duty of courts on the facts of each case to identify, ascertain and demarcate that real, yet elusive and difficult, line between voluntary consent and passive acquiescence, subject of course to the law relating to burden of proof and benefit of doubt. Consent in the law of rape need not always be a prudent or even intelligent one. It is easy to assume that no minor if prudent and intelligent, and if her faculties of reasoning and sense of righteous behaviour are properly developed and intact, would choose in the Indian context to consent to extra marital and pre marital sexual intercourse. Law in its wisdom chooses to concede to a girl, below 18 but above sixteen, the right to consent to sexual intercourse. That legislative wisdom cannot be questioned by the courts. The courts under the present law can only enquire whether consent in fact is there and whether such consent if any is vitiated. If such consent is given by a girl aged less than 16 years the same can be ignored. But if the minor girl is aged above 16 years, the courts can only enquire whether such consent was there and whether such consent if any is vitiated on any of the grounds enumerated in S.90 IPC or clauses thirdly to fifthly in S. 375 IPC; not whether it was moral or proper for the girl to give consent and for the indictee to accept and act on such consent of a minor. Her age, by itself, cannot be reckoned as sufficient to vitiate consent. Criminality and culpability according to law, and not morality of the consent or that of the indictee, are the questions before a criminal court[17].

Having Sex with Woman on False Promise of Marriage Amounts to Rape

There is a clear distinction between rape and consensual sex and the Court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala-fide motives and had made a false promise only to satisfy his lust as the latter falls within the ambit of cheating or deception. There is a distinction between mere breach of promise and not fulfilling a false promise. In the case of *Pradeep Kumar Verma* v. *State of Bihar*[18] the Supreme Court said that consensual sex shall not amount to rape. Explaining the concept of consent the court stated,

> "The consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. There is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

[17] Observations regarding *age of consent* given as a special note by Justice Basant of Kerala High Court in the case of *Joseph @ Baby* v. *SI of Police* Judgment dated 20/01/2005 in CRL A No. 590 of 2000(B)

[18] AIR 2007 SC 3059

In *Yedla Srinivasa Rao* v. *State Of A.P*[19] the intention of the accused was, right from the beginning, not honest and he kept on promising that he will marry her, till she became pregnant. This kind of consent obtained by the accused cannot be said to be any consent because she was under a misconception of fact that the accused intends to marry her, therefore, she had submitted to sexual intercourse with him.

In the case of *Jayanti Rani Panda* v. *State of West Bengal &Anr.*[20] it was observed that in order to come within the meaning of misconception of fact, the fact must have an immediate relevance. If a fully grown up girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact and Section 90 IPC cannot be invoked unless the court can be assured that from the inception accused never intended to marry her.

In such cases, the determining factor is the intention of the accused at the time of the act. If he never intended to marry then he is guilty of cheating. Therefore, it depends on case to case and the evidence led in the matter. If it is fully grown up girl who gave the consent then it is different case but a girl whose age is very tender and she is giving a consent after persuasion of several months on the promise that the accused will marry her which the latter never intended to fulfil right from the beginning, then Section 90 can be invoked. Such consent cannot condone the offence. In another case a girl aged 16 years was persuaded to sexual intercourse with the assurance of marriage which the accused never intended to fulfil. It was totally under misconception on the part of the victim that the accused is likely to marry her, that, she submitted to the lust of the accused. Such fraudulent consent cannot be said to be consent so as to condone the offence of the accused.[21]

A misrepresentation as regards the intention of the person seeking consent, i.e. the accused, could give rise to the misconception of fact. Applying that principle to a case arising under Section 375, consent given pursuant to a false representation that the accused intends to marry, could be regarded as consent given under misconception of fact.[22] A misstatement of the intention of the defendant in doing a particular act may be a misstatement of fact, and if the plaintiff was misled by it, an action of deceit may be founded on it.[23] Therefore, in order to amount to a misstatement of fact the existing state of things and a misstatement as to that

[19] 2006 (11) SCC 615 at p. 620-21

[20] (1984) Cri.L.J.1535

[21] *Emperor* v. *Mussammat Soma*, (1917) Crl. Law Journal Reports 18 (Vol.18)

[22] *Purshottam Mahadev* v. *State of Bombay*, AIR 1963 Bombay 74

[23] *Edgomgtpm* v. *Fotz,airoce* (1885) 29 Ch.D 459

becomes relevant. In the absence of such evidence. Sec. 90 cannot be called in aid in support of the contention that the consent of the complainant was obtained on a misconception of fact.

What is a voluntary consent and what is not a voluntary consent depends on the facts of each case. In order to appreciate the testimony, one has to see the factors like the age of the girl, her education and her status in the society and likewise the social status of the boy. If the attending circumstances lead to the conclusion that it was not only the accused but prosecutrix was also equally keen, then in that case the offence is condoned.

For determining whether consent given by the prosecutrix was voluntary or under a misconception of fact, no fixed criteria can be laid down, but age, intelligence, consciousness, morality, relationship with accused etc. may be considered. "However there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them."[24]

In the case of *Deelip Singh Alias Dilip Kumar* v. *State of Bihar*[25] the prosecuturix had taken a conscious decision to participate in the sexual act only on being impressed by the accused who promised to marry her. But accused's promise was not false from its inception with the intention to seduce her to sexual act. Therefore, this case is fully distinguished from the cases where the accused's promise is false from its inception. In cases where the accused promised to marry but he never intended to marry right from the beginning then the consent of the girl is of no consequence and falls in the second category as enumerated in Section 375 - "without her consent". A consent obtained by misconception while playing a fraud is no consent. The court must, while appreciating evidence in such cases closely scrutinize evidence while taking into consideration the factors like the age of the girl, her education, her social status and likewise the social status of the boy.

Age of Consent

The age at which a female offspring is reckoned as available (or competent to give the requisite consent) for sexual intercourse has often been reckoned as one safe index to assess the culture of a polity. Refined societies treat their children with concern and compassion. In the march of civilizations towards progress, puberty

[24] *Udav* v. *State of Karnataka*, [2003] 4 SCC 46
[25] [2005] 1 SCC 88

was earlier reckoned as the biological rubicon which had to be crossed by a female child to be eligible for according consent in marriage and sexual activity. But as civilizations advanced it was considered atrocious that the line could be drawn at such an early age. Hence the Indian legislature had drawn the line at sixteen years which was raised in the year 2013 to 18 years. This was also necessary to bring it in conformity with provisions under POCSO. The Law Commission of India did attempt in its 84th report to bring up the age of consent in rape to 18 years in tune with other enactments and consistent with refined and modern notions regarding the concern and compassion which society should bestow on its younger members[26].

Statutory Rape

Having sexual intercourse with a minor i.e. a person below eighteen years of age is known as Statutory rape. Clause sixthly of Section 375 provides that in rape cases, the consent of minor is immaterial and inconsequential. Such a measure was necessary to protect sexual exploitation of children of immature age and understanding. Legal Provisions that can be invoked in the case of rape of minor girl are

1. Section 23 of The Juvenile Justice (Care And Protection Of Children) Act, 2000[27]
2. Clause Six of Section 375 of the Indian Penal code, 1860.
3. Provisions of the Protection of Children from Sexual Offences (POCSO) ACT 2012.Under POCSO boys below 18 years of age are also protected against sexual assault.

In the case of *Narayan alias Naran* v. *State of Rajasthan*[28] the Supreme Court observed that, "For the offence of rape as defined in Section 375 of the Indian Penal Code, the sexual intercourse should have been against the will of the woman or without her consent. Consent is immaterial in certain circumstances covered by clauses thirdly to sixthly, the last one being when the woman is less than 16 years of age. Based on these provisions, an argument is usually advanced on behalf of the accused charged with rape that the absence of proof of want of consent where the prosecutrix is not under 16 years of age takes the assault out of the purview of Section 375 of the Indian Penal Code. Certainly consent is no defence if the victim has been proved to be less than 16 years of age. If she be of 16 years of age or above, her consent cannot be presumed; an inference as to consent can be drawn if only based on evidence or probabilities of the case. The victim of rape stating on oath that she was forcibly subjected to sexual intercourse or that the act was done

[26] *Joseph @ Baby* v. *SI of Police* Judgment dated 20/01/2005 in CRL A No. 590 of 2000(B)
[27] JJ Act, s 23: "Whoever, having the actual charge of or control over, a juvenile or the child, assaults, abandons, exposes or willfully neglects the juvenile or causes or procures him to be assaulted, abandoned, exposed o neglected in a manner likely to cause such juvenile or the child unnecessary mental or physical suffering shall be punishable with imprisonment for a term which may extend to six months, or fine, or with both"
[28] (2007) 6 SCC 465

without her consent, has to be believed and accepted like any other testimony unless there is material available to draw an inference as to her consent or else the testimony of prosecutrix is such as would be inherently improbable."[29]

Presumption as to Absence of Consent

Alongside the amendments related to Rape in IPC, Section 114A[30] was inserted in the Indian Evidence Act in the year 1983 and further amended in 2013 to make prosecutions in rape cases easier and less complicated. In rape trials there is a presumption as to the absence of consent on behalf of the woman and the onus is on defence to prove otherwise. Thus if the female says that she did not consent to the act of sexual intercourse, her statement will be presumed to be correct and taken as conclusive evidence. The burden would lie on the accused to rebut the same and prove that the intercourse was done with the consent of the woman. Therefore, in cases where there is no evidence to show that the victim consented and she states before the Court that she was raped without her consent and against her will, the Court shall believe her testimony[31]. However, Sec.114A enacts only a rebuttable presumption of fact and not law. The amount of circumstances necessary to rebut the presumption would certainly vary from case to case.

In *Gagan Bihari Samal and Anr* v. *State of Orissa*[32] the court held that, "it is clearly evident in the instant case, that the victim girl protested and struggled while she was subjected to sexual assault forcibly by the accused persons and this clearly evinces absence of consent on her part in such sexual intercourse".

In *Pratap Misra & Ors.* v. *State of Orissa*[33]the defence counsel contended that there was absence of corroboration of the testimony of the prosecutrix due to absence of injuries on the person of the woman. It was urged that absence of injuries on the person of the victim was fatal to the prosecution and that corroborative evidence was an imperative component of judicial credence in rape cases. The absence of injuries on the person of the appellants as also on the person of the prosecutrix is yet another factor to negative the allegation of rape and to

[29] *Ibid.* at para 19

[30] Indian Evidence Act, 1872 s 114A: Presumption as to Absence of Consent in Certain Prosecutions for Rape-- In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (j), clause (g), clause (h), clause ('), clause (j), clause (k), clause (f), clause (m) or clause (n) of sub-section (2) of section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court. That she did not consent, the court shall presume that she did not consent.

Explanation.- In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375

[31] *HanumanthuRama Rao* v. *State Of A.P.*2001 (2) ALD Cri 522, 2001 (2) ALT Cri 317

[32] 1991 SCR (2) 839, 1991 SCC (3) 562

[33] AIR 1977 SC 1307

show that the appellants had sexual intercourse with the prosecutrix with her tacit consent.[34]Disagreeing with the above Krishna Iyer J said,

> "The facts and circumstances often vary from case to case. The crime situation and the myriad psychic factors, social conditions and people's life-styles may fluctuate, and so, rules of prudence relevant in one fact-situation may be inept in another. We cannot accept the argument that regardless of the specific circumstances of a crime and criminal milieu, some strands of probative reasoning which appealed to a Bench in one reported decision must mechanically be extended to other cases. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of prudence under given circumstances. Indeed, from place to place, from age to age, from varying life-styles and behavioural complexes, inferences from a given set of facts, oral and circumstantial, may have to be drawn not with dead uniformity but realistic diversity lest rigidity in the shape of rule of law in this area be introduced through a new type of precedential tyranny. The same observation holds good regarding the presence or absence of injuries on the person of the aggressor or the aggressed. There are several "sacred cows" of the criminal law in Indo-Anglian jurisprudence which are superstitious survivals and need to be re-examined. When rapists are reveling in their promiscuous pursuits and half of humankind-womankind-is protesting against its hapless lot, when no woman of honour will accuse another of rape since she sacrifices thereby what is dearest to her, we cannot cling to a fossil formula and insist on corroborative testimony, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable. In this case, the testimony has commanded acceptance from two courts. When a woman is ravished what is inflicted is not merely physical injury, but 'the deep sense of some deathless shame."[35]

Hardly a sensitized judge who sees the conspectus of circumstances in its totality and rejects the testimony of a rape victim unless there are very strong circumstances militating against is veracity. [36]

The proviso to Section 146 of the Indian Evidence Act provides that in prosecutions for rape or for attempt to commit rape, where the question of consent is an issue, the court shall not permit anyone to adduce evidence or to put questions in the cross-examination of the victim pertaining to the general immoral character, or previous sexual experience, of the victim with any person for proving the consent or the quality of consent. Thus evidence of character or previous sexual experience is irrelevant in prosecutions for rape. Even in cases where there is some material to show that the victim was habituated to sexual intercourse, no inference of the victim being a woman of easy virtues or a woman of loose moral character can be drawn. Even such a woman has a right to protect her dignity and cannot be

[34] *Ibid.* para 9

[35] 1981 SCR (1) 402 at p. 405

[36] *Rafiq* v. *State of UP*, AIR 1981 SC 559

subjected to rape only for that reason .Merely because a woman is of easy virtue, her evidence cannot be discarded on that ground alone rather it is to be cautiously appreciated[37]. Even if the victim of rape was previously accustomed to sexual intercourse, it cannot be the determinative question. On the contrary, the question still remains as to whether the accused committed rape on the victim on the occasion complained of. Even if the victim had lost her virginity earlier, it can certainly not give a license to any person to rape her. Whether the victim is of a promiscuous character is totally an irrelevant issue altogether in a case of rape. Even a woman of easy virtue has a right to refuse to submit herself to sexual intercourse to anyone and everyone, because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone.

In view of the provisions of Sections 53[38] and 54[39] of the Evidence Act, 1872, unless the character of the prosecutrix itself is in issue, her character is not a relevant factor to be taken into consideration at all. Past character would be irrelevant for determining the guilt of the accused too although it may be considered in determination of sentence. A man's guilt is to be established by proof of the facts alleged and not by proof of his character. Such evidence might create prejudice but not lead a step towards substantiation of guilt.[40]

In *Sadashiv Ramrao Hadbe* v. *State of Maharashtra and another*[41], the Supreme Court while reiterating that in a rape case, the accused could be convicted on the sole testimony of prosecutrix if it is capable of inspiring the confidence in the mind of the Court, put a word of caution that the Court should be extremely careful while accepting the testimony when the entire case is improbable and unlikely to have happened. It was observed,

> "It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen."[42]

[37] *State of Maharashtra & Anr.*v. *Madhukar Narayan Mardikar*, AIR 1991 SC 207. Also see *State of Punjab* v. *Gurmit Singh &Ors.*, AIR 1996 SC 1393; and *State of U.P.* v. *Pappu @ Yunus & Anr.*, AIR 2005 SC 1248

[38] Indian Evidence Act, 1872, S. 53. In criminal cases, previous good character relevant.— In criminal proceedings, the fact that the person accused is of a good character, is relevant."

[39] Indian Evidence Act, 1872, S. 54. Previous bad character not relevant, except in reply.— In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.
Explanation 1.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.
Explanation 2.—A previous conviction is relevant as evidence of bad character.

[40] *Amrita Lal Hazra* v. *Emperor*, (1915) 42 Cal 957

[41] (2006) 10 SCC 92

It is pertinent to notice that in *Sadashiv Ramrao Hadbe*, the Apex Court found that the prosecution evidence suffered from many contradictions and the whole incident seemed to be highly improbable. It is true that in *Sadashiv Ramrao Hadbe*, this Court observed that the absence of injuries on the body of the prosecutrix improbabilise the prosecution version but the aforesaid observation has to be understood in the context of the insufficiency of evidence even to establish sexual intercourse.

It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a "rape", if the girl is under 16 years of age. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent[43].

In the context of Indian Culture, a woman - victim of sexual aggression - would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the Courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and, therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent[44].

Concept of Marital consent

In popular perception the husband cannot be guilty of raping his lawful wife on account of the presumed matrimonial consent to cohabit. Thus, in India, marital rape continues to be legal despite concerns regarding the abuse of women in the institution of marriage. Marital Rape refers to a non-consensual and unwanted

[42] *Ibid*

[43] *Radhu* v. *State of Madhya Pradesh*, SC judgment dated 14/9/2007 in Criminal Appeal no. 624 of 2005

[44] *Rajinder @ Raju* v. *State of H.P*, SC judgment dated 7 July, 2009 in Criminal Appeal no.670 of 2003

sexual intercourse by a man with his wife by using physical force or threatening to use force or under circumstances when wife is not in a position to give consent. As per Law "*Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.*"[45] Beyond 15 years of age there is no legal protection accorded to the wife except in cases when she is living separately under a decree of judicial separation or otherwise[46] i.e. under any custom or usage and the husband forcibly has sexual intercourse with her without her consent, then in such cases the husband faces imprisonment of either description for a term which shall not be less than two years but which may extend to seven years under Section 376B of the amended IPC.

Section 198B of the CrPC inserted by the Amendment Act of 2013 restrains Courts from taking cognizance of an offence punishable under Section 376B of the IPC where the persons are in a marital relationship, except upon prima facie satisfaction of the facts which constitute the offence upon a complaint having been filed or made by the wife against the husband.

Non criminalization of marital rape is sought to be justified on the grounds that we already have a civil remedy under the Domestic Violence Act, 2005 and a Criminal remedy under Section 498A IPC for protecting women against rapes by husbands. Rape of wife is recognized as sexual violence under the Protection of Women against Domestic Violence Act, 2005 and cruelty (physical and mental) under Section 498, IPC. Ironically complaints about marital rape are considered to go against traditional values and pose a threat to the institution of marriage, but the crime itself is overlooked and does not evoke such a strong sanction. Another argument is that proving rape within marriage would be next to impossible. Such an argument is worthless as difficulty in proving a crime is no ground to allow them to continue.

Consent not Implied in Live-In-Relationships

The question of consent has to be decided cautiously especially where the parties are consenting adults. In *Manoj Bajpai* v. *State of Delhi*, it was held that the acknowledged consensual physical relationship between the parties would not constitute an offence u/s 376 IPC, especially, because both the complainant as well as petitioner was major on the date of occurrence[47].

In the case of *State* v. *Yunus Khan*[48] the court observed that,

> "It is not the case of the prosecution that the accused had been sexually exploiting the prosecutrix on the false pretext of marriage. The investigation conducted by the IO demonstrates that the prosecutrix and the accused had been continuously staying together as husband and wife.

[45] Indian Penal Code, 1860 S. 375 Exception 2

[46] Indian Penal Code, 1860 S. 376B

[47] Delhi HC Judgment dated 21 May, 2015

[48] Judgment delivered by Delhi District Court on 8th April 2015 in SC no. 77/14, Unique Case ID No. 02405R0248822014.

> It is manifest from the record that the physical relations between the prosecutrix and the accused had all along been consensual. It is only when the accused refused to marry her that she leveled allegations of rape. There is also evidence on record that the prosecutrix herself is a married lady and therefore, knew that her marriage with the accused is not legally permissible. The testimony of the prosecutrix does not appear to be credible or trustworthy. Her version does not inspire confidence of this court. The facts which have come out during the course of investigation do not support the allegations of rape. Even the husband and sister of prosecutrix knew that she is staying with the accused. The landladies of all the houses, in which prosecutrix and accused were residing together before the registration of FIR, have stated to the IO that they were staying as husband and wife. The evidence on record, thus, establishes the fact that the prosecutrix and accused were staying together in a live in relationship for a long time before the registration of FIR."

Recently in the case of *Anil Dutt Sharma* v. *Union Of India & Ors*[49] a bench of chief justice G Rohini and justice Rajiv Sahai Endlaw observed that as far as keeping the live-in relationships outside the purview of Section 376 (rape) of the IPC is concerned, the same would amount to giving the live-in relationships, the status of matrimony and which the legislature has chosen not to. Thus live-in relationship cannot be kept out of purview of rape

Conclusion

In the ultimate analysis, the test laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.[50]

However we cannot close our eyes to the rising incidences of misuse of rape laws in contemporary times. No doubt, act of rape causes intense emotional distress and immense humiliation to the victim but at the same time one cannot lose sight of the fact that false implication in a rape cases causes equal humiliation, disgrace and mental agony to the accused. Rape is the most hated crime in society. No sooner that the news of a person having been accused of rape spreads in society, he is looked down upon by all and sundry. He as well as his family is ostracised from the main stream. He is humiliated and ridiculed everywhere. Even his honourable acquittal by the court is not taken note of and does little to salvage his lost honour and dignity. He has to live with the trauma of having been a rape accused

[49] Delhi HC judgment dated 18 February, 2015 in W.P.(C) 1045/2015

[50] *Uday* v. *State of Karnataka* AIR 2003 SC 1639

throughout his life. In the case of *State* v. *Kuljeet Singh*[51] while acquitting the accused the court observed, "This case is a classic example of how men are being falsely implicated in rape cases to settle personal scores with them. This is a perfect illustration of total misuse of rape laws. It is these false rape cases which make the crime graph shoot up, thus playing havoc with the actual crime statistics. These also tend to trivialize the offence of rape. Time has come when the courts should deal firmly with the women filing false complaints of rape. These women, who turn out to be tormentors and not the victims, should be punished under the appropriate provisions of law."

In the case of *State* v. *Sikander*[52], the husband of the prosecutrix, in order to settle scores with the accused had used the prosecutrix (his wife) as an arrow or pawn and slapped an utterly false criminal case upon the accused. The court cautioned that it is becoming a very difficult job, now-a-days, for the courts to differentiate the genuine rape cases from the false ones. The cases like the present one create a well founded belief among the public as well as the judiciary that the rape related laws are misused with impunity. The judges need to remain vigilant in differentiating between false and genuine rape cases so as to ensure that no innocent person is convicted and sentenced.

[51] Judgment delivered by Sh. Virender Bhat, A.S.J. (Special Fast Track Court), Dwarka Courts, New Delhi on 21 Jan, 2015 in SC No. 113/13, Unique Case ID No. 02405R0039292013.

[52] Delhi District court judgment delivered on 22nd March 2013 in SC No. 72/13, Unique Case ID No.02405R0292302012

Extent of Recognition of Unborn in Tort Law

Dr Sunanda Bharti[*]

Introduction

In most legal systems, legal personality of human beings begins at live birth. This is known as the Born Alive Rule (henceforth the BA Rule). Primitive medical technology made it impossible to establish that a foetus was alive until it was born. So, the Rule was primarily a result of unsophisticated medical knowledge and technical know-how. As Shah points out:

> The impossibility of determining whether and when a foetus was living and when and how it died led to the difficulty of ascertaining whether a defendant's misconduct was the cause of a foetus' death.[1] This is the main reason why pre-natal tortious injuries suffered by an unborn were not recognised as a civil wrong. There was no one to whom the defendant could owe a duty of care. Denial of legal personality to the unborn was and in many jurisdictions still is, substantially because of the BA Rule Today the born alive rule has outlived the reason for its application. Presently the medical and forensic science situation has changed drastically by making it possible to determine with almost pointed accuracy as to what caused the injury, when the deformity, if any, set in and why or what was the cause of death. Law should translate the above development into granting legal personality to the unborn from conception itself.[2]

'Tradition' as fetters to law reform

The whole basis of Common Law or judge-made-law was to afford justice on sensitivity of case basis and then suddenly the Doctrine of Stare Decisis was read into the legal system which stifled creative judgement. Outdated conventions

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[1] Mamta K Shah, *'Inconsistencies in the Legal Status of an Unborn Child: Recognition of a Foetus as Potential Life'* (Spring 2001) 931, 937-38.

[2] In *Winnipeg Child and Family Services (Northwest Area)* v. *DFG* 152 DLR (4th) 193, [1997] 3 SCR 925 (Can SC) para 67, it was stated that,
"[H]istorically, it was thought that damage suffered by a foetus could only be assigned if the child was born alive. It was reasoned that it was only at that time that damages to the live child could be identified. The logic for that rule has disappeared with modern medical progress. Today by the use of ultrasound and other advanced techniques, the sex and health of a foetus can be determined and monitored from a short time after conception. The sophisticated surgical procedures performed on the foetus before birth further belies the need for the 'Born Alive' Principle"

prevailed in the name of consistency and are prevalent till date in many jurisdictions insofar as legal personality of Unborn is concerned. As Gerard Casey notes,

> The conservatism of the Common Law is notorious. There are only two ways to escape its reach. The first way is by means of the sharp sword of statute. For those of a conservative bent this is a remedy not without danger but it has its uses in allowing us to cut through the Gordian knot of dead or decaying traditions. The second way to escape the reach of an established rule is by circumventing it.[3]

Presently, the world science does not suffer from any handicap but yet many jurisdictions prevent recovery by a foetus for pre-natal injuries either on grounds of viability or live birth.

Traditional Stand on Pre-natal injuries and Foetal Standing

Since traditionally foetus was not considered as a legal person, it was not compensated for pre-natal injuries. However, whenever such demands arose, the courts were compelled to dwell over the proper conceptual basis for allowing or denying a cause of action in cases of pre-natal injuries, including those resulting in death (discussed later in the paper). Recovery was denied in early cases on one or more of basis:

- lack of a duty to an unborn foetus, usually associated with and the lack of standing of the unborn as a person (the requirement of live birth);
- the difficulty of showing causation (that the pre-natal injury was caused by the defendant's act);
- the danger of encouraging spurious or doubtful claims; and
- others on case sensitive basis.

Hence, one can say that traditionally the question of whether an infant can sue for injuries sustained while *en ventre sa mere*[4] through the negligence of others was answered in the negative.[5] The 1921 case of *Drobner* v. *Peters*[6] was categorical in listing out the reasons for denial of recovery as:

[3] Gerard Casey, '*Born Alive: The Legal Status Of The Unborn Child In England And The USA*' (Barry Rose Law Pub Ltd 2005) 98.

[4] It is a French phrase that means a foetus *in utero.*

[5] See generally *Magnolia Coca Cola Bottling Co* v.*Jordan* 124 Tex 347, 78 SW 2d 944 (1935); *Drobner* v. *Peters* 232 NY 220, 133 NE 567 (1921); *Walker* v. *Great Northern Ry Co of Ireland* 28 LR Fr 69 (1891). In short, previously, the general rule was that a pre-natal injury afforded no basis for an action in damages in favour of the child. Today, however, the right of a child to bring suit to recover damages for pre-natal injuries tortiously inflicted is almost totally recognised, however the Born Alive Rule still holds ground in many jurisdictions. WD is not overwhelmingly recognised as actionable tort. The general rule being that an action may be maintained for such pre-natal injuries where the child was subsequently born alive (and died only after that).

[6] 232 NY 220, 133 NE 567 (1921).

1) lack of authority in the foetus referring to his lack of legal standing because of no birth yet;
2) practical inconvenience and possible injustice, referring to the difficulty in proving that the injuries sustained by the unborn were the result of the defendant's negligence;[7]
3) no separate entity apart from the mother and, therefore, no duty of care;[8] and
4) no person or human being *in esse*[9] at the time of the accident.

These reasons were severely criticized as an analogy was drawn from the contemporary Criminal and Property laws.[10] It was argued that since the interests of the unborn were protected there, logic compelled that the interests be protected under Tort law as well. Also, in the light of the medical advances it was believed that lack of proof was an unjust ground for denying relief.

Tracing Development of Recovery Rule for Pre-natal Injuries from Denial in early Cases to their Acceptance in Current Law

The Times of Non-liability: Trilogy of Dietrich-Walker-Allaire

Dietrich v Northampton[11] the US case of 1884 is considered to be the first reported case on the issue, in a common law jurisdiction. In this case, a PW (pregnant

[7] See for reference a much later case of *Magnolia Coca Cola Bottling Co* v. *Jordan* 124 Tex 347, 78 S W 2d 944 (1935).

[8] See Judge Holmes's rationale in the leading case of *Dietrich* v. *Inhabitants of Northhampton* 138 Mass 14 (1884). This reasoning became a benchmark for denying recovery for most of the succeeding cases till 1946.

[9] In *esse*, in ancient Latin, means in actual existence; as opposed to in *posse*. A foetus *en ventre sa mere* is a thing in *posse*.

[10] See '*Right to Recover for Prenatal Injuries*' (1935) The Yale Law Journal 44(8) 1468-1471, which summarises the state of the law at that time: 'It is not true, however, that for all purposes a child *en ventre sa mere* is non-existent, either physically or legally. Thus in the law of property he is in *esse* for all purposes which are to his benefit. He may take by descent or under a will or marriage settlement, have a guardian appointed, be made an executor, and, through his guardian, may secure an injunction to stay waste. The criminal law also regards him as a separate entity. Thus it has been held that when a child born alive dies as a result of pre-natal injuries inflicted by an unlawful beating of the mother, the wrongdoer is guilty of murder.'

[11] 138 Mass 14 (1884). Sixty-two years elapsed before the rule denying recovery in such cases was changed in *Bonbrest* v. *Kotz* (1946). This happened fifty years before the English courts would in the Criminal case of *Attorney-General's Reference* (No 3 of 1994), recognise the medical/biological fact that the foetus and mother are two individuals. It is notable that Tort law had realised the absurdity of not recognising the foetus as a separate entity under inheritance law long before, yet it denied such recognition in respect of pre-natal injuries. Presently, all US jurisdictions allow recovery in such cases, and indeed most have further expanded the Tort law to allow a personal representative of the injured foetus to sue where that foetus is not born alive but would have been entitled to sue had it been born alive. This explains the advancement of USA in the law of Torts in relation to the foetus.

woman), between four and five months, tripped on a defect in a highway of Northampton, Massachussets, and fell. Her fall caused a miscarriage and the child though born alive, it did not survive such a premature birth. There was testimony, however, based upon observing motion in its limbs, that it did live for ten or fifteen minutes. Peter Dietrich, administrator of the estate of the dead child, brought an action claiming compensatory damages from the town for the benefit of the mother as next of kin.

In the now infamous verdict rendered by Oliver Wendell Holmes, the court refused to recognise a cause of action on behalf of a child who died before or after birth as a result of injuries suffered in the womb because the foetus was considered legally a part of its mother and thus did not possess personhood.

Dietrich v. *Northampton* was copied by courts throughout the United States and elsewhere with such dedication that for over sixty years the law remained atrophied in this matter.[12] The policy changed after the decision in *Bonbrest* v. *Kotz*[13] in 1946.

Another influential early case that must be studied while tracing the history of recoverability in pre-natal injury cases is the 1891 Irish decision of *Walker* v. *Great Northern Railway of Ireland.*[14] It was the first judicial decision in the United Kingdom on the issue. In the case the child was born crippled and deformed because during pregnancy the PW was injured by reason of the negligence of the railway company. It was held that the child, upon being born alive could not claim against the railway company because a duty of care could only be owed to a living person after birth and not to an unborn child before birth. Chief Justice O'Brien reasoned that any duty to the child must flow from the contract of carriage, and, since the existence of the child was not known to the carrier, no duty could exist.[15] Another reason for denying compensation was the fear of unfounded claims-danger of indefinite and unknown expansion of actions.

The next benchmark was the 1900 case of *Allaire* v. *St. Luke's Hospital*[16] decided by the Illinois Supreme Court. In that case, the PW having completed full term had entered the defendant hospital for the purpose of delivering the plaintiff. According to the complaint, the unborn was seriously and permanently disabled by a malfunctioning elevator in the hospital. The Illinois Supreme Court denied that a cause of action existed.

The case is important however, more so because of the dissenting opinion of Justice Boggs who pithily attacked the extension of the *Dietrich* rationale to the

[12] The rule in *Dietrich* was also followed in other common law jurisdictions outside of the United States. For instance, *Walker* v. *Great Northern Ry Co of Ireland* 28 LR Fr 69 (1891); *Smith* v. *Fox* [1923] 3 DLR 785 (Ont Sup Ct 1922) (Canada); *Manns* v. *Carlon* [1940] Vict LR 280 (Australia).

[13] 65 F Supp 138 (1946).

[14] (1890) 28 LR Ir 69 (QB).

[15] (1890) 28 LR Ir 69, 79.

[16] *Allaire* v. *Saint Luke's Hospital* 184 Ill 359 (1900).

facts of *Allaire*. In arguing against live birth as the substantive determinant of personality, Boggs stated:

> Whenever a child *in utero* is so far advanced in pre-natal age as that, should parturition by natural or artificial means occur at such age, such child could and would live separable from the mother and grow into the ordinary activities of life, and is afterwards born and becomes a living human being, such child has a right of action for any injuries wantonly or negligently inflicted upon his or her person at such age of viability, though then in the womb of the mother.[17]

While *Dietrich* was hasty enough to declare recompense-ability in cases of pre-natal injury suffered by unborn to be a shut door, the dissent of Justice Boggs in *Allaire* opened that very door. However, the important limitation of viability was put on the capacity of the unborn foetus to recover.

It is the strong and well-reasoned dissent of Justice Boggs[18] that makes the case unique. In times when courts were quoting Blackstone, Fleta and Bracton for denying any legal personality to the foetus, Justice Boggs succinctly essayed why and how the common law had a unique ability to apply existing principles to novel fact situations.[19] Boggs maintained that such pre-natal injury cases came well within the existing limits of the Law of Torts, except for the fact that the injury was suffered while the victim was in the mother's womb.[20] He argued that this fact should not operate to deny a right of action and asserted that while a foetus might be regarded as part of its mother during the early period of its gestation, once it became viable, it became a separate entity.

The only rider that Boggs introduced was his reliance on viability. He distinguished *Dietrich* on the ground that the foetus in that case had not reached the stage of viability.

The Stray case of Montreal Tramways

The SC of Canada in 1933 in the famous case of *Montreal Tramways* v. *Leville*[21] which gave the foetus the honour of becoming the first common law appellate court

[17] *Ibid*

[18] *Id.* at 640. This opinion of Justice Boggs found favour with the courts in 1953 when *Allaire* was overruled through *Amann* v. *Faidy* 415 Ill 422, 117 NE 2d 412 (1953). In *Amann's* case, the court, while relying on an older case made an important reiteration 'that if we are to be restricted to the common law, as it was enacted at fourth James, rejecting all modifications and improvements which have since been made, by practice and statutes, except our own statutes, we will find that system entirely inapplicable to our present condition, for the simple reason that it is more than two hundred years behind the age.' Stating thus, it allowed recovery on behalf of the deceased foetus.

[19] 'The common law would be an absurd science were it founded on precedents only': 184 Ill at 368, 56 NE 640.

[20] *Ibid.*

[21] [1933] 4 DLR 337 (Can Sup Ct).

in the world to permit a child to succeed in a negligence action against a third party for pre-natal injuries. The Canadian Supreme Court stated:

> If a child after birth has no right of action for pre-natal injuries, we have a wrong inflicted for which there is no remedy, for, although the father may be entitled to compensation for the loss he has incurred and the mother for what she has suffered, yet there is a residuum of injury for which compensation cannot be had save at the suit of the child. If a right of action be denied to the child, it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor. To my mind it is but natural justice that a child, *if born alive and viable*, should be allowed to maintain an action in the Courts for injuries wrongfully committed upon its person while in the womb of its mother.[22]

One of the perks of being a legal person is that only legal persons have locus standi in courts and access to the legal processes of holding and enforcing their rights and prerogatives against others. One of the basic privileges that a legally recognised person gets in Law of Torts is to get compensation for any wrong that might have been committed against him.

In this case, the plaintiff, a little girl named Jeannine, had been born with clubfeet leaving her severely disabled. Her representative claimed that her mother was thrown off a tramcar two months before her birth which resulted in the deformity setting in Jeannine. The appellant company admitted the negligence of their motorman in causing the mother's fall. They conceded that she was entitled to damages for the personal injuries suffered due to the fall but reasoned that since there was no contract between the foetus and the company, there was no duty of care owed to the unborn foetus and therefore the company was not legally obliged to compensate Jeannine.

The court however, in a remarkable sidelining of the law of precedent, maintained that the pre-natally injured Jeannine had the right to claim in tort. It has been medically established that the foetus is more susceptible to life altering damage in the first trimester and therefore the earlier in the pregnancy the alleged harm occurs, the more likely it is that a causative relationship can be established. This is all the more reason why the foetus should be entitled to recover for very early injuries and why viability should not have anything to do with such a recovery. This can happen only when personality is attributed to the foetus-which should be done from conception itself.[23]

[22] *Id.* at 345.

[23] Similar issue arose in the Australian case of *Watt* v. *Rama* in 1972: [1972] Victorian Reports 353. In this case two cars collided-one driven by Habib Rama, the other by the pregnant Sylvia Alice Watt. The plaintiff was born after the accident suffering, it was alleged, from brain damage and epilepsy caused by the negligence of the defendant. The defendant admitted the collision but denied that the plaintiff's injuries were caused by his alleged negligence. He maintained that he owed no duty of care to the infant plaintiff who was then unborn and merely a part of the PW, amongst other things. This was not *contd...*

Progress since Bonbrest

It appears that with such sound logic, *Montreal Tramways* would have been able to change the tides in favour of the unborn; but it took another decade and a couple of years for the law to shake off the stricture of *Dietrich*. The case was *Bonbrest* v. *Kotz*[24], in which the court of the District of Columbia was able to force itself out of the overwhelming weight of authority in other jurisdictions. In this case, the defendant physicians J Kotz and Morton Kaufman were alleged to have caused pre-natal injury to Bette Gay Bonbrest, an unborn child, through professional malpractice during delivery of the child. The child survived birth but suffered debilitating injuries. It was commonly understood that an unborn child did not have standing to sue for injuries suffered in the womb. However, the Court in this case, claimed a prerogative to extend common law protections to the viable foetus, based on similar treatment of the viable foetus in other fields of law, such as criminal and abortion laws. It was ruled that the child Bette Gay Bonbrest had standing as an independent individual to sue for injuries suffered while she was a viable foetus in the womb.

The Condition of Viability

Though *Bonbrest* was an important development, the cases immediately following it limited their application to only viable foetuses; whether it be pre-natal injuries simpliciter or pre-natal injuries resulting in WD.[25] The requirement of viability for WD claims is still questionable in many jurisdictions, though within a few years of *Bonbrest*, the illogic, lack of factual medical support and seeming injustice compelled the courts to eliminate the same in regard to pre-natal foetal injuries. It was only a casual connection between the act and the resultant injury that was to be proved.

Since, *Bonbrest* the law has been trying to sort the various off-shoots of pre-natal injuries to zero-in on those that are compensable. Across the globe, the courts are still, for instance on the horns of a dilemma as to whether 'viability' should be a condition to grant recovery in pre-natal injury cases, whether live birth should be considered mandatory and so on.

Viability as Benchmark for Limiting Duty of Care

One of the fundamental tenets of Tort law is contained in the Latin Maxim 'Ubi *Jus Ibi Remedium*', meaning, where there is a right, there is a remedy. Translated in the Hohfeldian language, there is a justified claim present in the victim corresponding to which, there is a correlative duty in the tortfeasor to remedy the wrong. This concept of 'duty' in common law is of utmost importance because it defines the way in which and the extent to which, liability of the tortfeasor would be

accepted by the court and the plaintiff was allowed to succeed.

[24] 65 F Supp 138 (DDC 1946): in

[25] See *Verkennes* v. *Corniea* 229 Minn 365, 38 NW 2d 838 (1949); *Woods* v. *Lancet* 303 NY 349, 102 NE 2d 691 (1951).

determined. If no duty is recognised by courts, it is a straight way, to borrow the expression of Justice Holmes, of saying that 'the law does not spread its protection so far.'[26]

This was the state of affairs till 1946 (barring the rare exception of *Montreal Tramways* in 1933) during the pre-*Bonbrest* age. From the state of 'no liability of the defendant' for pre-natal injuries inflicted by him on the foetus, the courts conceded that some liability should be imputed on to him (for after all there was an injury for which it was felt that law should recognise some remedy). That limited liability was made dependent upon whether the foetus was viable at the time of the alleged injury. Live birth, one may note, was never taken away as a requirement. The foetus had to be born alive to claim damages for pre-natal injuries. If it died *in utero* there was no relief, at least not yet. Similarly, injuries suffered in the pre-viable stage were unaccounted for.

Viability was such a strong measure of foetal personality that injury to a pre-viable foetus went totally unnoticed and un-remedied. The classic defence of the tortfeasor was that the plaintiff could have no cause of action because at the time of the alleged breach of duty it was a non-viable foetus. The implication was that thus, the defendants did not owe it a duty of care.

For inheritance purposes unborn children were accounted for and no distinction between viability or non-viability was ever attempted to be drawn in determining the point of vestiture of the legal right, yet when it came to compensating for pre-natal injuries suffered by the unborn, complications of all sorts were read in.

Tide against Viability

Medical science of even that age recognised the embryo as *in esse* from conception[27]. Given this, there appeared to be no justification for obstinately maintaining a foetus to be a part of the mother until viable. Furthermore, it was unjust to arbitrarily distinguish between unborn bearing similar injuries and equally entitled to recompense just on the basis of gestational age. As maintained by Winfield, 'It is true that causal connection is more difficult to establish in the earlier stages of the child's pre-natal development; nevertheless the relation between the negligence and the injury to the non-viable infant can be established.'[28]

With the increase in medical knowledge, the erroneous belief that 'viability' constituted the origin of separate being fell increasingly under fire. Medicine emphasised that the crucial period of intrauterine development during which the foetus would be most susceptible to environmental influences was during the first trimester, long before viability...it was realised hence that the viability limitation presented a potential of working injustice.[29]

[26] See Leon Green, '*Foreseeability in Negligence Law*' (1961) 61 Columbia Law Review 1401, 1407.
[27] Griesheimer, *Physiology and Anatomy* (5th edn, Lippincott 12s 6d 1945) 738.
[28] See Winfield, '*The Unborn Child' (1942)* 4 Toronto Law Journal 278, 293.
[29] David A Gordon, '*The Unborn Plaintiff*' (Feb 1965) 63(4) Michigan Law Review 589 *contd...*

It is only after new and increasingly diverse fact situations started coming to the fore, that the illogic of viability was recognised. Contemporary developments in the field of science made this more acceptable. It was acknowledged that in an unborn, all the vital organs form at a very early stage of foetal life, and hence the most serious postnatal disabilities resulted from injuries that occurred in the first trimester of pregnancy-long before viability. From the medical point of view, therefore, it made little sense to condition recovery, in cases of pre-natal injury, to only viable foetuses.

Brief on Theories in the UK and USA on Recovery for Pre-Natal Injuries

Till at least late 1940's, the tort law in the United States limited the liability of the negligent defendant on the basis of duty, forseeability, or proximate cause, which cut down his responsibility to the point where his legal liability was commensurate with his wrong.[30] For instance, it was cemented that since in cases of medical malpractice the unborn's presence is or should be known to the attending doctor, it was foreseeable that his negligence might cause injury, and hence the infant was (or rather should be) permitted to recover.[31]

Contrary to this, where the defendant was unaware of the existence of the infant *en ventre sa mere*, it was considered difficult to impose any liability.[32] The general feeling was that in such cases, to hold the defendant liable for the injuries suffered by the unborn might amount to imposing upon him too great a financial responsibility. The liability was imposed on the 'proximate cause' rationale. For instance, in *Waube v Warrington,*[33] a mother suffered miscarriage on seeing her son run down by the defendant. The court refused to hold the defendant liable for the death of her foetus. The imposition of such a duty on the tortfeasor, the court believed, would be imposing liability wholly out of proportion to the culpability of the negligent party.

In the UK however, there was a different theory prevalent for such cases. The theory revolved around compelling the defendant to assume that there would always be a certain proportion of women pregnant. In the face of such assumption, the defendant could reasonably be expected to contemplate the possibility that his negligence might result in injury to an infant *en ventre sa mere*, and he was held liable. This was widely held to be the English view, and the defendant was held liable for all the consequences that could be traced to his negligence. Hence, whether the result was foreseeable or not, the defendant, in pre-natal injury cases,

(emphasis added).
[30] '*Legal Status of Infant En Ventre Sa Mère*' (Winter 1950) 17(2) The University of Chicago Law Review 395-400.
[31] In *Bonbrest* v. *Kotz* 65 F Supp 138 (DC 1946), the infant plaintiff was injured through the malpractice of the surgeon in removing it from its mother's womb. The court held that the plaintiff's complaint stated a good cause of action.
[32] For instance, in cases of automobile or train accidents.
[33] 216 Wis 603, 258 NW 497 (1935).

was held responsible.[34] In the USA such an assumption was not made and cases were determined on the basis of a 'proximate cause' rationale.

Associated Problems Concerning Recognition of Liability for Pre-natal Injuries—the Rise of Wrongful Death (WD) Cases

The era of denial of liability for any pre-natal injury was, in a way, less of a burden on academic, legal and judicial intelligentsia because there was no need to distinguish between cases where pre-natal injury resulted in death of the foetus from the cases where it simply caused an injury to it-remedy was denied to both uniformly.

With recognition of liability, however, live birth resurfaced as an incident of utmost importance for WD cases. In many jurisdictions till date, a pre-natal injury that results in stillbirth is not considered as a case fit for WD claim. For a successful claim, the foetus should take birth and then die later as a result of pre-natal injuries

Cases of 'wrongful life' and 'wrongful birth' are new areas where new tort laws are emerging. Courts have been grappling with a number of issues that were hitherto unheard of for instance, right of action by the unborn against the mother for failure to provide a healthy womb (say when PW is a drug addict, an alcoholic etc); the right of action against the mother for a botched self-abortion attempt resulting in temporary or permanent disability of the child; or the right of action against the attending physician for negligence.

The law of pre-natal torts has, over the years, presented problems of its own. They may be categorised as follows:

A. Situation where the unborn is injured *en ventre sa mere*, is born, and then brings suit for his injuries through a guardian. Presently the UK and every jurisdiction in the US allow recovery on these facts. Irrespective of whether injury occurred before or after viability, so long as the child's condition can be traced to the concerned injury.
B. Situation where the child is born but subsequently dies from the effects of the pre-natal injury. This is the classic WD situation.
C. Situation where the child is stillborn as a result of defendant's tortious act, that is, the death occurs before birth. It is this third scenario that posed problems, although many jurisdictions allowed recovery.[35]

To elaborate, if the foetus is not merely injured, but it dies in the womb as a result of those injuries. Presently, this is also considered as wrongful death and poses problems graver than where the child takes birth and then immediately dies.

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[34] *Smith* v. *London & South Western Ry Co* (1870) LR 6 CP 14; *In re Polemis* (1921) 3 KB 560; *Hambrook* v. *Stokes* (1925) 1 KB 141. Here the court permitted the plaintiff to recover on facts almost identical with those in *Waube* v. *Warrington* 216 Wis 603, 258 NW 497 (1935), the US case stated above.

[35] For instance, the State of Michigan does allow recovery as in case of *O' Neill* v. *Morse* stated above.

The question whether the parents of a foetus that died *in utero* as a result of pre-natal injuries may recover under wrongful death statutes came to the fore for the first time in 1949 in the American case of *Verkennes* v. *Corniea*.[36] It was a medical malpractice suit where the mother suffered a ruptured uterus during labour that resulted in the death of both herself and her child. It was alleged that the attending doctor was negligent in providing due care and treatment. The father claimed on behalf of the deceased foetus *but was denied*.

Though the suit did not succeed, in the coming years, WD cases saw a rise and were not confined to malpractice suits. The courts started concluding that a wrongful death action was available even when there was no live birth.[37] This development was criticised severely by those who swore by the traditional approach and maintained that legal personality of the foetus was conditioned by live birth.[38] Hence a wide split of authority developed.

Survived Foetuses versus Dead—Rational behind Denial of Relief for WD

In case of foetuses injured pre-natally who survived birth, denying relief comprised the hardship of requiring the newborn to go through life 'bearing the seal of another's fault'.[39] There was no such moral complication in a wrongful death situation.[40] Moreover, the infant was not a 'breadwinner' which made it all the more easy for the courts to deny relief.

A fundamental tenet of the law of Tort is that the relief is compensatory in nature and not punishment based. Tort law enables the innocent plaintiff to recover the loss that he might have suffered at the hands of the negligent tortfeasor. Those who opposed compensation in WD cases maintained this as a ground for denial of relief claiming that allowing recovery of compensation in WD would tantamount to punishing the wrongdoer.

It is not submitted that the tortious destroyer of a child *in utero* should be able to escape completely by killing instead of merely maiming. But it is submitted that to compensate the parents any further than they are entitled by well-settled principles of law and to give them a windfall through the estate of the foetus is blatant punishment.[41]

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[36] 229 Minn 365, 38 NW 2d 838 (1949).

[37] *Porter* v. *Lassiter* 91 Ga App 712 (Chatham Sup Ct 1955); *Mitchell v Couch* 285 SW 2d 901 (Ky 1955); *Worgan v.Greggo & Ferraro Inc* 50 Del 258, 128 A 2d 557 (1956).

[38] *Keyes* v. *Construction Serv Inc* 340 Mass 633, 165 NE 2d 912 (1960); *Mace* v. *Jung* 210 F Supp 706 (D Alaska 1962).

[39] See *Montreal Tramways* v. *Leveille* [1933] 4 DLR 337, 344.

[40] 'The policy considerations which call for a right of action when a child survives do not necessarily apply in the absence of survivorship': *West* v. *McCoy* 233 SC 369, 375 (1958) (emphasis added).

[41] David A Gordon, '*The Unborn Plaintiff*' (Feb 1965) 63(4) Michigan Law Review 595. The mother was not able to recover for injuries to the child for instance, in the following cases: *Butler* v. *Manhattan Ry* 143 NY 417, 38 NE 454 (1894); *Finer* v. *Nichols* 158 Mo App 539, 138 SW 889 (1911).

The act of compensating the unborn for pre-natal injuries suffered should not be viewed upon as unjust or in the nature of punishment. Infact, the same gels totally with the 'Corrective Justice Theory' considered as one of the most influential perspective on Tort law. The idea behind this theory revolves around a fantastic system of first and second order duties. Duties of the first order establish norms of proper conduct, for example, duty not to injure. Duties of the second order are duties of repair. These duties arise upon the breach of first-order duties.

Translated in the language of foetal rights and pre-natal injuries inflicted upon it by the defendant, it means that (a) defendant is under a duty not to injure (or conversely, foetus has a right not to be injured); (b) if the defendant breaches that first order duty and injures the foetus through his conduct, his second order duty activates and he must be compelled by law to repair the wrongful loss that his conduct has caused.

Reasons for Allowing Cause of Action in WD cases:

According to Robertson, "Once the courts recognised the foetus as a living entity with a separate biological existence, it was clearly tempting to carry the proposition to its logical extreme-to endow this living being with all the attributes of personhood and to extend to it all the legal protections that attach to that concept. Thus, when the death of that separate biological existence occurred through the wrongful act of another, logic dictated that such a wrong required a remedy."[42]

In addition to this, following reasons may be culled out for the evident shift in stance by courts:

(1) It was considered as incongruous to allow a cause of action to a live infant for pre-natal injuries but to deny it to one whose injury was so severe that it died from it. The requirement of live birth was also removed from WD claims because it indirectly permitted the tortfeasor to inflict the greatest injury to avoid liability.[43]

(2) Wrongful death is mostly governed by statutes and is punitive in nature, and it was felt that there was just as much reason to punish a wrongdoer where the unborn infant died before birth as where it survived to live birth.

(3) Not to allow recovery, it was felt, would amount to permitting a wrong for which there was no remedy.

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[42] Horace B Robertson Jr, '*Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Pre-natal Injuries, Preconception Injuries and Wrongful Life' (Jan 1979)* 1978(6) Duke Law Journal 1427.

[43] As stated by the Supreme Court of Wisconsin: 'Denying a right of action for negligence [sic] acts which produce a stillbirth leads to some very incongruous results. For example, a doctor or a midwife whose negligent acts in delivering a baby produced the baby's death would be legally immune from a lawsuit. However, if they badly injured the child they would be exposed to liability. Such a legal rule would produce the absurd result that an unborn child who was badly injured by the tortious acts of another, but who was born alive, could recover while an unborn, who was more severely injured and died as the result of the tortious acts of another, could recover nothing.': *Kwaterski* v. *State Farm Mutual Automobile Insurance Co* 34 Wis 2d 14, 20, 148 NW 2d 107, 110 (1967).

(4) Since the foetus was recognised as a life separate from its mother, it was felt that certain elements of damage could only be compensated in an action by the unborn.

Conditions Required for WD Claim

The two main conditions required for a successful claim of compensation by the plaintiff are as follows:

1. that the death came about because the defendant was negligent or strictly liable for the same.
2. that the death affected some survivors, mother, father, siblings of the victim who would be beneficiaries from a wrongful death settlement. Basically, this means the death of the victim must have personally damaged an immediate family member who can collect compensation.

Difference between the Civil Wrong of WD and Criminal act of 'Miscarriage'

Sometimes, the pre-natal injury resulting in wrongful death may also result in some separate harm to the mother compensable as a miscarriage or other harm to the body. The mothers claim for the personal injuries is different from the foetal claim for damages. Abortion or miscarriage is also very different from WD. The latter is remedial in nature, the purpose of which is to vindicate the life destroyed and also to compensate the survivors for their loss. Also miscarriage is governed by the Law of Crime while WD is a civil wrong, the main difference between the two being that of intention. Procuring or inducing miscarriage that is not lawful is a criminal offence. Contrary to this, a WD is a civil wrong, a Tort. The latter remedy is available where an unborn child is killed as a result of another party's negligence, malpractice, unsafe product and so on.

WD may occur in two ways: (1) the foetus dies because the mother is killed (this may in-fact give rise to both a crime and a tort, if the killing of mother is intentional), or (2) the mother survives or is unharmed but the foetus sustains injuries which lead to its death either in-*utero* or post birth.

In these situations, ideally, there arises a distinct claim for the wrongful death of the foetus (which can be maintained by the kith and kin of the deceased foetus who would have benefitted from his life) which is separate from any claim involving injuries to or the death of the mother. The courts have avoided any encouragement of these claims primarily because of two reasons:

- refusing to recognise the foetus as a person (in jurisdictions such as India)
- because there is no way to deal with the flood of cases which would be sure to follow.

Victim Talem Qualem Rule

In relation to allowing for compensation for WD's, the victim *talem qualem* Rule presents problems particularly to doctors. The rule is an expression of the legal policy that a wrongdoer must take his victim with all his susceptibilities, abnormalities, and propensities.

Hence, if a certain pregnancy is unhealthy in the first place, and death of the foetus results, the fact of the pregnancy being diseased may be overlooked or sidelined and in any wrongful death action that is brought by the beneficiaries of the stillborn/dead infant, the defendant doctor may be held liable for causing the death because of the victim *talem qualem* rule.

In such a case, it would be on the defendant doctor to somehow prove that the health of the foetus was such that it would have inevitably and of its own accord aborted. If this can be established, the defendant ought not to be held liable.[44]

Statistics on WD Claims

In the USA itself, there is no uniformity amongst states on the treatment of WD claims. In 1949, Minnesota became the first state to permit a civil cause of action for the death of an unborn child. Now, 39 states recognise such a claim. Of these, 27 states allow a wrongful death suit only if the child was viable at the time of his or her death, while remaining 12 states allow suits for a pre-viable child. Conversely, 11 states still require a live birth, barring a cause of action for the death of the unborn child, unless the child is born alive and dies thereafter.[45]

Viability in WD cases

Increasing suits by living infants against defendants for pre-natal injuries suffered in the pre-viable stages compelled the courts to overwhelmingly recognise the futility of viability as a condition to grant recovery. However, where pre-natal injury caused death (that is WD cases), the requirement of viability survived a longer period. Confusion persisted because for a long duration, most reported cases on WD claims involved foetuses which were viable both at the time of the injury and at the time of death.

In principle, there is no logical reason to disallow recovery for WD in cases involving pre-viability injury. Medical science has made it possible to prove causation with finest precision and also a foetus, of whatever gestational age is a living entity nonetheless and very much separate from the PW. If it's potential for life is cut short by the defendants' wrongful act, it comes within the paradigm of natural justice that the surviving relatives who were anxiously awaiting its arrival be commensurately compensated.

As Robertson questioned in one of his articles, 'What change occurs at viability that makes it a watershed for such a marked alteration in the obligations owed to the foetus?'[46] Authorities on medicine maintain that, "Transition from non-viability to viability is not marked by some sharp line of demarcation, accompanied by a clearly identified signal to the mother or physician. It is a hazy, perhaps

[44] See Peaslee, '*Multiple Causation and Damage*' (1934) 47 Harvard Law Review 1127.

[45] See '*Unborn Wrongful Death Act Model Legislation & Policy Guide 2012*, Americans United for Life <www.aul.org> accessed 08 April 2013.

[46] Horace B Robertson Jr, '*Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Pre-natal Injuries, Preconception Injuries and Wrongful Life*' (Jan 1979) 1978(6) Duke Law Journal 1428.

variable, zone of time estimated to occur between the middle of the sixth month and the end of the seventh month of pregnancy."[47]

Despite help and clarity being offered by medical science, however, there is no uniformity amongst various jurisdictions on matters of viability and WD claims involving foetuses. Often these new medical capabilities require fundamental changes in legal analysis or raise legal questions that never before have required consideration.

Argument for maintaining WD Action in India

In India, though the Law of Tort is not strong, there have been cases in the recent past that would come under the head of WD. . From what appears through the available case law, the Indian judiciary became active about the issue only since 2004-05.

It may also be relevant to mention that India does not have any WD legislation as such. Whatever jurisprudence is there has been developed on a case to case basis by the judicial authorities in India.

In a first case of its kind, the Karnataka HC was required to fashion a remedy for a still born. In *Divisional Controller, B.T.S. Division, Karnataka State Road Transport Corporation* v. *Vidya Shindhe*[48] (Karnataka High Court), an accident resulted in grievous injuries to a PW. In the accident the child in being also received injuries which compelled the PW to undergo a surgery known as 'foetal distress'. She gave birth to a child who was born alive but died after two days of delivery. It was evidenced that the baby died due to the pre-natal injuries sustained by him in the accident. There was held to be a nexus between the accident and the cause of death of the child and hence when a claim for compensation on account of the death of the child was filed, the Tribunal awarded Rs 150000 towards the death.

It was challenged before the Karnataka High Court on the ground that the claim was not maintainable as the child was not born on the date of the accident. The Karnataka High Court held that since the foetus had completed 37 weeks, for all practical purposes, it was a child, although stillborn. Hence the claim petition filed by the mother on account of death of her two days old child who was born subsequent to the date of the accident was maintainable. The award of Rs 150000 by the learned Tribunal was upheld. This case marked the acknowledgement of WD claims in India.

Just one year later, in *Bhawaribai* v. *New India Assurance Co. Ltd*[49], the Karnataka High Court again decided a case in favour of the unborn despite stillbirth. Here, the claimant suffered an abortion of an almost full term foetus on account of an accident. The Karnataka High Court considered the in-utero death of the foetus at par with death of a minor. The case is important because even stillbirth

[47] See L Hellman & J Pritchard, *Williams Obstetrics* (14th ed, 1971) 493.

[48] MANU/KA/0514/2003: 2005 ACJ 69.

[49] MANU/KA/0646/2005: 2006 ACJ 2085.

was considered eligible for WD claim. This makes India come at par with the USA and other developed countries.

Another case of similar nature is *Shraddha* v. *Badresh*[50] decided by the Madhya Pradesh High Court wherein an accident resulted in injury to a PW carrying a seven months old foetus. The accident resulted in pre-mature labour and still birth. The stillborn baby died in the womb due to the injuries sustained by the appellant in the accident. There was held to be a nexus between the accident and the cause of death of the child. Hence the court held that the appellant was entitled for compensation on account of the stillborn baby.

There are cases which revolve around the law of insurance and deal with whether insurance can be claimed for the *in utero* or ex utero death of an unborn in a motor vehicle accident. One such case is *Kanta Mohanlal Kotecha* v. *Branch Manager, United India Insurance Company Limited.*[51] In this case, one Mr. Mohanlal Kotecha had taken a comprehensive insurance policy from M/s. United India Insurance Co. The insurance cover was taken for four unnamed passengers. On the day of accident, Mr. Mohanlal Kotecha, his son Atul Kotecha and his daughter-in-law Mrs. Switi Kotecha were travelling by Maruti car when an accident occurred on Yavatmal Nagpur road. In the said accident all the three occupants of the vehicle died on the spot. Mrs. Switi Kotecha was pregnant at the time of accident. Smt. Kanta widow of Mohanlal Kotecha, mother of Atul Kotecha and the Mother-in-law of Switi Kotecha submitted the claim to the Insurance Co. Insurance Co., amongst other things, repudiated the claim for unborn child on the ground that unborn child could not be treated as a passenger.

The aggrieved, Smt. Kanta Kotecha filed consumer complaint which resulted in inadequate compensation been granted by the District Consumer Forum, Yavatmal and more so, no compensation being granted to the unborn for lack of any legal personality. The complainant filed an appeal with the Maharashtra Consumer Disputes Redressal Commission.

The MCDRC had to decide whether a child in the mother's womb could be regarded as one of the 'unnamed passenger' of the vehicle. Heavy reliance was paid on the decision of the Supreme Court in *S. Said Ud Din* v. *Court of Welfare Commissioner Bhopal Gas Victims Tribunal.*[52] Mention was also made of the US Unborn Victims of Violence Act, 2004. The Unborn Victims of Violence Act, 2004 defines violent attack on a PW as two distinct crimes, one against woman herself and the other against unborn child.

In the instant case, which is one of the rare Indian cases, touching on the issue of foetal personality, the Commission relied on the concept of 'viability' and the progress made by science. It was stated:

> Use of modern medical extensive care technology has greatly increased proportion of premature babies living and has pushed back boundary of viability to much earlier dates than would be possible without intensive medical assistance because of new technology in medical science. Now it can safely be assumed that period of embryo converting to foetus, 8 weeks time is required and age of viability may be taken from 22 to 25 weeks. Natural science now confirms through genetics that two human beings are present in a pregnancy not just the mother. This gives us good scientific basis for person-hood for unborn child. Unborn child in the womb is capable of possessing or is **actually in possession** of life.[53]

[50] 2006 ACJ 2067.

[51] 2006 Indlaw SCMAH 5 [Maharashtra Consumer Disputes Redressal Commission].

[52] (1997) 11 SCC 460.

Further, it was stated that:

> Having regard to the medical science and the natural growth of embryo into foetus, one can legitimately conclude that an unborn child in the mother's womb is a human **being. Unborn** advanced **foetus** in the mother's womb can be regarded as a human person.[54]

Since the insured, now deceased had taken an insurance policy wherein the insurance cover was taken for 4 unnamed passengers, the Commission held that the 4th entity was the unborn. At the time of accident, 3 grown up persons were in the vehicle and 4th was in mother's womb.

Taking a cautious approach, the Commission ruled out the possibility of an already defective foetus. Since No foetal anomalies were detected in the sonography, it was beyond doubt that Mrs. Switi Kotecha was pregnant and had in her womb well developed human foetus. Had the accident not occured, the unborn child would have survived and could have seen the light of the day after delivery. The Commission, in a path breaking order, allowed the complaint to the extent of unborn child and directed the insurance Co to pay a sum of Rs 100000 together with interest @ 6% per annum to the appellant from the date of repudiation that is, 11/11/2004, till the date of realisation.

It is worth noting that in all the cases above, the judicial authorities allowed recovery only for viable foetuses. The same was repeated in *Oriental Insurance Company Limited, Represente, by its Branch Manager Bangalore* v. *Santhilal Patel, Tirupathi*[55], where the father alleged that his wife and unborn child of 10 months gestation died in an accident that occurred in 1995 due to rash and negligent driving of the driver of a car belonging to a person that was insured with the appellant insurance company.

It may be noted that the concerned legislation –the Motor Vehicles Act, 1988 (MVA) insofar as the liability to pay compensation is concerned, under Section 140, states that where death of a person results from an accident arising out of the

[53] *Kanta Mohanlal Kotecha* v. *Branch Manager, United India Insurance Company Limited* 2006 Indlaw SCMAH 5 [Maharashtra Consumer Disputes Redressal Commission] paras 8-11 (emphasis added).

[54] *Kanta Mohanlal Kotecha* v. *Branch Manager, United India Insurance Company Limited* 2006 Indlaw SCMAH 5 [Maharashtra Consumer Disputes Redressal Commission] para 12.

[55] 2007 INDLAW AP 288.

use of a motor vehicle, the owner as well as the insurer of the vehicle are jointly and severally liable to pay compensation in respect of the death of that person. The father contended that the unborn child was also a person within the meaning of the Act.

Also, under Section 163-A of the Act the legal heirs of the victim are also entitled for compensation. Compensation is to be computed as per the Second Schedule depending upon the age of the victim and by adopting appropriate multiplier to the monthly income. The schedule says that the income of a non-earning person has to be taken at Rs 15000 per annum.

Additionally, under Section 166 of the Act a person who has sustained injury or the legal heirs of the deceased person are entitled for compensation arising out of the accident involving death or bodily injuries.

The accident happened when the deceased wife along with her two minor sons were travelling in a Rickshaw on Tirupati-Renigunta road; the driver of the car drove the vehicle in a rash and negligent manner endangering the human life on the public road and hit the rickshaw from behind as a result of which the wife of the claimant, his two children all received severe grievous and multiple injuries. Upon being treated in a hospital at Tirupati, the doctor declared that deceased wife was carrying a male child in the womb.

In 1997 the Chairman, Accidents Claims Tribunal, Chittoor at Tirupati passed an order awarding compensation of Rs.50,000 for the death of the unborn child in favour of Shantilal Patel, the father of the dead child. This was appealed against by Oriental Insurance Company contending that the tribunal erred in awarding compensation and that the child in the womb could not be treated as a person; that hence the claimant was not entitled to any compensation in respect of the unborn.

After discussing relevant case law and also the different stages of birth of a child in the womb the AP HC held that the unborn of 10 months gestation came within the definition of person and hence as per the scheme of the MVA, 1988 the legal heirs of the child were entitled for compensation.

Non-viable foetus

The issue of a non-viable foetus was taken up in *Manikuttan* v. *M.N. Baby*[56]. The Kerala High Court focused on the medical aspect of 'life' and refused to treat the foetus as just an extension of the mother because it was non-viable when the injury was inflicted. The facts state that an accident resulted in the death of a PW carrying a *four month old foetus*. Compensation for loss of foetus was claimed by the husband. The Kerala High Court held that foetus was another life in the woman and it became a baby in course of time, and hence compensation was to be granted for the death of the PW as well as the foetus. It stated:

> In our view, compensation to be granted for the death of a PW in motor accident is for loss of two lives. Therefore, appellant in this case is

[56] MANU/KE/0318/2008: 2009 ACJ 1497.

> certainly entitled to claim compensation separately for the loss of his child in the womb of his wife who perished in the accident.

On Quantum of Compensation and Calculation

Though the jurisprudence relating to compensability of the WD of a viable foetus that was stillborn had been settled way back in 2005 by the Karnataka HC[57], the matter came to light again in *Prakash and Ors* v. *Arun Kumar Saini*[58].

The court was categorical in stating that, 'A stillborn baby should be considered as a child--like a minor child, for compensation in case of WD.'[59] However, the court made a demarcation between the quantum of compensation that could be awarded to the unborn child and the quantum that could be awarded to a minor child. The court maintained that a seven months old foetus could not be compared with seven years old child and, therefore, compensation already awarded to the appellants could not be enhanced.

In this case, one Indu Devi died in an accident. The deceased was survived by her husband and two children who filed the claim petition before the learned Tribunal. At the time of death, she was pregnant with a foetus of about 24 to 28 weeks. The appellants challenged the award of the Tribunal whereby compensation of Rs 611000 was awarded to the appellants. The appellants sought enhancement of the award amount. However, the court stated that:

> A foetus shall be treated as a child does not mean that the compensation in respect of a foetus shall be equal to a seven year old school going child. The love and affection of the parents for seven year old child cannot be equated with that of a foetus which has yet to take birth. The love and affection develops after the birth of the child and it keeps on growing and goes deep in the memory. The death of a seven year old child would leave deep memories and, therefore, deeper hurt. In case of death of a child, the photographs of the child and other articles belonging to him/her keep on reminding the parents of the child and make them sad. Memories are also refreshed when parents see other children of same age and it takes a very long time for pain and suffering to dissolve, whereas there are no such memories in case of a foetus and, therefore, lesser hurt.

The Supreme Court of India, in ***Common Cause, A Registered Society* v. *Union of India***[60] made a valuable observation about the difficulty of measuring the worth of human life in terms of money but at the same time maintained that such difficulties should not translate into no compensation being awarded to the aggrieved for that would not serve the ends of justice. It observed that:

[57] See *Bhawaribai* v. *New India Assurance Co. Ltd* MANU/KA/0646/2005: 2006 ACJ 2085.

[58] 167 (2010) DLT 311.

[59] *Prakash and Ors* v. *Arun Kumar Saini* 167 (2010) DLT 311 (emphasis added).

[60] MANU/SC/0437/1999: (1999) 6 SCC 667, 738 (emphasis added).

> [I]t is extremely difficult [read in case of foetal deaths] to quantify the non pecuniary compensation as it is to a great extent based upon the sentiments and emotions. But, the same could not be a ground for non-payment of any amount whatsoever by stating that it is difficult to quantify and pinpoint the exact amount payable with mathematical accuracy. Human life cannot be measured only in terms of loss of earning or monetary losses alone. There are emotional attachments involved and loss of a child can have a devastating effect on the family which can be easily visualised and understood. Perhaps, the only mechanism known to law in this kind of situation is to compensate a person who has suffered non-pecuniary loss or damage as a consequence of the wrong done to him by way of damages/monetary compensation. Undoubtedly, when a victim of a wrong suffers injuries he is entitled to compensation including compensation for the prospective life, pain and suffering, happiness etc., which is sometimes described as compensation paid for 'loss of expectation of life'. This head of compensation need not be restricted to a case where the injured person himself initiates action but is equally admissible if his dependant brings about the action.

Perhaps the best case that goes in favour of the unborn in this regard is the Supreme Court case of *S. Said-Ud-Din* v. *Commisioner Bhopal Gas Victims*[61] wherein the apex court awarded compensation to a child, who was adversely affected due to the gas leakage, which was inhaled by her mother when the child was in the womb. The doctor who examined the child on the sixth day of its birth found symptoms including eruption of body and smarting of the eye as well as breathlessness. Therefore, the SC held that as the infant too was the victim of the MIC poison, she was separately entitled to compensation.

All these cases hint that the foetus is regarded as a person in India per the unwritten Law of Torts and can claim compensation as a separate individual if other fundamentals of tort law, for instance causation, can be established (though it has not been enunciated in so many words, at least not by the Legislature). Also, viability of the foetus seems to be an essential requirement for recovery, if cases are to be taken as indicative of any trend. Viability, barring a few cases, it seems, remains a sine-qua-non for both WD and pre-natal injury cases.

Need for WD Legislation

In India, the status of Tort Law as such is dismal and hence it is regarded as a weak law. There is not only dearth of any wrongful death laws but also an absence of any legislative will to fill the vacuum.

It is submitted that in India, the legislature or the judiciary should learn from the experience of the USA and not get influenced by the arbitrary requirement of viability or live birth to entertain claims.

[61] 1996 Indlaw SC 2620.

It is suggested that India should have a specific 'Unborn Wrongful Death Act' to permit wrongful death claims for the death of an unborn child *at any stage of development or gestation and even for in-utero wrongful deaths*. This would place India not only at par with the most advanced countries of the world, but also introduce a change in one of the basic tenets of Tort law-survival of cause of action post the victim's death. The tortfeasor (wrongdoer) would not be able to escape liability merely because he inflicted injuries so severe that they resulted in the death of his victim in *utero*. It would also mark as a watershed development for it would mean acknowledgement of foetus as a legal person.

Apart from this it would necessarily involve a healthy interaction of law with the discipline of medicine and forensic science. Law would be able to take advantage of the advancement in medical science to establish culpability even if the injury is inflicted in the pre-viable stage and also establish if the reason for still-birth was the injury inflicted by the defendant.

However, before one can propose a law of such nature, it would have to be plugged against loopholes or inconsistencies or conflict between laws. For instance, it would have to be assured that the attending doctor/s would have to be immune from any cause of action in respect of the death of an unborn child caused by an abortion where the abortion was permitted by law and the requisite consent was lawfully given. Justice demands that such a death not be treated as WD.

It is impossible to maintain in today's world that the foetus is a mere extension of the mother and hence no separate duty can be owed to it. The medical fact that a foetus is a separate living entity has long been accepted by law.

While it is not required that medical concepts be incorporated into the law, the courts have shown a willingness to adopt them if necessary to remedy what was, at least in pre-natal injury cases, a clear injustice.[62]

Initially when medical science was not so advanced as to pin-point with accuracy the cause of injury suffered by the unborn, there was a fear of fraudulent claims coming to the fore. However, the same was not allowed to stand in the way of a pre-natal injury action. Likewise, the same should hold for recognition of an action for pre-natal wrongful death. The courts should not assume upon themselves the task of vetoing otherwise meritorious causes of action just because of difficulty of proof in cases involving foetal injury and subsequent death. Rather the courts should respond promptly to those medical advances that provide increasingly more reliable proof of causation in such cases.

[62] See *Smith* v. *Brennan*, 31 NJ 353, 362-63, 157 A2d 497, 501 (1960).

ASSESSING THE CORPORATE CRIMINAL LIABILITY: A Travel from Pecuniary to Punitive Approach

*Arti Aneja**

Introduction

Globalization resulting in the growing interdependence in economic, social and environmental activities by corporate entities has changed the economic scenario at national and global levels to the extent that at is being dominated by large multinational corporations.[1]

These multinational organizations have grown to such an astonishing magnitude that they are fully comparable with nations states in their economic dimensions and thus these have contributed to the substantial increase in economic and white-collar-crime. So, most of the industrialized countries are trying to put adequate control over the conduct of multinational corporation.[2]

The problem of how best to control the crimes of corporations and their executives has bedeviled social life since the first such organizations were formed in medieval times. Today, the enormous power of the corporate world makes attempts to rein in their extralegal excesses, a matter of compelling importance.

It has been correctly remarked by the American Supreme Court that, "The law cannot shut its eyed to the fact that a great majority of business transactions in modern times are conducted through these bodies (corporations), and particularly that inter-State commerce is almost entirely in their hands, and giving them immunity from all punishment because of the old doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at."[3]

It is the fitness of things to conceptualize the corporate criminality in the present day world. Simply put, corporate crime has been defined as, 'the conduct of a corporation, or of employees acting on behalf of a corporation, which is proscribed and punishable by law'.[4]

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1 Thomas L. Friedman, *The World is Flat: The Globalized World In The 21st Century*, 45, Penguin Press, USA, 2nd Rev ed., 2007.

2 *Ibid.*

3 *New York Central & Hudson River R.R.* v. *U.S*, 212 U.S. 481 (1909).

4 John Braithwaite, *Corporate Crime in the Pharmaceuticals Industry*, 6 Routledge & *contd...*

The main aim of criminal culpability of corporations are similar those of general criminal law in which are briefly enumerated below:

- The first characteristic of corporate criminal punishment is deterrence-effective prevention of future crimes.
- The second consists in retribution and reflects the society's duty to punish those who inflict harm in order to 'affirm the victim's real value'.
- The third goal is the rehabilitation of corporate criminals.
- Fourth, corporate criminal liability should achieve the goals of clarity, predictability, and consistency with the criminal law principles in general.
- The fifth goal is efficiency, reflected by the first three goals mentioned above, but also by the costs of implementing the concept, following which there is the goal of general fairness.[5]

Indeed, any model adopted by the legal system of a country seeks to achieve the aforementioned goals.

It is, therefore, submitted that, instrumental to the achievement of the aforementioned goals, is the fulfillment of the foremost requirement of criminal law, i.e., the mental element inherent in a crime committed. The central theme, therefore, is to understand how mens-rea is attributable to corporations.[6]

The 'corporate criminal liability' is the liability imposed upon a corporation for any criminal act done by its employee. Liability is imposed on the corporation in order to regulate lie acts and affairs of the corporation.[7] The critical issue of corporate criminal liability is the coherent link between the corpus of criminal law, which is developed for natural persons and the realities of corporate form, which is a complex fabric of human actors. In the legal perspective, the question to be answered is whether and to what extent corporation may be made liable for the acts of its employees.[8]

Initially, the approach to the corporate criminal liability was focused mainly on the relationship between corporation and its employees. By this approach a theory was developed that the state of mind of employees could be deemed to be the state of mind of the corporation. In U.K., the identification theory was developed which made the corporation directly liable for the wrongful conduct of senior employee's state of mind. And, in U.S., the vicarious liability theory was developed which made individual state of mind imputed on the corporation.

The current situation, which is applied by all legal systems, holds a corporation liable for the criminal acts of its employees, which are done "within the scope of

Kegan Paul Books, London, Boston, Melbourne and Henley, 1st ed., 1984.

5 *See* V.S. Khanna *Corporate Criminal Liability: What Purposes Does it Serve?*, 109 *Harv. LRev.* 1477-1509 (1996)

6 *Ibid.*

7 L. Leigh, *The Criminal Liability of Corporations in English Law*, 2, The Cambridge Law Journal 75 (1969). *See* also Leigh, *The Criminal Liability of Corporations and Other Groups 9*, Ottawa L. Rev. 247 (1977).

8 *Ibid.*

employment"[9] and done with the intent to benefit the corporation.[10] The difference is not of the criminal acts of any senior, subordinate or menial employees. Corporation is accountable for the criminal acts of the senior as well as the subordinate or menial employees done within the scope of employment.[11]

So far the punishment for any criminal activity, done by whomsoever the law has bound the courts to impose only fine as a form of punishment for the corporation; Such limitations cannot solve the growing problems hence evolve new forms of punishment which can be imposed upon the corporation and will be effective and result oriented.[12] It is endeavored to look to this situation for following perspectives;

(a) Conceptualize corporate criminality in the present scenario
(b) To discuss various legal approaches to deal with this growing problem of corporate crime
(c) To analyze the extent the situation can be controlled through the instrumentality of law.

Criminal Liability: The Basic Rule

The criminal liability is attached to those wrongs which lead to violation of criminal law. The basic rule of criminal liability revolves round the Latin maxim "***actus non facit reum, nisi mens sit rea***" to make one liable it must be shown mat act or omission has been done which was forbidden by law and has been done with guilty mind. Hence, every crime has two elements: physical act known as actus reus and mental act known as mens-rea.[13]

This is the legalistic of criminal liability which in ordinary sense, the principle upon which responsibility is premised is autonomy of the individual, which states that the imposition of responsibility upon an individual flows naturally from the freedom to make rational choices about actions and behaviour.[14]

In order to apply such rule on corporate body, the court have found difficulty in ascertaining the real "cognitive faculty, with the requisite mens-rea which has been exhibited by the actus reus.

[9] Activities of an employee that are in furtherance of duties that are owed to an employer and where the employer is, or could be. exercising some control, directly or indirectly, over the activities of the employee, *available at:* http://legal-dictionary.thefreedictionary.com/Scope+of+Employment

[10] Celia wells, *Corporations: Culture; Risk and Criminal Liability*, 551,Crim. Law Review, 558 (1993)

[11] *Ibid.*

[12] *Ibid.*

[13] S.K Sarvana (ed.), *R.A. Nelson: Nelson's Indian Penal Code*, pg.590, Butterworth's, New Delhi, 9th ed., vol. 1, 2003.

[14] A. Ashworth, *Principles of Criminal Law*, p.79-81 (Oxford; Clarendon Press, 1991) cited by B Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. Cal LRev 1141.

Corporations Cannot Have the Mens-Rea or The Guilty Mind to Commit Offence

Every corporation has its own legal entity, which is separate from its directors and shareholders and officers. A corporation can sue and be sued, can hold property on its name and enter into contracts.[15] The shareholders enjoy the benefit of limited liability, i.e., they are personally not liable for the debts or obligations of the corporation.[16] And the corporation is perpetual in the sense its existence is not altered by death or retirement of the existing members.[17]

The central issue that arises in attaching criminal liability to a corporation is the theoretical difficulty of attributing a culpable mental state or mens-rea- the required element of most criminal offences to non-human and juristic person.[18]

Mens-Rea under Traditional Criminal Law

Early in the English legal tradition, the idea arose that criminal liability entails some mental activity on the part of the offender relating to the prescribed conduct.[19]

Over time, the maxim, *'actus non facit reum nisi mens sit rea*[20] became well ingrained in common law and still remains a central precept of criminal law in all major legal regimes today.[21] Thereupon, the requirement that there must be a wrongful act— actus reus combined with a wrongful intention, mens-rea, remains the fundamental principle of criminal liability.

Mens-Rea, as mentioned above, is a technical term, generally taken to mean some blameworthy mental condition, the absence of which on any particular occasion negatives the condition of crime.[22]

The fact that mens-rea has been made central to criminal liability points towards the reasoning adopted that every person has the capacity to choose between right and wrong and, once the person who makes that choice has to take responsibility for the same.[23] This is in tune with the objective that any punishment

[15] James Elkins, "Corporations and the Criminal law: An Uneasy Alliance," 65 *Ky. L.J.* 73 at p.86-87 (1976) (tracing the historical development of imputing intent to corporations).

[16] *Ibid.*

[17] Gower & Davies, *Principles of Modem Company law*, p. 51-52, London Sweet & Maxwell South Asian, ed. 8, 2008.

[18] J.C. Coffee, *Corporate Criminal Responsibility*, in S.H. Kadish (Ed.), Encyclopedia of Crime and Justice, pg.1854-1855, Macmillan, NewYork,Vol. IV,1983.

[19] Martin R. Gardner, *The Mens Rea Enigma: Observations on the role, of Motive in the Criminal Law Past and Present*, Utah.L.Rev.*635 (1993)*.

[20] "An act does not make one guilty unless his mind is guilty": *See* Wayne R. LaFave & Austin W. Scott. Jr. *Criminal Law*, 212 (1986).

[21] *See* Richard R. Singer & Martin R. Gardner, *Crimes and Punishment: Cases, Materials and* Readings in Criminal Law, 213 (1989).

[22] *State of Maharashtra* v. *Mayer Hans George*, AIR 1965 SC 722.

[23] Baker Denis J.(ed.),*Glanville Williams, Textbook of Criminal Law*, Sweet & Maxwell, UK, 4th ed., 2015.

to be meted out for a criminal act must punish the person with a guilty mind and no one else.

The element of mens-rea as an essential ingredient of a crime is also approved by the growing modern philosophy of penology. Modern day criminal jurisprudence no longer accepts retribution as the main object of criminal law and rather places emphasis on reforming the criminal and rehabilitating him.[24]

Under the Indian Penal Code,[25] even though the drafters have not used the common law doctrine of mens rea in defining the crimes, it has been imported by using different terms indicating the required evil intent or mens-rea as the essence of a particular offense.

Almost all offences under the Penal Code are qualified by one or the other words such as 'wrongful gain or wrongful loss', 'dishonestly', 'fraudulently', Voluntarily', 'intentionally', etc.[26] It is submitted that all these words indicate the blameworthy mental condition required at the time of commission of the offence.

It is, therefore, submitted that due to the very nature of mens-rea as an ingredient, courts in the past have found it extremely difficult to attribute the same to any juristic person apart from human beings. This is due to the age-old understanding of such artificial institutions, owing to the absence of 'mind' could not form the required 'intention' to commit a crime.[27]

New Dimensions of corporate criminal liability

However, as stated above, realizing the drastically increasing presence and importance of corporations, courts all over the world felt the need to extend criminal liability to these conglomerates as well. But it was until much later that courts finally extended to juristic persons such liability to crimes of intent.[28]

Corporate criminal liability was first established under the American system by way of its 1909 Supreme Court decision in *New York Central & Hudson River Railroad Co.* v *United States.*[29] The court, in this case, while fastening criminal liability to a corporation observed that,

> "We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable because of the knowledge and intent of its agents to whom it has entrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. The law cannot shut its eyes to the fact that the great

[24] See K.I. Vibhute (ed.), *PSA Pillai's Criminal Law*, LexisNexis, India, 12th ed., 2014.
[25] See The Indian Penal Code, 1860 (Act 45 of Year 1860).
[26] See generally the Indian Penal Code, Sec. 23,24,25,39,300.
[27] *See supra* note 25.
[28] Kathleen F. Brickey, *Corporate Criminal Accountability: A brief History and an Observation*, Vol.60 WASH.U.L.Q.393 (1982).
[29] 212 U.S. 481 (1909),

> majority of business transactions in modern times are conducted through these bodies and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at."

It is submitted that, unlike the English Law, it is not a requisite to identify specific individuals who committed the crime in American law. By way of the aggregation theory, American law seeks to overcome the hurdles posed by huge corporations having multiple levels of authority.[30]

This theory provides that corporations can be held criminally liable based on the act of one employee and on the culpability of one or more other employees who, cumulatively, but not individually, met the requirements of actus-reus and mens-rea of the crime.[31]

To bring a corporation within the ambit of this theory, two main requirements have to be met, i.e., the employee must act within the scope of his or her employment[32] and must act with the intent to benefit the corporation.[33] It is submitted that such an act need not necessarily benefit the corporation and the only thing required is the intent to act on behalf of it.[34]

Lack of Appropriate Legislative Provisions

There are certain offences for which punishments imposed are death, life imprisonment, rigorous and simple imprisonment, forfeiture of property, and fine. But there are certain offences for which imprisonment as a punishment is prescribed by the legislature. Therefore, the problem arises as to how to prosecute the companies for the offences which require mandatory imprisonment, as criminal statute needs to be strictly interpreted wherein there is no scope for corporations to be imprisoned.

The Supreme Court in the case of *Assistant Commissioner, Assessment-II, Bangalore and others* v. *Velliappa Textiles Ltd. and others*[35] was of the view that:

[30] *See* Frederic P. Lee, *Corporate Criminal Liability*, Vol. 28 Columbia Law Review, No. 1, pg.1-28 Jan. (1928)
[31] *Ibid.*
[32] "The acts 'directly related to the performance of the type of duties the employee has general authority to perform' fall "within the scope of employment". *See Supra* note 9.
[33] *In re Hellenic*, Inc., 252 F. 3d 391,395 (5th Cir. 2001); *United States* v. *Pacricme*, 949 F. 2d 1183,1200 (2nd Or. 1991).
[34] E.M. Wise, *Criminal Liability of Corporations- USA, La criminalisation du Comportement collectif*, pg.391(2005).
"*If* the employee intended to benefit only himself or a third party, the corporation is not liable except for strict liability offenses. If the employee intended to benefit both himself and the corporation, the corporation is held criminally liable." Guy Stessens, *Corporate Criminal Liability: A Comparative Perspective*, Vol.43, Intl & Comp LQ pg. 493 (1994).
[35] (2004) 1 Comp LJ 21 (SC)

In India, the company could be prosecuted for an offence involving rupees one lakh or less and be punished as the option is given to the court to impose a sentence of imprisonment or fine, whereas, in the case of an offence involving an amount or value exceeding rupees one lakh, the court is not given a discretion to impose imprisonment or fine and, therefore, the company cannot be prosecuted as the custodial sentence cannot be imposed on it.[36]

Evolution of the corporate criminal liability in United Kingdom Despite an earlier reluctance to punish the corporation the first attempts to impose corporate criminal liability were taken by common law countries, due to the advent of industrial revolution during the 19th century.

The recognition of corporate criminal liability by the English courts started in 1842 in the case of *Birmingham and Gloucester Railway Co.*[37] where in the corporation was fined for failing to fulfill a statutory duty. The reasons for this disinclination were the corporation was deemed to be a legal fiction, and under the rule of ultra-vires those act were to be carried out which were specifically mentioned in the object clause of company's constitution. The other objections raised to this were the lack of the necessary mens-rea, and the ability to appear in court personally. And also it was proving difficult to punish the corporation for lack of adequate sanctions. Earlier the English courts followed the doctrine of vicarious liability, in which the acts of a subordinate are attributed to the corporation.[38]

But during 1940s series of cases under statutory offence provisions moved away from vicarious liability to find that corporations were directly liable for offences committed by employees. The first case in U.K. which dealt with corporate criminal liability was *Lennard's Carrying Co Ltd* v. *Asiatic Petroleum Co Ltd*[39]; this case was dealt on the basis of the 'doctrine of identification' further In 1971, the decision of the House of Lords in *Tesco Supermarkets Ltd* v. *Nattrass* [40] held that corporations would be directly liable for wrong committed by persons sufficiently senior to constitute the corporation's directing mind and will, on the basis that the actions and culpable mindset of such individuals were the actions and mindset of the company.

During the last decade the concept of corporate criminal liability made a sea change in UK after the decision in the case of Attorney-General's Reference[41] in which the company whose negligence had led to the Southall train disaster and seven people had died, could not be convicted of manslaughter by gross negligence unless an individual who constituted a 'directing mind and will' of the company had the requisite mens rea, this case was referred by the Attorney-General to the Court

[36] *Ibid.*
[37] (1842) 3 QB 223,1
[38] Ferguson, Gerry, *Corruption and Corporate Criminal Liability" Paper presented at Corruption and Bribery in foreign Business Transactions: A Seminar on New Global and Canadian Standards*, 4-5 February, 1999. Vancouver, Canada.
[39] (1915) AC 705.
[40] (1972) AC 153.
[41] (No.2 of 1999) (2000) 3 All ER 182.

of Appeal a question as to whether a non-human defendant could be convicted of manslaughter by gross negligence in the absence of evidence establishing the guilt of a known individual. The Court of Appeal held that the 'identification' model in *Tesco Supermarkets Ltd v Nattrass* [42] still served as the basis for corporate criminal liability.

As late as May, 2000, the government issued a consultation paper based on the Law Commission's recommendations known as 2000 Consultation Paper. In this paper, it was accepted that the liability should be based on failures in the management or organization of a corporation's activities.

A draft Corporate Manslaughter Bill[43] was published by the Government on 23 March, 2000, in which it accepted the notion of failure in the management or organization of activities as a basis for liability, but inserted a requirement that these failures be preferable to senior management.[44]

In the United Kingdom, mass disasters such as the train crash at Paddington and the capsizing of the ferry Herald of Free Enterprise in the English Channel have acted as catalysts for reforms making it easier to impose criminal liability on corporations for physical injuries and/or deaths.[45]

In U.K. legislative changes were adopted after prosecutors were unable to secure corporate convictions in these cases, despite the fact that official inquiries found that corporate fault caused the loss of many lives[46] as well as the fact that the regulatory oversight had also failed in those cases that led to the inclusion of provisions allowing governmental entities, such as police departments, to be convicted of manslaughter in the United Kingdom.

USA

Evolution of corporate criminal liability in United States of America through courts was parallel to that of the English courts, but they soon departed from the English position. And a different approach was introduced instead of holding the corporation indirectly liable; the Federal courts applied the concept of vicarious liability. The courts initially had made use of this doctrine solely in cases where mens-rea was not required but later decisions included this category of offenses. Thus, this was the radical departure from the stance English courts had taken.[47]

[42] *See supra* note 40.
[43] Known as Draft Bill.
[44] J. Gobert, *Corporate Criminality: New Crimes for the Times*, Crim LR 722 (1994). Such legislative steps have been successful in Australia. Further, even the US has enacted a Model Penal Code as a guide, while imposing of criminal liability of corporations, in spite of following the aggregation mode.
[45] B Fisse and J Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 23 Sydney, L.Rev 476 (1988).
[46] *Ibid.*
[47] The approach, which is promulgated by legal theorists, is to locate fault in the corporation's organizational structure, policies, culture and ethos.

At the beginning of the Century, American courts started to expand the concept of corporate criminal liability to include mens-rea offenses. In the case of *New York Central and Hudson River Railroad Company v U.S*[48] confirmed this position after Congress had passed the Elkins Act, which stated that the acts and omissions of an officer acting within, the scope of his employment were considered to be those of the corporation, thus introducing the concept of vicarious liability.

In 1983, the 4th Circuit Court in *U.S.* v. *Basic Construction Co.*[49] Stated that 'a corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or-apparent authority, and for the benefit of the corporation, even if such acts were against corporate policy.'

Presently, in USA, criminal law is divided at the State and Federal levels. The majority of prosecutions are brought under State criminal laws. The liability of corporations under Federal criminal law is based on the doctrine of respondent superior or vicarious liability. The position in relation to State criminal laws is more complex. Some States have adopted more sophisticated statutory provisions concerning corporate liability which is based on the Model Penal Code.[50]

Under the Federal system of law, US have a simple approach to corporate criminal liability but have advanced sentencing regimes for the corporate defendants. Under the Federal Sentencing Guidelines Manual, corporate culture considerations are taken into account in the assessment of the appropriate fine and other orders to be imposed on corporate defendants. But the Department of Justice is increasingly relying on 'deferred and non-prosecution agreements', which allow corporate defendants to avoid condemnation by taking a range of steps, which usually include payment of a monetary penalty, and, more importantly, for present purposes, making changes to their corporate governance. But, However, for more than 50 years, most criminal law and corporate scholars in the United States have been opposed to corporate criminal liability, arguing that it should be eliminated or it should be strictly limited[51]. Many law and economics scholars have argued that corporate liability is inefficient and should be scrapped in favour of civil liability for the entity or criminal liability for individual corporate officers and agents.[52]

India

Following the imposition of criminal liability on corporations in England and USA, In the past, Indian courts were of the opinion that if mens-rea is an element of an offense, a corporation cannot be prosecuted for such an offense as it cannot

48 212 US. 481 (1909)

49 711F. 2d 570 at 573 (4th Cir. C.A. 1983)

50 J. Gobert and Maurice Punch, *Rethinking Corporate Crime*, Cambridge University Press, 2003.

51 Sara Sun Beale, *Is Corporate Criminal Liability Unique*? Vol.44 AM.Crim. L.R. pg.1503 (2007).

52 Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, Vol. 72 N.Y.U. L. Rev ,pg. 687-692 (1997).

possess mens-rea. But what if a corporation is accused of violating a statute that mandates imprisonment for its violation? The Indian Supreme Court has settled the disputed question of criminal liability of a corporation and the doctrine of corporal legal liability was finally recognized in India by in the landmark judgment of *Standard Chartered Bank and others etc.* v. *Directorate of Enforcement and others etc.*[53] It overruled the previous views regarding the corporate criminal liability in India and made it clear that the corporations could be held liable for the criminal offence. Corporate criminal liability based on mens-rea and holding individuals guilty is established now.

The court in the same case further held that as in case of torts the general rule prevails that a corporation may be criminally liable for the acts of an officer or agent, assumed to be done by him when exercising authorized powers, and without proof that his act was expressly authorized or approved by the corporation.

The rule has been laid down, however, that corporations are liable, civilly or criminally, only for the acts of their agents who are authorized to act for them in the particular matter out of which the unlawful conduct with which they are charged grows or in the business to which it relates.

The above approach by the courts was adopted by following the doctrine of attribution and imputation. In other words, the criminal intent of the 'alter ego' of the company, i.e., the person or group of persons that guide the business of the company would be imputed to the corporation.

The doctrine of attribution and imputation was explained by the Supreme Court in the case of *Iridium India Telecom Ltd* v. *Motorola Incorporated and others,*[54] where it held that a body corporate is a 'person' to whom 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 circumstances may be such that the knowledge of the agent must be imputed to the body corporate.

Principles of attribution and vicarious liability clarified by the Supreme court recently in *Sunil Bharti Mittal* v. *Central Bureau of Investigation ("CBI") and Others*[55] has 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; however it cannot be applied in reverse direction to make the directors of the company liable for an offence committed by the company. The Supreme Court has clarified that the application of the principle of vicarious liability to make the directors of the company liable for an offence committed by the company can only be done if the statute provides for it. While doing so, the court has set aside the order of the Special Court wherein the Special Court had issued summons to the directors of the companies by stating that they represent the alter ego of the companies.

53 (2005) 4 Comp LJ 464 (SC).

54 (2011) 8 Comp LJ (SC): (2011) 1SCC 74.

55 Criminal Appeal No. 35 of 2015 (arising out of Special Leave Petition (Crl.) No. 3161 of 2013)

A corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons.

Prosecution of Companies for Punishment Which Require Sentence of Mandatory Imprisonment

An important question of concern arises in the case when the punishment for the offence committed requires the mandatory imprisonment.

The Supreme Court in the case of *Velliappa Textiles*[56] 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.[57]

A company registered under the Companies Act, 1956, is a juristic person and 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 for the offence which require mandatory imprisonment, and if the court does it, it would be altering the very scheme of the Act and usurping the legislative function.[58]

But the above view of the court that a company cannot be prosecuted for a punishment which requires mandatory punishment was changed in the case of *Standard Chartered Bank and others etc.* v. *Directorate of Enforcement and others*:[59] The court held that 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. Such discretion is to be read so far as the juristic person is concerned. The court can always impose a sentence of fine and the sentence of imprisonment can be ignored, as it is impossible to be carried out in respect of a company.

The court further held that prosecuting the companies for punishment of mandatory imprisonment appears to be the intention of the legislature. There is not 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 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 with stable economy.

[56] (2004) 1 Comp LJ 21 (SC).
[57] *Ibid.*
[58] *Usual Vanaspati and Allied Industries* v. *State Of Uttar Pradesh* (1993) 1 comp 172 (all).
[59] (2005) 4 Comp LJ 464 (SC).

The above view was followed by the Supreme Court in the case of *Iridium India Telecom Ltd* v. *Motorola Incorporated and others*[60], wherein the court held that as the company cannot be sentenced to imprisonment, the court has the discretion to resort to punishment of imposition of fine which is also a prescribed punishment. As per the scheme of various enactments and also the Indian Penal Code, mandatory custodial sentence is prescribed for graver offences. A company cannot escape liability for a criminal offence, merely because the punishment prescribed is that of imprisonment and fine.

The Indian legal position as to the recognition of mens rea can be traced from the seminal Supreme Court judgment in *Iridium India Telecom v Motorola Inc.*[61] The court in this case looked towards common law to fill the void that was present in Indian law. It traced the origins of corporate criminal liability under the English legal regime which have been elaborately stated in the preceding sections. After giving due recognition to the identification theory prevalent under English law, the court noted that the universally accepted position was that corporations could be liable for offences requiring mens rea. It further went on to observe that,

> "Acorporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons."[62]

It is submitted, therefore, that in doing so, the court has effectively imported the 'identification principle', a product of the common law, into the Indian law on corporate criminal liability. This can be an effective starting point for such prosecutions in India, paving the way for future developments in this field.

The Way Forward for India

Attempt made here is to portray that the only way to efficaciously punish and battle corporate crime is to criminally punish corporations. Prosecution of individuals only is unjust not only to them, but to society at large because convictions of individuals will rarely affect the way corporations will conduct their business in the future.

Moreover, civil and administrative liability of corporations has proved to be insufficient as a deterrent factor for such crimes. It is in this context that such doctrines imposing mens-rea on corporations as per criminal law gains relevance.

[60] (2011) 8 Comp LJ (SC): (2011) 1 SCC 74
[61] (2011) 8 Comp LJ97 (SC).
[62] *Ibid.*

It is submitted that the Indian legal system should not only look towards England for guidance but must also consider the different theories being adopted in other parts of the world. Specifically stating, it must propound a legal standard for attributing liability, striking a balance between the doctrine of identification and the aggregation theory in light of the criticism and drawbacks that these theories face.

In the words of Sir William Russell[63]

> "The modern tendency of the courts has been inclined towards widening the scope within which criminal proceedings can be brought against institutions which have become so prominent a feature, of everyday affairs, and the point is being reached where what is called for is a comprehensive statement of principles formulated to meet the needs of modern life in granting the fullest possible protection of criminal law to persons exposed to the action of the many powerful associations which surround them."

Imposing the Sentence of Fine—Legislative Intention

The problem faced by the courts in the cases involving the mandatory punishment of sentence and fine was noticed by the Law commission of India. The law commission in its 41st report recommended that every case involving the offence only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an association of individuals the court will be competent enough to impose a sentence of fine on such body corporate

Parliament of India did not give any heed to the recommendations made by the Law Commission, so again in its 47th report, the Law Commission recommended that the economic offences in which imprisonment is mandatory and the committed person is a corporation die court will be competent enough to impose a sentence of fine on the offender.

Again, the recommendations of the Law Commission did not obtain any response from the Parliament. This shows that the Parliament does not have any intention to give the courts discretion of imposing sentence of fine in the cases involving the mandatory imprisonment.

However, the Supreme Court in the cases of *Standard Chartered Bank and others etc.* v. *Directorate of Enforcement and others*[64] and *Iridium India Telecom ltd* v. *Motorola Incorporated and others*[65], has ruled that in the cases involving mandatory imprisonment the court will be having discretion to impose sentence of fine on the company which is the offender. This conclusion of exercise of discretion by the court is without any legislative approval.[66]

In both the above cases, the court has observed that there is legislative intent to prosecute the corporate bodies for the offence requiring mandatory imprisonment.

[63] Russell on Crime, (ed.) F.W. Cecil Turner, Vol. 1. Stevens Publishing. London, 1964.
[64] (2005) 4 Comp LJ 464 (SC).
[65] (2011) 8 Comp L] (SC): (2011) 1 SCC 74.
[66] *Ibid.*

The court also observed that the legislature does not have intention only to prosecute the corporate bodies for minor offences and extend immunity of prosecution in grave economic offences. This conclusion of the court can be held inappropriate from the fact that the Parliament has not yet adopted the recommendation of the Law Commission.

The role of court could be derived from the famous maxim 'judicis est jus dicere, non dare' read with doctrine of separation of power is to interpret the law and not make die law. The court's hands are bound to impose the various kinds of punishments as given by die legislature. So in order to avoid the court to go into die statute and define the law, which is the role of legislature, it is proper that the legislature should amend die various penal statutes to bring in various forms of punishments for the corporations, thus maintaining the doctrine of separation of power and hence enforcing the rule of law which is part of the 'basic structure' of the Indian Constitution.

Recommendations for Inclusion of New Type of Punishments

Fines as a punishment imposed on the company could be appropriate in die cases of minor offences like offences against property, etc. But where the offences of higher degree like die offence of criminal negligence committed by Union Carbide Corporations, it is questionable whether the fine could achieve the object of punishment. The punishment of fine pins the poor and eases the rich. The rich could, easily pay the fine in lieu of the imprisonment and thus waive off their offence.

The corporations with their massive bank accounts could easily escape from criminal liability by giving the huge fine imposed on them, thus defeating the purpose of punishment.

The courts have evolved the concept of corporate criminal liability but have imposed fines as the only punishment. It is the duty the legislature to evolve new forms of punishments and incorporate them in the corporate criminal justice system. We are trying to suggest some new forms of punishments which can be classified into economic sanctions and social sanctions.

Economic Sanctions

Under the economic sanctions, the property of company could be confiscated and forfeited. Under it following types of punishments could be imposed:

1. Cases involving continuous criminal behavior, the punishment imposed could be the winding up of the company. This form of punishment could be imposed on the offences in which due to intentional activity of corporate, people might lose their lives like in the *Bhopal Gas Tragedy* and *Uphaar Cinema* v. *Union of India*[67] in which many innocent people lost their lives.
2. The punishment of 'corporate imprisonment', which means restraining the company's ability to take action by either seizing its physical or monetary

[67] (2003) 104 DLT 334.

assets, or restricting its liberty to act in a specific manner, could also be imposed.

3. The corporate could be ordered for 'corporate probation' which means providing community services like rehabilitate the people which have suffered due to criminal act of corporate. The corporate which are involved in the crime of polluting the rivers could be ordered to clean the riverbanks which have been polluted by their toxic disposal.

Social Sanctions

Under social sanctions the punishment of publication of judgment could be imposed as punishment as a result of this punishment the goodwill or reputation, which is the heart and the soul of any corporate body will be destroyed. This type of punishment could force the company for fear of adverse media attention whose consequences is difficult to determine. It will create a deep stigmatizing effect on the corporation since its business would come to a standstill with no customers.

Conclusion

From the above analysis it could be concluded that it is the settled point of law that the corporation could commit crimes and corporate criminal liability could be imposed upon them. Though the concept of corporate criminal liability was evolved during the time of industrial revolution the debate on this concept is now on its high. During these years the concept of corporate criminal liability have been changed from no liability of crimes of corporate to the 'alter ego' of the company which is based on the identification of liabilities of some person.

Today, there is need of introducing well-defined roles and modes of collaboration within the investigative agencies and these agencies should have all the necessary skills and authority to prevent white-collar crimes. Particularly in India, where the combination of prolonged and expensive judicial trial in addition to Indian courts rarely awarding damages to delinquent corporate houses need to be changed.

However, now a days the punishment given to the corporations are legally recoverable and while deciding the punishment to be awarded to the corporate the general public should be allowed to participate.

A corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens-rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree and control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons. Mens-rea is attributed to corporations on the principle of 'alter ego' of the company a company/corporation cannot escape liability for a criminal offence, merely because tile punishment prescribed is that of imprisonment and fine.

Indeed, there is considerable debate for charging corporate houses for criminal liability. In several jurisdictions, the concept of the liability of the companies is recognized, as the company could be held liable for the criminal act of its employee if the act was done by the employee with the intention of benefitting the company and done within the course of employment.

An attempt here is to explore the rationale behind the doctrine of corporate criminal liability after summarizing the historical evolution of this doctrine and surveying the current legal landscape in the countries like United States, United Kingdom and India. It is sought to be argued that, in India, the assumption of the Supreme Court regarding intention, of legislature of charging the corporate houses criminally liable for the offence requiring mandatory imprisonment, mismatches with the Parliament not adopting the Law Commission reports.

The law requires the courts to impose only fine on the corporate houses for the alleged criminal act. It is also argued that there is a need of evolving new types of punishments upon the companies so that the purpose of criminal law regarding punishments is fulfilled. Suggestion is also made for new types of punishments which may be imposed on the company.

Justice through Tribunalization in India with special reference to Armed Forces Tribunal

Alok Kumar[*]

Introduction

In today's world over and above ministerial functions, the executive is performing many quasi-legislative and quasi-judicial functions.[1] The paradigm shift from the model traditional theory of 'laissez faire and the old idea of 'police state' have now been replaced with the modern brainwave of 'welfare state' and due to this radical change in the philosophy of the role to be played by the state, its functions have increased many folds. Today it exercises not only sovereign functions, but, as a progressive democratic state, it seeks to ensure social security and public welfare for common masses. The issues arising there from are not purely legal issues. It is also not possible for the ordinary courts of law to deal with specialized issues entangled with the socio- economic problems, this lead to gradual use of administrative process.

The growth of administrative process has been a universal phenomenon of contemporary society, although both speed and the manner of its development have varied greatly from country to country.[2] The complexities of modern concept of governance lead to the delegation of quasi-legislative and quasi-judicial functions to administrative authorities. In most of the countries, redress against administrative wrong is normally obtained largely within the administrative machinery itself. However, the most commonly employed technique of administrative adjudication which has achieved almost universality, is adjudication by Tribunals.[3]

Concept of Tribunal

The word "tribunal" lacks precision, its meaning not being very articulate, it is difficult to define it scientifically. The word tribunal is a name given to various types of administrative bodies, the only common element running through these

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1 According to the traditional theory, the function of adjudication of disputes is the executive jurisdiction of ordinary courts of law, however in practice many judicial functions are being performed by the executive e.g search, seizure, confiscation of goods, imposing fines and penalty etc.

2 W. G. Friedmann, *Law in a Changing Society* 273 Penguin Books Ltd. 1964, p. 273

3 Hari Saran Saxena, *Central Administrative Tribunal Redress Against Administrative Wrongs* 1996, Deep & Deep Publications, 1996, p.1

bodies is that they are quasi-judicial and are required to observe principles of natural justice while determining issues before them. Tribunal as per dictionary meaning is a seat or a bench upon which a judge sits in a court.[4] This meaning is very wide as it includes even the ordinary courts of law, whereas, in administrative law, the expression is generally limited to adjudication authorities other than ordinary courts of law.[5]

It may be said that tribunal is a specialized group of judicial body which akin to our courts of law. They are normally setup under statutory power which also governs their constitution, functions and procedures.

The Categorization in absence of an articulate definition and the resemblance with the courts has become notoriously difficult one. The Committee on Minister's power[6] in England attempted to provide dividing lines, but its views are scarcely regarded as even respectable today.[7] Frank's Committee Report which dominated the thinking about tribunals did not define it but observed that:

> "Tribunals are not ordinary courts, but neither are they appendage to the Government Departments ... We consider that tribunals should properly be regarded as machinery provided by the parliament for the adjudication rather than as part of the machinery of administration. The essential points is that in all these cases parliament has deliberately provided for a decision outside and independent of the Department concerned either at first instance ... or on appeal from a decision of a minister or of a official in a special statutory position ... Although the relevant statutes do not in all cases expressly enact that tribunals are to consist entirely of persons outside the government service, the use of the tribunal in legislation undoubtedly bears this connotation, and the intention of parliament to provide for the independence of tribunal is clear and unmistakable".[8]

Referring to the position of administrative adjudication in the United States, Pillsbury observes that, the administrative tribunals both exercise the power to hear and determine' and also construe and apply the laws' in proper cases. A simpler statement is that where the function of the body is primarily regulatory, and the power to hear and determine is merely incidental to regulatory duty, the function is administrative. But where the duty is primarily to decide questions of legal rights between private parties, such decisions being the primary object and not merely incidental to regulation, the function is 'judicial'.[9]

4 Webester's New World Dictionary, 1972, p. 1517

5 C. K. Thakkar, *Administrative Law* Eastern Book Company,1992, p. 224

6 Cmd. (40 60) 1932, pp. 73-74

7 William A. Robson, *Justice and Administrative Law: A Study of the British Constitution* 33 1957, London, Stevens & Sons, 1957, p. 33

8 *Report of the Committee on Administrative Tribunals and Enquiries* 9 (Cmd. 218-1957), p. 9 (para 40)

9 Worren H. Pilsbury, "*Administrative Tribunals*" 36 Harvard Law Review 419-22 (1922-23)

In India also, although the words 'court' and 'tribunal' have been used in some Articles of the Constitution,[10] the term has not been defined. The General clauses Act year also does not define these terms. So far as the word court is concerned, though it has been defended in certain statutes, the definition in those enactments seems to have been made for specific purpose of the concerned statues. For example, Sec. 20 IPC defines *'a court of justice 'to mean a 'judge who is empowered by law to act judicially alone...*

In the Indian context the word "Tribunal" has at least three meanings.[11] all quasi-judicial bodies, whether part and parcel of a department or otherwise, are regarded as tribunals. The only distinguished feature of these departmental bodies, as against purely "administrative" bodies, in most cases would be that in process of arriving at their decisions they may have to observe some or all the norms of fair hearing or Principles of Natural Justice.[12]

Secondly, a narrow approach has been taken to view that only such bodies are tribunals as are outside the control of the department involved in the dispute, either because they are under the control of some other department or because of the nature of their composition or because they adjudicate on disputes between private parties. The most important aspects of the judicial mind are 'the independent mental process of the judge – the psychological process which arises out of his non-identification in the matters in issue before him. The type of bodies as these are endowed to a great extent with the kind of impartiality which the judge has because they are not part and parcel of the government departments which prevents them from being biased towards departmental policies. Perhaps even within this narrow approach, those quasi-judicial bodies which are departmental but which decide disputes between private parties may be regarded as tribunals because of their impartiality in relation to the contesting parties before them.[13]

Thirdly, the word "tribunal" has also been used in article 136 of the Constitution of India. In the absence of a definition of a general application, the characteristics of tribunals vis-à-vis courts have been subject of debate before the courts. In the first case[14] which came up for consideration before the Supreme Court, the primary question was to ascertain the exact connotations of the words court and tribunal. J. Mahajan who delivered the principal judgment in the case observed:

> "It must be presumed that the draftsmen of the institution knew well the fact that there were number of tribunals constituted in this country previous to coming into force of this constitution which were performing certain administrative, quasi-judicial or domestic functions, that some of them have even the trapping of the court, but inspire of those could not be given that description. It must be presumed that that the constitution makers were aware of the fact that the higher court in this country had local that all tribunals that discharged judicial functions fell within the definition of the expression 'court'..."[15]

He then observed that:

> "Before a person or persons can be said to constitute a court it is held that they derive their powers from the state and are exercising the judicial powers of the state."[16]

Thereafter, he proceeded to hold that the expression tribunal as used in Article 136 of the Constitution of India does not mean the same thing as Court but included within its ambit. All adjudicatory bodies provided that they are constituted by the state and invested with the judicial powers of State. A body or authority for being characterized as a tribunal for the purposes of article 136 of the Constitution must possess the following features[17]:

(a) It must be a body or authority invested by law with power to determine questions of disputes affecting the rights of citizen.
(b) Such body or authority in arriving at the decision must be under a duty to act judicially. Whether an authority has a duty to act judicially is to be gathered from the provisions of the Act under which it is constituted. Generally speaking, if the investigation is subject to certain procedural attributes contemplating an opportunity of presenting its case to a party, ascertainment of the facts by means of evidence if the dispute be on a question of fact, and if the dispute be on a question of law on the presentation of legal arguments, and the decision result in the disposal of the matter on findings based upon those questions of law and fact, then such a body or authority acts judicially.
(c) Such a body must be invested with the judicial power of the state. This means that the authority required to act judicially, though not a court in strict sense, should be invested with the "trappings of the court", such as authority to determine matters in case initiated by parties, sitting in public, power to compel attendance of witnesses and to examine them on oath, duty to follow fundamental rules of evidence, provisions for imposing sanctions to enforce obedience to its command. Such trapping will ordinarily make the authority which is under duty to act judicially, a tribunal.

The apex court in *Meenakshi Mills's case*[18] reiterated the position held in *Jaswant Sugar Mills Case*[19] regarding the tests to decide whether the body or authority is Tribunal or not in following words:

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[10] Constitution of India, Arts 136, 227, VII Schedule Entry 3 List I
[11] S. N. Jain, *Administrative Tribunals in India: Existing and Proposed* 6 (1977, N. M. Tripathi Pvt. Ltd.)
[12] *Ibid*
[13] *Ibid*
[14] *Bharat Bank* v. *Employees of Bharat Bank* AIR 1950 SC 188

[15] *Id.* at p. 194
[16] *Id.* at p. 195
[17] M. P. Singh, (ed.), *V. N. Shukla's Constitution of India* , Eastern Book Company, 2011, p. 511
[18] *Workmen of Meenakshi Mills Ltd.* v. *Meenakshi Mills Ltd.*, AIR 1994 SC 2696
[19] *Jaswant Sugar Mills Ltd.* v. *Lashmi Chand*, AIR 1963 SC 677

(a) It should not be an administrative body pure and simple, but a quasi-judicial body as well;
(b) It should be under an obligation to act judicially;
(c) It should have some trappings of a court;
(d) It should be constituted by the State;
(e) The State should confer on it its inherent judicial power, i.e., power to adjudicate upon disputes.

Owing to the absence of any clear cut definition of the very word tribunal it appears to be identical to ordinary court but they are separate from the regular court and constituting in it special court constituted with inherent power of the state. There is no fundamental difference between these two, although tribunals represent to some extent the judicial system rather than a radical departure from it. There are, however, some procedural differences between the two.

Growth of Tribunals in India

A brief survey of various statues clearly demonstrates the fact that tribunals have functioned in India from the middle of nineteenth century. The Public Servants Inquiries Act, 1850 provided for a tribunal to be constituted for inquiring into cases of misbehaviour of public servants. The Opium Act of 1857 authorised the formation of a tribunal for licensing and imposing penalty with regard to cultivation of poppy. The Wastelands Claims Act of 1863, provided for a tribunal to adjudicatory bodies created under different legislations to discharge a number of functions.[20] The prominent amongst them, being the Railway Rates Tribunal under the Indian Railways Act, 1890, to dispose of complaints relating to the railway rates.

With the enormous growth of administrative law in India law in India in the post-Independence period, the government and its various instrumentalities came to exercise a wide variety of administrative powers. The changing role of government in welfare state led to variety of disputes.

The existing system of courts proved to be inadequate to meet the needs of adjudicating various kinds of disputes that arose in these fields. There are a number of reasons which paved the way for the establishment of specialized administrative tribunals which include want of technical expertise, required to adjudicate a dispute, consumption of more time by the courts, rigid procedural formalities involved and court fees required to be paid by the litigants, etc. However, it would be far from the truth to say that the tribunals in India came to be established only after the Independence. There existed many industrial tribunals, labour courts, income tax tribunals and juvenile courts not only in pre-Independence India, but also in USA and UK. In the post-Independence era there had been a substantial growth of tribunals not only numerically but also from the

[20] Ganges Tolls Act, 1867; The Sea Customs Act, 1978; The Explosive Act, 1884; The Land Acquisition Act, 1894; The Indian Railways Act, 1890; The Pension's Collector Act, 1871; The Indian Registration Act, 1908; The Patents and Designs Act, 1911, etc.

point of various specialized areas like industrial law, taxation, motor vehicle accidents, customs and excise, consumer protection, environmental matters and service matters.

From the theoretical point of view, the tribunals in India are not different in any substantial manner from the tribunals in England or the agencies in the United States. Tribunals in India are presumed to be free from the Executive influence. Judicial trappings are a familiar feature of the tribunals in India. True to its origin, the tribunals in India still follow the British lead.

The Law Commission of India in 1958 made a rapid survey of the developments in the United Kingdom, United States and France. It did not, however, say a single word about the composition, structure and the detailed procedure etc., of adjudicatory bodies in India.[21] The Law Commission acknowledged the value of the work of the tribunals and the need for permitting them to exist as a supplement to the courts in view of certain inherent advantages like speed, cheapness, procedural simplicity and availability of special knowledge.[22] Like the Donoughmore Committee and the Frank's Committee, the Law Commission of India, did not support supplanting the law courts and substituting them by administrative courts on the French model. The commission only emphasized that the administrative tribunals may be imbued with greater judicial spirit and insisted on the observance of the principles of natural justice.[23] The recommendations of the study team on tribunal's set-up by the Administrative Reform Commission departed substantially from those of the Law Commission of India. The study team after acknowledging the restricted nature of the constitutional protection favoured the installation of tribunals of wide powers which could decide a case on facts as well as Law.[24]

Ultimately the Constitution (Forty-second Amendment) Act, 1976 had made major changes in the settlement of disputes, by introduction of Article 323A and 323B in the Constitution. This constitutional mandate leads to establishment of vast number of Tribunals in India and Armed Forces Tribunal is among them.

Armed Forces Tribunal

The existing system of administration of justice in the Army and Air Force provides for submission of statutory complaints against grievances relating to service matters and pre and post confirmation petitions to various authorities against the findings and sentences of courts-martial. In Navy, an aggrieved person has a right to submit a complaint relating to service matters and has a right of audience before the Judge Advocate General in the Navy in regard to the finding

[21] See, Report of the Law Commission of India (14th Report, 1958)
[22] *Ibid*
[23] *Ibid*
[24] See, Report of the Study Team on Tribunals (March, 1967), p. 4

and sentence of a court-martial before the same are finally put up to the Chief of the Naval Staff.[25]

Having regard to the fact that a large number of cases relating to service matters of the members of the above-mentioned three armed forces of Union have been pending in the courts for a long time, the question of constituting an independent adjudicatory forum for the Defence personnel has been engaging the attention of the Central Government for quite some time. In 1982, the Supreme Court in *Prithi Pal Singh Bedi* v. *Union of India and others*[26] held that the absence of even one appeal with power to review evidence, legal formulation, conclusion and adequacy or otherwise of punishment in the laws relating to the armed forces was a distressing and glaring lacuna and urged the Government to take steps to provide for at least one judicial review in service matters. The Estimates Committee of the Parliament in their 19th Report presented to the Lok Sabha on 20th August, 1992 had desired that the Government should constitute an independent statutory Board or Tribunal for service personnel.[27]

In view of the above, it is proposed to enact a new legislation by constituting an Armed Forces Tribunal for the adjudication of complaints and disputes regarding service matters and appeals arising out of the verdicts of the courts-martial of the members of the three services (Army, Navy and Air Force) to provide for quicker and less expensive justice to the members of the said Armed Forces of the Union.[28]

Establishment of an independent Armed Forces Tribunal will fortify the trust and confidence amongst members of the three services in the system of dispensation of justice in relation to their service matters.[29]

The Act seeks to provide a judicial appeal on points of law and facts against the verdicts of courts-martial which is a crying need of the day and lack of it has often been adversely commented upon by the Supreme Court. The Tribunal will oust the jurisdiction of all courts except the Supreme Court whereby resources of the Armed Forces in terms of manpower, material and time will be conserved besides resulting in expeditious disposal of the cases and reduction in the number of cases pending before various courts. Ultimately, it will result in speedy and less expensive dispensation of justice to the Members of the above- mentioned three Armed Forces of the Union.

The Armed Forces Tribunal Act 2007, was passed by Parliament and led to the formation of AFT with the power provided for the adjudication or trial by Armed Forces Tribunal of disputes and complaints with respect to commission, appointments, enrolments and conditions of service in respect of persons subject to the Army Act, 1950, The Navy Act, 1957 and the Air Force Act, 1950.It can

[25] 215th Report of Law Commission of India
[26] AIR 1982 SC 1413
[27] *Ibid*
[28] *Ibid*
[29] *Ibid*

further provide for appeals arising out of orders, findings or sentences of courts-martial held under the said Acts and for matters connected therewith or incidental thereto. Besides the Principal Bench in New Delhi, AFT has Regional Benches at Chandigarh, Lucknow, Kolkatta, Guwahati, Chennai, Kochi, Mumbai and Jaipur. With the exception of the Chandigarh and LucknowRegional Benches, which have three benches each, all other locations have a single bench. Each Bench comprises of a Judicial Member and an Administrative Member.

The Judicial Members are retired High Court Judges and Administrative Members are retired Members of the Armed Forces who have held rank of Major General/ equivalent or above for a period of three years or more, Judge Advocate General (JAG), who have held the appointment for at least one year are also entitled to be appointed as the Administrative Member.

The Tribunal shall transact their proceedings as per the Armed Forces Tribunal (Procedure) rules, 2008. All proceedings in the Tribunal will be in English. The Tribunal will normally follow the procedure as is practiced in the High Courts of India.

The dress as mandated for the officials of the Tribunal including bar will be white shirt, collar band and a black coat/ jacket.

Establishment

The Central Government shall, by notification, establish a Tribunal to be known as the Armed Forces Tribunal to exercise the jurisdiction, powers and authority conferred on it by or under this Act.[30]

Composition:

Composition of Tribunal and Benches thereof[31]

1. The Tribunal shall consist of a Chairperson and such number of Judicial and Administrative Members as the Central Government may deem fit and, subject to the other provisions of this Act, the jurisdiction, powers and authority of the Tribunal may be exercised by Benches thereof.
2 Subject to the other provisions of this Act, a Bench shall consist of one Judicial Administrative Member.
3. Notwithstanding anything contained in sub-section (1), the Chairperson—
   a. may, in addition to discharging the functions of a Judicial Member of the Bench to which he is appointed, discharge the functions of an Administrative Member of any other Bench;
   b. may transfer a Member from one Bench to another Bench;
   c. may, for the purpose of securing that any case or cases, which having regard to the nature of the questions involved, requires or require, in his opinion, or under the rules made under this Act, to be decided by a Bench

[30] Section 4, Armed Forces Tribunal Act, 2007
[31] *Id.*, Section 5

composed of more than two members, issue such general or special orders, as he may deem fit:

Provided that every Bench constituted in pursuance of this clause shall include at least one Judicial Member and one Administrative Member.

4. Subject to the other provisions of this Act, the Benches of the Tribunal shall ordinarily sit at Delhi (which shall be known as the Principal Bench), and at such other places as the Central Government may, by notification, specify.

Qualifications for appointment of Chairperson and other Members

Just like other acts providing for establishment of tribunals and laying down the qualification for appointment of its members. The Armed Forces act also expressly lays down the qualification mandates for both the judicial and administrative members. The qualifications for Chairperson and Members are as follows[32]

1. A person shall not be qualified for appointment as the Chairperson unless he is a retired Judge of the Supreme Court or a retired Chief Justice of a High Court.
2. A person shall not be qualified for appointment as a Judicial Member unless he is or has been a Judge of a High Court.
3. A person shall not be qualified for appointment as an Administrative Member unless—
   a. he has held or has been holding the rank of Major General or above for a total period of at least three years in the Army or equivalent rank in the Navy or the Air Force; and
   b. he has served for not less than one year as Judge Advocate General in the Army or the Navy or the Air Force, and is not below the rank of Major General, Commodore and Air Commodore respectively.

Term of office

The Chairperson or a Member shall hold office for a term of four years from the date on which he enters upon his office and shall be eligible for re-appointment[33]:

Provided that no Chairperson shall hold office as such after he has attained,—

a. in case he has been a Judge of the Supreme Court, the age of seventy years; and
b. in case he has been the Chief Justice of a High Court, the age of sixty-five years

It is further provided, that no other Member shall hold office as such Member after he has attained the age of sixty-five years.

[32] *Id.*, Section 6
[33] *Id.*, Section 8

Jurisdiction and Power

The Tribunal shall exercise all the jurisdiction, powers and authority exercisable under this Act in relation to appeal against any order, decision, finding or sentence passed by a court martial or any matter connected therewith or incidental thereto.[34]

Any person aggrieved by an order, decision, finding or sentence passed by a court martial may prefer an appeal in such form, manner and within such time as may be prescribed.

The Tribunal shall have power to grant bail to any person accused of an offence and in military custody, with or without any conditions which it considers necessary:

The Tribunal shall allow an appeal against conviction by a court martial where the finding of the court martial is legally not sustainable due to any reason whatsoever; or the finding involves wrong decision on a question of law; or there was a material irregularity in the course of the trial resulting in miscarriage of justice, but, in any other case, may dismiss the appeal where the Tribunal considers that no miscarriage of justice is likely to be caused or has actually resulted to the appellant. The Tribunal may allow an appeal against conviction, and pass appropriate order thereon.

The Tribunal may have the powers to substitute for the findings of the court martial, a finding of guilty for any other offence for which the offender could have been lawfully found guilty by the court martial and pass a sentence afresh for the offence specified or involved in such findings or if sentence is found to be excessive, illegal or unjust, the Tribunal may (i) remit the whole or any part of the sentence, with or without conditions; (ii) mitigate the punishment awarded (iii) commute such punishment to any lesser punishment or enhance the sentence awarded by a court martial:

The Tribunal may release the appellant, if sentenced to imprisonment, on parole with or without conditions; suspend a sentence of imprisonment; Or pass any other order as it may think appropriate.

Notwithstanding any other provisions in this Act, for the purposes of jurisdiction and powers, the Tribunal shall be deemed to be a criminal court for the purposes of relevant sections of the Indian Penal Code and Chapter XXVI of the Code of Criminal Procedure, 1973.

Power of Contempt

In the Armed Force Tribunal, there is no power to implement its own orders and judgments. There is no mechanism to punish for contempt for not implementation of its orders and directions.[35] Therefore, it has been turned as a tooth less tiger. In the Act, there is ambiguous procedure for the execution of its own judgments, even no substantive procedure prescribed for such execution.

[34] *Id.*, Sections 14-20
[35] *Id*, Sections 19

Appeal

Section 31 of the act clearly lays down that any appeal against the order of the tribunal shall lie before the Supreme Court of India. Further it provides clearly that the appeal can lie only against the final decision or order of the Tribunal and that there shall be no appeal against an interlocutory order of the Tribunal. Further such appeal is required to be preferred within a period of ninety days of the said decision or order. There has been large number of cases on specifically this issue of appeal and in particular with regard to the fact that whether an appeal may lie to high court or whether an appeal shall lie exclusively to the supreme court alone.

Pursuant to section 30 appeal lies to Supreme Court against any final order passed by the Armed Force Tribunal not to the High court which has writ and superintendence jurisdiction under article 226 and 227 respectively. The section 30 of The Armed Force Tribunal clearly overshadowed the dictum of *L. Chandra Kumar*[36] case which was then the law of the land being decision of Supreme court. The Supreme Court judgement in *L.Chandera kumar*, related to the jurisdiction of appeal against the orders of Central Administrating Tribunal, both the legislations had identical provisions. Where an appeal against any order passed by the central administrative tribunal, could be preferred to the high court was not incorporated in Armed Forces Tribunal Act. Therefore, as per the legislative intent of the act any person aggrieved by the final decision and order of the (AFT) cannot approach to the High Court but may approach only the Supreme Court. Therefore, recourse is available only before the highest court of the land, that is the apex court, which is a very expensive agency for litigation and thereby, defying another basic principle of tribunalization which is cheap and speedy justice. The author will attempt to analyse whether the establishment of armed forces tribunal has been able to provide effective assistance to the armed forces personnel's or not. In the light of latest judgment of *Maj Gen Shahi Kant Sharma* v. *Union of India*[37] was the Supreme Court correct in holding that due to specific provision in the act providing for appeal to Supreme Court only the appeal shall lie only to Supreme Court against the orders of the Tribunal.

Conclusion

The Act establishes the Armed Forces Tribunal to adjudicate certain matters. These matters include disputes and complaints related to commission, appointments, enrolment and conditions of service in respect of persons subject to the Army Act, 1950, the Navy Act, 1957 and the Air Force Act, 1950. The Tribunal is also empowered to hear appeals arising out of orders, findings or sentences of court martial held under these Acts.

The purpose to set Armed Forces Tribunal was to provide speedy, less expensive and quality justice and same could be analysed through the following table of two benches i.e. Principal Bench, New Delhi and Lucknow Bench. In

[36] AIR 1997 SC 1125
[37] Supreme Court of India Judgment dated March, 2015

principle bench situated in New Delhi, where total transfer from high court of Delhi 1679, and fresh cases filed 3272, and out of total number of pending cases 4789 has been dismissed and dispose of, and total number of cases pending before the tribunal are 1256 till December, 2014 In the Lucknow bench (regional) of armed force tribunal was set up pursuant to the armed force tribunal act, 2007, where total number of cases filled 3427 and disposed of 2301 and presently pending 1126 till Decembe,.2014.

As far speedy justice is concerned the trend shows a quite satisfactory report, but whether they are providing quality justice, this remains a valid question for the consumer of justice which could be analysed.

One aspect on the quality justice can also be analysed that it is not consist of all judicial members to decide the disputes of member of armed forces, therefore, element of bias may come while deciding the dispute as administrative members are coming from department concerned.

Another drawback is judicial review power as they are analysing service rules whether it was arbitrary or not? But as per judgement of *L. Chandra Kumar* this power can only be exercised by constitutional court. This aspect also needs some research.

In the Armed Forces Tribunal Act, there is no provision of contempt of court as far as executions of its orders are concerned like Administrative Tribunals Act, 1985. This also poses serious threat to the satisfaction of consumer of justice and their trust in the institution. These are certain aspects which require attention for proper and effective functioning of Armed Forces Tribunal.

MONEY-LAUNDERING: Concept, Magnitude & Dimensions in Indian Perspective

*Rahul Kumar**

Introduction

"The function of criminal law is to preserve public order and decency, to protect citizens from what is offensive or injurious and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are young, weak in body or mind, inexperienced, or in a state of physical, official or economic dependence."[1] Under criminal law this protection is given to citizens by the state. But, the offence like money laundering challenges the state itself. If not controlled, it has capacity to ruin the econom: and legal system by exploiting it at mass level.

Long back in the words of Jack Blum[2], "International financial fraud, commercial fraud, money laundering and tax evasion will be the most important enterprising crimes of the future." And he was right to the extent that today the offence of money laundering has become a global menace. Except certain countries which act as tax havens[3] every other country on the globe is feeling the heat of illicit capital flight from their respective economy.

It is fundamental rule of economics that development of economy requires capital. Without capital no economy can flourish. Money which is removed from legal economy illegally is black money. And this black money which is stashed away causes potential damage to the financial system of the economy. The capital

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1 The Wolfendon Committee Report 1958 as cited in R.C. Nigam, *Law of Crimes in India*, Asia Publishing House, 1965, p. 36.

2 As cited in Shelly and Louise, *"Crimes and corruption in Digital Age"*, Journal of International Affairs, 1988, p. 24. See also Sushmita P. Mallaya, *"Money Laundering and Banker's Duty of Confidentiality"* Cochin University Law Review 2002, p. 294.

3 "Roughly 15 percent of countries are tax havens; as has been widely observed, these countries tend to be small and affluent. Tax haven countries receive extensive foreign investment, and, largely as a result, have enjoyed very rapid economic growth over the past 25 years. There are roughly 40 major tax havens in the world today." Dhammika Dharmapala & James R. Hines Jr., *"Which Countries Become Tax Havens?"* National Bureau of Economic Research (Cambridge, 2006). Available at http://www.nber.org/papers/w12802.pdf.

flight from the legal economy leads any nation towards debilitating stage. And if the money or capital is taken away illegally from the developing or third world countries or any country definitely it is a kind of attack at the spine of the economic system of any nation.

As per Global Financial Integrity[4] some 150 developing countries developing and emerging economies lost US $6.6 trillion in illicit financial flows from 2003 through 2012, with illicit outflows increasing at an staggering average rate of 9.4 percent per year, roughly twice as fast as global GDP.[5] The report further says the total 3.9 percent of GDP of developing countries is parked away from these countries. The report provides that developing and emerging economies lost US $6.6 trillion in illicit financial flows from 2003 through 2012, with illicit outflows increasing at a staggering average rate of 9.4 percent per year, roughly twice as fast as global GDP.[6] The report further shows the increasing trend of the rising capital flight from legitimate legal economies globally, which is depicted below as follows:[7]

Year-wise table of Illicit Financial Flows from Developing Countries: 2003-2012

Year	*Amount (in millions of U.S. dollars)*
2003	297,411
2004	380,835
2005	488,997
2006	502,809
2007	593,472
2008	793,435
2009	748,307
2010	821,939
2011	968,684
2012	991,245

This trend of capital flight in global perspective cuts a sorry figure for the legitimate economic systems of the countries. The aforesaid data shows that day by day the menace of illicit financial flow from legitimate economy have rising as in 2003 it was 297,411 million USD out flowed illegally and at the average rate of 9.4

4 A Washington based think tank, which used to research on the economy of countries, particularly developing countries. The report was co authored by an economist of Indian origin, Mr. Dev Kar.

5 Global Financial Integrity Report: *Illicit Financial Flows from the Developing World*: 2003-2012 (December, 2014) Visited at http://www.gfintegrity.org/report/2014-global-report-illicit-financial-flows-from-developing-countries-2003-2012/.

6 *Ibid.*

7 *Ibid.*

percent per annum it rose upto 991,245 million USD. India is also not an exception to this trend. Rather, here the trend is more worrisome, which requires serious attention against this menace.

As far as India is considered the gross total misinvoicing from the country amounted to US $ 925.93 million in between 2003-2012. However, from Indian side no official data was to show about the quantity of black money. But in 2012, the then CBI Chief Sh. A.P. Singh had estimated on behalf of Government of India that around US $ 500 billion (nearly Rs. 24 Lakh Crore) is deposited in foreign accounts.[8] It was the first instance of official estimate of unaccounted wealth stashed abroad. However, CBI Chief did not indicate how he arrived at the estimate of illegal money parked in tax heavens.[9]

As it has been rightly observed, "It is estimated by various historians that the 90 years of formal British rule between 1857-1947 resulted in the transfer of wealth of approximately 1 trillion US Dollar (USD) at current market price from India to Britain. We seem to have done far better in sixty odd years of self rule, especially in the last thirty years. Various estimates demonstrate that our post independence rulers have achieved this target far more efficiently compared to what the British did with so much ado in ninety years. The estimates further suggest that our indigenous *Swadeshi* rulers have taken merely thirty years to transfer USD 1.4 trillion (Rs. 70 Lakh Crores) our wealth abroad."[10]

Though accurate figures not available, the black economy as a percentage of national income (GDP) is supposed to have grown from about in 3 percent in the mid-fifties to 7 percent by the end sixties to 20 percent by 1980-81, to around 35 percent by 1990-91 and 40 percent by 1995-96.[11]

This trend continued in new century also and India maintains fourth rank in global illicit outflow of the fund from the country to obscure the black money abroad. The recent estimate[12] provides the same which is demonstrated in tabular form below:

Country Rankings by Largest Average Illicit Financial Flows, 2003-2012

Country	*Average Illicit Financial Flows (in millions of U.S. Dollars)*
China	125,242
Russian Federation	97,386
Mexico	51,426
India	43,959
Malaysia	39,487

8 *The Times of India*, Delhi, February 14, 2012, p1.
9 *Ibid.*
10 M. R. Venkatesh, "*Sense, Sensex and Sentiments: The failure of India's Financial Sentinels*" KW Publishers Pvt. Ltd., New Delhi, 2011, p. 1.
11 Arun Kumar, "*The Black Economy in India*" Penguin Books, Gurgaon, Reprint 2014, p.2
12 *Supra* Note 5 at p. 28.

Another speculation about the quantity of black money abroad varies in between Rs. 20,000 crore to Rs. 25 lakh crore as per data flying on the internet.[13] As per Swiss National Bank's latest data, the total money held by Indians in Swiss Banks stood at over Rs. 14,000 crore as on December 2013.[14] However as per another data India saw an international outflow of illicit cash in between 2001-2010 amounting to USD 123 billion.[15]

As per secret inquiry by Financial Intelligence Unit of Ministry of Finance and Directorate of Enforcement most of the *Hawala* transactions take place at Mumbai, Ahemdabad and Delhi. The daily business through *Hawala* is of Rs. 2,000 Crores and annual turnover reaches through this network up to Rs. 7,00,000 Crore in the year 2011. This amount was almost near to the Central budget of Rs. 9,00,000 crore.[16] The same report stated that in India the illegal business of gold and silver amounts to 27,000 tons and 1,50,000 tons respectively. The 40 percent real estate deals were illegal and made with hard cash.[17]

The figure is so huge that it is claimed that if even half of the black money parked away is brought back everybody in the country can get a home.[18]Due to the concept of global village, liberalization and information revolution, this by-product of society has also developed robustly. The convertibility of currencies, e-money, e-cash, internet and smart cards, credit cards i.e. to say the wire transfer of money and money in plastic form has made the situation complex. The laundered money becomes available round the globe to reverse the process i.e. for funding and financing of criminal activity again.

Broadly, the ill-effects of money laundering activities on the socio-legal and economic systems of the world may be summarized as:[19]

"(i) inexplicable variation in money demand'
(ii) prudential risks to soundness of banks,
(iii) contamination effects on legal financial transactions,
(iv) increased volatility of international capital flows and exchange rates due to unanticipated cross-border asset transfers,
(v) dampening effect on the foreign direct investment when a country's commercial and financial sectors are perceived to be subject to the control and influence of organised crime,
(vi) undermining investor confidence,
(vii) possibility of acquiring control of large sectors of economy through investments, bribes and coercion,

13 S. Pushpavanam, "*Black Money Conundrum,*" The Hindu, Delhi, December 15, 2014, p.13.
14 The Indian Express, Delhi, October 16, 2014, p13.
15 *Ibid.*
16 The India Today (Hindi Edition) Delhi, October 05, 2011, p.44
17 *Ibid.*
18 The Hindustan (Hindi Daily), Delhi, October 30, 2014, p 15.
19 Akash Chaubey & Sarvesh Singh, "*Money Laundering: The Growing Menace*" (2003) 2 COMP LJ(62) at 65.

(viii) weakening of social fabric, ethical standards and the democratic institutions of the society,
(ix) due to the in-extricable link to the underlying criminal activity that generated it, money laundering in turn enables that criminal activity to flourish further, thereby becoming a cause as well as an effect,
(x) tainting of the reputation of the involved banking and other financial institution in the eyes of the other financial intermediaries, regulatory authorities and ordinary customers, and
(xi) drawing of financial institutions into the criminal network by active complicity or turning a blind eye towards launderers."

Money laundering is a sophisticated organized crime. The level of its sophistication is such that no one can take it very seriously at the first glance in comparison to street crimes. But, it is the crime which prevails at the highest or ultimate stage of crime, of which every criminal dream for i.e. to wash the money and have a luxurious life.

The unholy alliance of the organized criminal enterprises and syndicates involved in organized economic crimes like drug trafficking and terrorism etc. are well serviced by money laundering organizations and financial institution mostly operating overtly in national jurisdictions are a serious threat to any government, more so to the governments in the developing countries.

Evolution and Anti-Money Laundering Regime

Though the origin of money laundering is unknown it is believed it has genesis from the history of trade and banking as it is about hiding money and as well as assets from the eyes of state authorities to avoid taxation and confiscation. The abuse of merchants and others by rulers led them to find ways to hide their wealth, including ways of moving it around without it being identified and confiscated. Money laundering in that sense can be said to be prevalent 4000 years before Christ.[20]

In modem times too, this term 'money laundering' is nevertheless of fairly recent origin. Almost a century ago the expression 'money laundering' was first used by the media in USA in the 1920s, and referred to the accounting methods used by Al Capone's financer, Meyer Lansky, who used car washes to hide the gang's funds.[21] Meyer Lansky, was particularly affected by the conviction of Capone for tax evasion. Determined that the same fate would not befall him, he set about searching for ways to hide his money. Before the year was out, he had

[20] Bhure Lal, *Money Laundering: An Insight into the Dark World of Financial Frauds*, Sidharth Publications, New Delhi, 2003, p. 20-21.

[21] *Ibid.* See also, Vijay Kumar Singh, "*Controlling Money Laundering in India-Problems and Perspectives*", paper presented at the 11th Annual Conference on Money and Finance in the Indian Economy on 23-24 January, 2009, p 5.

discovered the benefits of numbered Swiss bank accounts. This appears to be the advent of money laundering.[22]

However, in recent times the first documented mention in newspaper about money laundering is attributed to a report about the Watergate Scandal in the United States in 1973.[23] Since then, the term 'money laundering' has been used popularly throughout the world and accepted worldwide.

It was the United States of America which smelled the problem first and took the initiatives at earliest to combat the problem of money laundering. At that time during 1970-80s the volume of laundered money almost threatened the financial system of USA. So, the Banking Secrecy Act, 1976 was enacted there. It was the first instrument to check the problem of merger of illegal money into the legitimate financial system. Thereafter the USA enacted a number of legislations to curb the menace and brought the fight at international panorama through the stage of the United Nations.

The Money Laundering Control Act, 1986; the Anti-Drug Abuse Act, 1988; the Money Laundering Suppression Act, 1994; the Money Laundering and Financial Crimes Strategy Act, 1998; the Uniting and Strengthening America by Providing Appropriate Tools to Restrict, Intercept and Obstruct Terrorism Act, 2001 (USA PATRIOT Act) and the Intelligence Reform & Terrorism Prevention Act, 2004 were enacted to meet the requirements of the USA AML regime. The Foreign Account Tax Compliance Act, 2009 of USA is an important piece of legislation there, on the lines of which the Indian legislature has enacted Undisclosed Foreign Income and Assets (Imposition of Tax) Act, 2015 recently.

At the UN level several conventions and resolutions took place, model legislations were drafted and passed by the UN General Assembly to be adopted by the member states. For the first time the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which was approved on 19th December, 1988 in Viena, Austria put a step forward to concretise a universally accepted description of money laundering[24] to bring the illicit funds in trappings of

[22] *Supra* note 10 at p. 11.

[23] The Water Gate scandal is related to the re-election of the then President Nixon, where campaign contributions were first send outside the country and brought back through a Company situated in Miami. The Guardian newspaper published from Britain was first to refer such process as 'laundering'. As cited in Vijay Kumar Singh, "*Controlling Money Laundering in India-Problems and Perspectives*", 5, paper presented at the 11th Annual Conference on Money and Finance in the Indian Economy on 23-24 January, 2009. However, the Water Gate was exposed by *the Washington Post* and *the New York Times*, leading newspapers of America in 1972. As cited in TCA Ramanujam and TCA Sangeeta, "*A Bill to prevent money laundering*" 129 [1998] 30 CLA (Mag.) 129.

[24] The relevant portion of the Article 3(1)(b) & (C) of the Convention which deals with the offence of money laundering is as follows:
(b) "(i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph a) of this paragraph, or from an act of participation in such offence or offences, for the purpose

contd...

legal systems of the world as it was signed by 88 countries and came into force on 11th November, 1990.[25] Again, Beijing Session of Interpol General Assembly in 1995 went further on the line.[26] The United Nations Political Declaration and Action Plan against Money Laundering, 1998; Convention against Transnational Organized Crime, 2000; the United Nations: Security Council Resolution 1373; International Convention for the Suppression of the Financing of Terrorism; Convention Against Corruption, 2003 are the important instruments under United Nations Anti-Money Laundering Regime. The UN has also provided different model legislations to prevent money laundering for the common and civil law systems. These legislations are updated at regular intervals as per suggestions of GPML.

In order to counter money laundering, the UN has devised a global programme against money laundering, known as GPML[27]. Under GPML the UN provides technical assistance, undertakes research on money laundering issues and pioneers special study projects for affected regions in the world. Under its technical assistance component the UN also helps countries to put in place mechanisms and institutions to counter money laundering. The GPML focuses in particular on the development of financial Intelligence Units (FIUs).[28]

The efforts made by the UN played the role of catalyst for regional players to create an anti-money laundering regime. In result 40+9 guidelines by Financial Action Task Force, initiatives by the Egmont group against money laundering, Basal Committee etc. came into existence. SAARC countries have also become very serious in the direction. And keeping the promise intact in respect to combat

of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph a) of this paragraph or from an act of participation in such an offence or offences;

(c) (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph a) of this paragraph or from an act of participation in such offence or offences."

25 Hynes, Furlong and Rudolf, *International Money Laundering and Terrorist Financing: A UK Perspective*; Thomson Reuters, 2009, p. 426.

26 The Beijing Session describes money laundering as, "Any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources".

27 Adopted by the UN General Assembly on 23rd February 1990 by its Resolution No. S-17/2.

28 Jyoti Trehan, *Crime and Money Laundering: The Indian Perspective*, Kluwer Law International, New York, 2004, p. 221.

money laundering, finally India also came with legislative enactment in 2003 which declared the flow of illicit funds through various channels an offence.[29]

Although a bit late but, India also joined the crusade against money laundering and for the first time the Prevention of Money Laundering Bill was introduced in 1998 but was in vain. Finally, on 17th January 2003 the bill took the shape of an enactment with the assent of the President of India after having been passed by both the Houses of the Parliament to prevent money laundering and to provide for confiscation of property derived from, or involved in, money laundering and for matters connected therewith or incidental thereto. To achieve the objectives of the Act several amendments have been made in it in the years of 2005, 2009 and 2012.

The significance of this Act is that for the first time in India the process of making black money white has been made offence and punishable if the tainted money is proceed of any crime mentioned under the schedule of the Act. To meet the ends of this Act three fold machinery has been provided. The Directors[30], the Money Laundering Adjudicating Authority[31] and the Special Courts[32] have been appointed and duly constituted to serve the purpose of this Act. It is mandatory for the Adjudicating Authority to dispose of the matters before it within 180 days. Appeal can be made against the orders of the Adjudicating Authority and Special Courts to the Appellate Authority and the High Court respectively. This Act provides for confiscation of property derived from or involved in money laundering. This Act is a clear cut message to the offenders that their proceeds of crime are not safe anymore.

Conceptual Framework

The term 'Money Laundering' describes the process whereby cash from illegal activities is converted to an alternate from in a manner that conceals its origin, ownership, or other potentially embarrassing factors. While laundering schemes can be of varying degrees of sophistication, all are designed to accomplish the same purpose – to obscure and if possible to obliterate the audit trail.[33]

In very simple terms 'Money laundering' is an act of projecting money that has come from illegal source to make the same look like it comes from a legal source. The crux of various international and national definitions[34] shows that money

29 Section 3 of the Prevention of Money-Laundering Act, 2002 defines the offence of 'money laundering' as, "Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a part or is actually involved in any process or activity connected proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering."

30. Section 48, The Prevention of Money-laundering Act, 2002.

31 Section 6, The Prevention of Money-laundering Act, 2002.

32 Section 43, The Prevention of Money-laundering Act, 2002.

33 B. V. Kumar, *The Darker Side of Black Money: An Insight into the World of Financial Secrecy and Tax Heavens*, Konark Publishers Pvt. Ltd.,New Delhi, 2013, p.73

34 The definitions in international instruments like Vienna Convention of 1998, the UN

contd...

laundering is not an independent crime rather it depends upon a 'predicate offence'[35]. It is the fruits of the predicate offence or 'proceeds of crime'[36] which is laundered and constitutes commission of the offence.

Generally, the three stage process is prevalent in global circuit for money laundering:[37]

(A) **Investment**: it is the first stage. Here the link between the money and its original source i.e. crime is severed by the criminal. The large amount of cash is broken up into smaller sums for its deposition and investment into different monetary instruments of banks and other financial institutions like banks etc for proper disposal of black money.

(B) **Layering**: it is the second stage. At this stage complex layer of financial transactions is created by the offenders. A number of rotations to slush funds are given through banks and other financial institutions[38]. Complex layers of the financial transactions are made out to separate the 'proceeds of crime' from its original source. The objective is dilution of the tainted money through various financial channels and spread to such length that it becomes almost impossible to find out the real source of origin.

(C) **Integration**: The reinjection of washed or laundered tainted property into the financial system is called 'integration'. Now, at this stage the washed or laundered money is available round the globe to be used in any manner at any place as clean and genuinely and legally acquired property. In this way the fund re-enters the legitimate financial world.

Thus, merely in just three stages i.e. placement, layering and integration the illicit money gets cleaned and becomes available round the globe. But, money laundering is not as easy as it appears. Secrecy, confidentiality or concealment appears to be the essence of money laundering because all abovementioned the three step exercise is made just to hide the illicit money.

Therefore, the involvement of a constant struggle between the launderers and the law enforcement agencies like game of hide and seek. From both the sides new ways are remain searched. Launderers continuously remain searching new ways and technology to get the money away from gazes of the agencies. While, the anti-

Convention against Transnational Organized Crime, the U.K. Proceeds of Crime Act, 2002 the U.S. legislations like the PATRIOT Act, the Banking Secrecy Act etc. have been dealt with at Chapter IV of this work. Under Chapter V of this work definition given under the PMLA, 2002 has been discussed in detail.

35 Article 2(h) of the UN Convention against Transnational Organised Crime states "predicate offence shall mean any offence as a result of which proceeds have been generated that become the subject of an offence as defined in Article 6 of the offence."

36 'Proceeds of crime' shall mean "any property derived from or obtained, directly or indirectly, through the commission of an offence." Article 2(e), The UN Convention against Transnational Organised Crime, 2000.

37 Bhure Lal, *Money Laundering: An Insight into the Dark World of Financial Frauds*, Siddharth Publications, New Delhi, 2003, p. 29.

38 These banks and financial institutions are mostly based in tax heaven countries, where privacy is given to the bank customers.

money laundering regime agencies/officials are continuously involved in detection, disruption and prevention of completion of money laundering cycle. In this way money-laundering industry is both innovative and highly dynamic.[39]

Black Money and various 'Methods of laundering'

Despite the old saying that "money has no smell" there exist two principal types of funds in the underground economics of the world i.e. 'black money' and 'dirty money'.[40] Black money covers all types of unaccounted money, whether it is illegally obtained money or money obtained legally but not accounted to the government authorities. Black money may not be obtained from only illegal activities, but it may also be generated simply by exchanging or keeping the same secret to avoid taxes or to circumvent currency restrictions that a particular country may have in force. Whereas 'dirty money' is obtained completely through illegal means and it also forms part of black money.[41] It can be hidden, but it can't be used by the holder until it is transformed to 'clean' money so that its origin is concealed. For example the traffic in illicit drugs generates enormous quantity of dirty money, while money evaded from income tax is black money.

In the White Paper published by the Government of India it was rightly observed, "There is no uniform definition of black money in the literature or economic theory. In fact, several terms with similar connotations have been in vogue, including 'unaccounted income', 'black income', 'dirty money', 'black wealth', 'underground wealth', 'black economy', 'parallel economy', 'shadow economy', and 'underground' or 'unofficial' economy. All these terms usually refer to any income on which the taxes imposed by government or public authorities have not been paid. Such wealth may consist of income generated from legitimate activities or activities which are illegitimate per se, like smuggling, illicit trade in banned substances, counterfeit currency, arms trafficking, terrorism, and corruption." For the purpose of the present research, the most suited definition of 'black money' is as "assets or resources that have neither been reported to the public authorities at the time of their generation nor disclosed at any point of time during their possession".[42]

39 *Supra* note 37 at p.76.

40 M. Ponnain, *Criminology & Penology*, Pioneer Books, New Delhi, 1992, p. 107.

41 *Ibid.*

42 White Paper on Black Money 2 (Ministry of Finance, 2012). This definition of black money is in consonance with the definition used by the National Institute of Public Finance and Policy (NIPFP). In its 1985 report on Aspects of Black Economy, the NIPFP has defined "black income" as "the aggregates of incomes which are taxable but not reported to the tax authorities".

In addition to wealth earned through illegal means, the term black money also includes legal income which is not accounted to public authorities.[43] Therefore black money is inclusive of the following:

(A) through evasion of payment of taxes (income tax, excise duty, sales tax, stamp duty, etc);
(B) through evasion of payment to other statutory contributions;
(C) by non-compliance the provisions of industrial laws such as the Industrial Dispute Act 1947, the Minimum Wages Act 1948, the Payment of Bonus Act 1936, the Factories Act 1948, and the Contract Labour (Regulation and Abolition) Act 1970 with regard to financial matters; and/ or
(D) by evading payment under other laws and administrative procedures."

Thus, after aforesaid discussion over black money, it may be inferred that the term 'black money' or 'illicit funds' may be used in generic sense to cover all type of unaccounted wealth. It should be immaterial whether such money is proceeds of any crime or have not been accounted before the authorities for tax purposes. Once, either because of any of the aforesaid reason money is stashed away from the genuine legal system it turns into black.

All that starts for money is run with the resource of money. The underground hidden flow of parallel economy, where money flows freely has become the biggest challenge for law enforcement agencies today. Money laundering often involves five different directional fund flows:[44]

(i) "**Domestic money laundering flows**: In which domestic funds are laundered within the country and reinvested or otherwise spend within the country;
(ii) **Returning laundered funds**: Funds originate in a country, are laundered abroad and returned to the same country;
(iii) **Inbounds fund**: Illegal funds earned out of crime committed abroad are either laundered [placed] abroad or within the country and are ultimately integrated into country;
(iv) **Out bound funds**: Typically constitute illicit capital flight from a country and do not come back to the country; and
(v) **Flow-through**: The funds enter a country as part of the laundering process and largely depart for integration elsewhere."

Prevention, detection and confiscation of all abovementioned illicit flows of fund are the sole objective of anti-money laundering instruments and legislations. Evidence and investigation of crimes becomes very difficult where the crimes are among consenting parties and all are beneficiaries of the crime. Almost all the economic organized crime including money laundering is of same nature. Hardly, any complaining victim breaks out from within a market system of advantageous exchange of subjects of the illicit business. All parties to that advantage have an

[43] *Ibid.*
[44] *B. Rama Raju* v. *Union of India*, W.P. Nos. 10765, 10769 & 23166 of 2010 dated 04.03.2011 by Andhra Pradesh High Court at Para 12(C).

interest in protecting the system and keeping it secret as launderers are equal beneficiary of black money as the generator.

There are following methods to show the means or medium by use of which, money laundering activities are carried out:[45]

(i) **Structuring or smurfing**: it is possibly the most commonly used method of money laundering. To avoid the threshold of reporting entities many individuals deposit cash into bank accounts or buy bank drafts in small amounts.
(ii) **Bank Complicity**: When a bank employee involves himself in facilitating the part of the money laundering process, it is known as bank complicity;
(iii) **Money services and Currency Exchanges**: Services provided by money and currency exchangers enables individuals to exchange and transport the illicit funds out of the country. Such money can also be wired to the accounts in other countries. Other services offered by these businesses include the sale of money orders, cashier cheques, and traveller's cheques;
(iv) **Asset Purchase with Bulk Cash**: Money launderers may purchase high value items such as cars, boats or luxury items such as jewellery and electronics. Money launderers will use these items but will distance themselves by having them registered or purchased in an associate's name;
(v) **Electronic Funds Transfer**: Also referred to as a telegraphic transfer or wire transfer, this money laundering method consists consist of sending funds electronically from one city or country to another to avoid the need to physically transport the currency;
(vi) **Postal Money Orders**: The Purchase of money orders for cash Allows money launderers to send these financial instruments out of the country for deposit into a foreign or offshore account;
(vii) **Credit Cards**: Overpaying credit cards and keeping a high credit balance gives money launderers access to these funds to purchase high value items or to convert the credit balance into cheques;
(viii) **Casinos**: the casino cheques purchased through cash may be taken to another casino and then can be redeemed at different branches situated at different places;
(ix) **Refining**: This money laundering method involves the exchange of small denomination bills for large ones and can be carried out by an individuals who converts the bills at a number of different banks in order not to raise suspicion. This serves to decrease the bulk of large quantities of cash;
(x) **Legitimate Business/Co-mingling of Funds**: Criminal groups or individuals may take over or invest in businesses that customarily handle a high cash transaction volume in order to mix the illicit proceeds with those of the legitimate business. Criminals may also purchase businesses that commonly receive cash payments, including restaurants, bars, night clubs, hotels, currency exchange shops, and vending machine companies. They will then insert

[45] Rajkumar S. Adukia & Rishabh R. Adukia, *Bharat's Prevention of Money Laundering Act, 2002*, Bharat Law House Pvt. Ltd., New Delhi, 2014, p.14.

criminal funds as false revenue mixed with income that would not otherwise be sufficient to sustain a legitimate business;

(xi) **Value Tampering**: money launderers may look for property owners who agree to sell their property, on paper, at a price below its actual value and then accept the difference of the purchase price "under the table". In this way, the launderer can, for example, purchase a 2 million rupee property for 1 million rupee, while secretly passing the balance to the seller. After holding the property for a period of time, the launderer then sells it for its true value of 2 million rupees; and

(xii) **Loan Back**: Using this method, a criminal provides an associate with a sum of illegitimate money and the associate creates the paperwork for a loan or mortgage back to the criminal for the same amount, including all of the necessary documentation. This creates an illusion that the criminal's funds are legitimate. The scheme's legitimacy is further reinforced through regularly scheduled loan payments made by the criminal, and providing another means to transfer money.

The aforesaid list of methods is not exhaustive. As it a dynamic and innovative process, the launderers always remain in new ways to carry out their activities or many other ways of laundering may still not be known.

Offence of Money-laundering

The offence of money laundering is a process of converting the ill source of money to untainted source of money. Therefore, this process is accomplished through three stages of placement, layering and integration.[46] Primarily the offence of money laundering does not appear as a serious offence but in reality it may be common denominator of all the offences with economic motive. Money laundering is not an independent offence rather it depends upon other crimes which are internationally as well as in the Act has been described as predicate crime. In the offence of money laundering the money in reality remains the outcome or proceeds of the crime, which has been defined internationally as 'predicate offence'[47] and under the PMLA, 2002 it has been given as 'Scheduled Offences'[48].

The Prevention of Money-Laundering (Amendment) Act 2012 (2 of 2013), expanded the definition of the offence of money laundering so as to include concealment, possession, acquisition or use and projecting or claiming the proceeds of crime as untainted property. The present definition of money laundering covers almost all conceivable acts of money laundering.

[46] Supra Note 37 at p. 29.

[47] S.K. Sarvaria, *Commentary on The Prevention of Money Laundering Act*, Universal Law Publishing Company, New Delhi, 2014, p.vii.

[48] Section 2(1)(y), The Prevention of Money-Laundering Act, 2002.

However, the definition of 'money laundering, as given in the Prevention of Money Laundering Act, 2002 appears inclusive than exhaustive. The Act describes the offence of money laundering as follows:[49]

> "Offence of money-laundering: Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a part or is actually involved in any process or activity connected [proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming][50] it as untainted property shall be guilty of offence of money-laundering."

If the bare provision is analysed following essentials of the definition may be found which constitutes the offence:

(A) Attempt to indulge or actually involved in any process or activity connected with proceeds of crime

(B) Concealment

(C) Possession

(D) Acquisition

(E) Use of tainted property

Section 3 of the Act is very important as this section enumerates the essential ingredients which constitute the offence of money-laundering for the purpose of this Act. Before the amendment of the Act in 2013 the offence of money laundering was limited to mere proceeds of crime as untainted property. India has become a member of Financial Action Task Force (FATF) and Asia Pacific Group on money-laundering which are committed to effective implementation and enforcement of internationally accepted standards against money laundering. The anti-money laundering legislative framework of each country was evaluated by FATF in 2009. During mutual evaluation of India, it was pointed out by FATF that concealment, possession, acquisition or use of proceeds of crime are not criminalized by the PMLA, 2002.[51] The Act was amended as suggested by the aforesaid report of FATF.

Attempt to indulge in any process or activity connected with proceeds of crime

Section 3 of the PMLA is coded to cover as an offence, any attempt to indulge in any process or activity connected with crime. Attempt means to make an effort to effect some object; to make a trail or experiment; to endeavour, to use exertion for some purpose; to make an effort or endeavour, or an attack; a trial or physical effort to do a particular thing; an effort or endeavour to effect the

[49] *Id.*, Section 3 & 2(1)(p).

[50] Substituted by the Act 2 of 2013, sec. 3 for "With the proceeds of crime and protecting" (w.e.f.15-02-2013, vide S.O. 343(E), dated 8-02-2013).

[51] Standing Committee Report on *Prevention of Money-Laundering (Amendment) Bill*, 2011.

accomplishment of an act; an intention to do a thing combined with an act which falls short of the thing intended.[52]

Regarding the aspect as to what constitutes an "attempt", the Supreme Court observed followed Kenny's definition of 'attempt to commit a crime' in *State of Maharashtra* v. *Mohd Yakub*:[53]

> *"last proximate act which a person does towards the commission of an offence, the consummation of the offence being hindered by circumstances beyond his control".*

The definition is too narrow. What constitutes an "attempt" is a mixed question of law and fact, depending largely on the circumstances of the particular case. "Attempt" defies a precise and exact definition. Broadly speaking, all crimes which consist of the commission of affirmative acts are preceded by some covert or overt conduct which may be divided into three stages. The first stage exists when the culprit first entertains the idea or intention to commit an offence. In the second stage, he makes preparations to commit it. The third stage is reached when the culprit takes deliberate overt steps to commit an offence. Such overt act or step in order to be 'criminal' need not be the penultimate act towards the commission of the offence. It is sufficient if such act was or acts were deliberately done, and manifest a clear intention to commit the offence aimed, being reasonably proximate to the consummation of the offence.[54]

Therefore within the definition itself the words 'attempt to indulge directly or indirectly' have been enshrined by the legislature. If it is known that property is tainted and one tries to show it as untainted or project the same as legally acquired the offender cannot escape. If attempt is successful he has committed the offence and even if he fails in his attempt he cannot escape from the iron hands of law.

Known assistance in hiding the source of proceeds of crime is an offence as it will also attract the word 'directly or indirectly' given within the definition. And if somebody takes part in any process of laundering the 'proceeds of crime' or it is his usual business or he runs racket of making black money white, it is evident from the definition that he has no place to escape. That is to say direct involvement in changing the source of proceeds of crime is an offence. It is immaterial whether he is in possession of the said tainted property or concealing the same or has acquired it. The only condition is that he should know about its tainted origin.

Concealment

The word conceal is derived from the Latin *concelare* which implies to hide. It means "to hide or withdraw from observation; to cover or keep from sight; to prevent the discovery of; to withhold knowledge of."[55] A withholding of

[52] Y.V. Chandrachud (ed.), *P. Ramnath Aiyars's Concise Law Dictionary*, Lexis Nexis, New Delhi, 2008, p. 396.
[53] AIR 1980 SC 1111 at Para13, 1980 (3) SCC 57.
[54] *Ibid*
[55] *Supra* note. 52 at p.940.

something which one knows and which one, in duty, is bound to reveal.[56] Concealment is the designed and intentional withholding of any fact material to the risk, which the assured, in honesty and good faith, ought to communicate to the underwriter; mere silence on the part of the assured, especially as to some matter of fact which he does not consider it important for the underwriter to know, is not to be considered as such concealment. If the fact so untruly stated or purposely suppressed is not material, that is, if the knowledge or ignorance of it would not naturally influence the judgment of the underwriter in making the contract, or in estimating the degree and character of the risk, or in fixing the rate of the premium, it is not a "misrepresentation" or concealment,"[57] The Act prior to 2013 amendment did not include concealment of proceeds of crime as an offence. But after the amendment if a person is found to have been involved in concealment of the proceeds of crime, the person can be charged with the offence of money-laundering. The act of concealing itself would impute knowledge on part of the person committing the act of concealment.

Possession

To possess means To occupy in person; to have in one's actual and physical control; to have the exclusive detention and control of; to have and hold as property; to have a just right to; to be master of; to own or be entitled to be master of; to own or be entitled to.[58] The courts have defined the tem as follows: Simply the owing or having a thing in one's power, the present right and power to control a thing ; the detention and control of the manual or ideal custody of anything which may be the subject of property, for one's use of enjoyment, either as the owner or as the proprietor of a qualified right in it, and either held personally or by any other who exercises it in one's place and name; the detention or enjoyment of a thing which a man holds or exercises by himself or by another who keeps or exercises it in his name; the act of possessing a halving and holding or retaining of property in one's power or control; the sole control of the property or some physical attachment to it; that condition of fact under which one can exercise his power over a corporeal thing at his pleasure, to the exclusion of all the other persons.[59]

It is banal that to hold a person guilty, possession has to be conscious. Control over the goods is one of the tests to ascertain conscious possession so also the title. Once an article is found in possession of a person it could be presumed that he was in conscious possession. Possession is a polymorphous term which carries different meaning in different context and circumstances and, therefore, it is difficult to lay

[56] *Dolcater* v. *Manufacturers & Tradersx Trust Co.*, D.C.N.Y., 25 F.Supp. 637, 641.
[57] Henry Campbell Black, M.A., *Black's Law Dictionary*, St. Paul, Minn. West Publishing Co. 4th revised edition 1968, p. 360.
[58] *Id.*, p.1324.
[59] *Emperor* v. *Sitaram* AIR 1937 All 735 : Cr LJ 18

down a completely logical and precise definition uniformly applicable to all situations with reference to all the statutes.[60]

Acquisition

Acquisition is the act of getting or of becoming the owner of any property; the act by which one acquires or procures property in anything.[61] Black's Law Dictionary defines the term acquire as to gain by any means, usually by one's own exertions; to get as one's own; to obtain by search, endeavor, practice, or purchase; receive or gain in whatever manner; come to have.[62]

The Bombay High Court[63] while dealing with a case under section 8 of Foreign Exchange Regulation Act (since repealed), while dealing with the term "otherwise acquire" held that the process of acquisition with relation to any species of property including foreign exchange, basically and primarily is the process known to law involving transfer of interest in property. Positively the process of acquisition follows concrete results in taking up the property so that the acquirer comes into possession and is in position to appropriate the same. The words 'otherwise acquire' imply positive possession and capacity for appropriation with regard to the item of property. It is 'taking' in law for all purposes.

In *State of Maharashtra* v. *Mahesh P Mehta*[64] the court observed that it would be too specious to equate the concept of acquiring with the concept of physical possession and to hold that in every case of possession simplicitor the concept of acquisition is automatically introduced or is implicit, or to put it in other form it would be too specious to hold that every case of physical possession would amount to contravention.

Use of Tainted Property

The term 'Use' means to make use of, to convert to one's service, to avail one's self of, to employ.[65] In Oxford dictionary, the word 'use' has been defined as 'using', 'employment' 'application to a purpose' 'availability' 'utility' ' purpose for which things can be used'.[66]

'Taint' means to contaminate; to corrupt; to tinge or affect slightly for the worse.[67] Property as per section 2(v) of this Act means any property or assets of every description, whether corporeal or incorporeal, movable or immovable,

[60] *Ram Singh* v. *Central Bureau of Narcotics* (2011) 11 SCC 347, 2011(6) Scale 243.
[61] *Supra* note 52 at p. 14.
[62] Henry Campbell Black, M.A., Black's Law Dictionary, St. Paul, Minn. West Publishing Co. 4th revised edition 1968, p. 42.
[63] *Pandharinath* v. *Deputy Director* (1981) 51 Comp. Caes 163 (Bom).
[64] (1983) 1 Bom C.R. 606; 1985 Cr.L.J 453(Bom).
[65] Henry Campbell Black, M.A., Black's Law Dictionary , St. Paul, Minn. West Publishing Co. 4th revised edition 1968, p. 1710.
[66] *Ravi Shankar Sharma* v. *State of Rajasthan,* AIR 1993 Raj 117 (125) : 1993 CrLJ 1458.
[67] *Supra* note 52 at p. 1119.

tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets wherever located.

Money-laundering essentially relates to the tainted property which is derived from criminal activity relating to a scheduled offence. Such tainted property may eventually be projected as untainted property in the hands of person other than the person charged of having committed a scheduled offence. Therefore, if tainted or corrupted property being proceeds of crime is claimed or projected to be untainted property, the offence of money laundering shall be attracted.

In *Sanjay Kumar Chaudhary* v. *Government of India through the Director, Directorate of Enforcement*[68] the court rejected the contention that one cannot be said to have committed offence of money laundering unless it is established that, the person has committed crime proceeds of which is being projected as untainted property and further held that the provision as contained in section 3 never does suggest that the offence of money laundering can be launched only when one is found guilty of a crime, proceeds of which has been projected as untainted property, rather the offence of money laundering as defined under section 3 unambiguously prescribes that any one, who directly or indirectly tampers with the property connected with the proceeds of the crime projecting it as untainted property, is liable to be punished for the offence of money laundering.

Burden of Proof

Generally under the criminal law burden of proof remains on the prosecution. But being a special enactment to deal with the socio-economic offence this Act shifts the onus on the accused himself to prove that he is not guilty. The mandatory presumption to prove his innocence rests on the accused.[69] Now after amendment one addition has been made to the provision that in case of person other than the accused the court or the Authority may presume that the proceeds of crime in possession of the person was involved in money laundering. The change is dilution of presumption of 'shall presume'[70] against the person other than the main accused.[71]

The amended section provides for a unique blend of mandatory and non-mandatory presumption. Under clause (a) in case where any person is charged with the offence under section 3 it 'shall' be presumed that such proceeds of crime are involved in money-laundering. However, in the case of any person other than the person charged with the offence under section 3 the court or authority 'may

[68] 2010 Cr.L.J. 1960 Jharkhand High Court.
[69] Section 24, The Prevention of Money-Laundering Act, 2002.
[70] Section 4, The Indian Evidence Act, 1872.
[71] Prior to Amending Act of 2013, the burden of proving that proceeds of crime are untainted property was on accused, when he was accused of having committed the offence under section 3. In such cases the prosecution had just to establish the existence of the proceeds of the crime and once it was shown the burden rested on the accused of proving that proceeds of crime are untainted property.

presume'[72] that that such proceeds of crime are involved in money laundering. Hence the burden of proof in clause (a) is always on the accused unless the contrary is proved. And in clause (b) the burden of proof will depend on the presumption of the court. Mandatory presumption is applicable only in cases where the person is charged under section 3.

A question may arise that whether the section may be construed to mean that the prosecution has only to allege that an accused is indulging into money laundering or the section should be read so as to mean that only allegation is not necessary, some material evidence has to be shown. In *Hasan Ali Khan* v. *Union of India*[73] the Bombay high court in its order has given a glimpse of adopting a broad interpretation and has followed the view that the prosecution need to support the allegation with some material evidence.

Control Mechanism to counter the problem of Money-Laundering in India

In fact, the PMLA, 2002 provides for a comprehensive scheme for investigation, recording of statements, search and seizure, provisional attachment and its confirmation, confiscation and prosecution. The provisions of the Act have an overriding effect.[74] A person accused of money laundering is subject to broadly two parallel actions:

(i) Prosecution for Punishment under section 4 for the offence of money-laundering defined in section 3 and
(ii) Attachment of the Property involved in money laundering, under Sec. 5 off the Act.

The punishment specified for the offence of money laundering under Sec. 4 of the Act can be administered only after prosecution by way a filing a complaint/charge sheet before the special court and due trial and conviction; while on investigation if any property is suspected to have been derived out of the proceeds of crime, that property is placed under provisional attachment under Sec. 5(1) and a complaint is filed before the Adjudicating Authority within thirty days of such attachment.[75] The Adjudicating Authority must consider any complaint or application received by it and issue a notice only when it has reasons to believe that a person that committed an offence under Sec. 3 or is in possession of proceeds of crime, calling upon such person to indicate the sources of income, earning or assets out of which or by means of which he has acquired the property provisionally attached under Sec.5(1) or seized under Sec.17 or 18, along with evidence on which the person relies and other relevant information and particulars and to show cause why or all any of such property should not be declared to be properties

[72] Section 4, The Prevention of Money-Laundering Act, 2002.
[73] Criminal Bail Application No. 994 of 2011 decided by Single Bench of Bombay High Court on 12th August, 2011.
[74] Section 71, the Prevention of Money-Laundering Act, 2002.
[75] *Id.*, at Section 5(5).

involved in money laundering and confiscated by the Central Government.[76] However, an order of provisional attachment is operative for a period not exceeding one hundred and eighty days from the date of such order.[77]

Members having vast experience in the field of law, finance, accountancy or administration are taken to constitute Adjudicating[78] and Appellate Tribunal[79] under the Act. Therefore, the Adjudicating Authority and Appellate Tribunal are independent of the enforcement mechanism and ensure a matrix of independent scrutiny of the actions and orders passed by Enforcement Authority. There are sufficient safeguards to prevent abuse of the powers conferred on the Adjudicating Authority as well. For speedy trial of cases the provision has also been enshrined for establishment of special court[80] under the Act to try the offences under the Act. The provisions enabling the shifting of burden of proof and the empowering of the Directorate and Adjudicating authorities with provisions for attachment, adjudication and confiscation of properties/records are helpful to the government to achieve success in controlling if not containing money laundering in India. The Appellate Authority and the High Court may help the accused to have adequate protection from overreaching officials. Provision for three distinct set of authorities along with appellate tribunal makes it a unique piece of legislation.

Searches are made possible only after charges have been filed. This may hamper investigation though it is necessary to prevent harassment by enforcement officials. The provisions enabling two parallel avenue of adjudication might also lead to confusion and lack of cooperation between the agencies.[81]

Power to arrest has been conferred upon the Director, Deputy Director, Assistant Director or any other authorised officer. Of course this power has to be exercised on the basis of reason to believe. Reason to believe is a subjective concept. The Act does not answer how a junior officer under the Act shall have reason to believe and act on that basis discretely. Apprehension of abuse of this provision may not be denied. Provision for guidance of junior officers from senior ones like the directors under the Act would have provided a better administration of this Act.

Provisions against vexatious prosecution signify the concern of the legislation for the protection of innocent people. Even after the possibilities for frequent appeal may have the tendency of hindering the progress of enforcement agencies it cannot be denied that it is a welcome enactment in as much as it strikes a proper balance between individual rights and societal rights.

[76] *Supra* note 24, p.164.
[77] Section 5(1), the Prevention of Money-Laundering Act, 2002.
[78] *Id.*, at Section 6.
[79] *Id.*, at Section 27.
[80] *Id.*, at Section 43.
[81] K.N.C. Pillai, "*The Prevention of Money Laundering, Act, 2002*" in K.N.C. Pillai & A. Francis Julian(eds.) Prevention of Money Laundering-Legal and Financial Issues, The Indian Law Institute, New Delhi, 2008, p. 87.

The Preventive regime under the Act was very limited in its coverage. While only banks, financial institution and certain securities related services were brought under the requirement of record keeping and reporting requirement, certain business and professions are not covered. But the amendments made in 2013[82] has filled the gap as per the FATF recommendations, and European Anti-Money Laundering provisions as businesses such as beneficial owner, clients, chit fund company, dealer, certain real estate agents, precious stone, and precious stones, professionals etc. are covered.[83] Initially these activities were not covered under the Act in India. It has been mentioned earlier that these activities are high intensity zone for money laundering at large scale.

On the importance of the PMLA, 2002 and validating the constitutionality of attachment and confiscations made under the Act the Hon'ble High Court of Andhra Pradesh has given following observations:[84]

> "The huge quanta of illegally acquired wealth; acquired from crime and economic and corporate malfeasance corrodes the vitals of rule of law; the fragile patina of integrity of some of our public officials and state actors; and consequently threatens the sovereignty and integrity of the nation. The Parliament has the authority to legislate and provide for forfeiture of proceeds of crime which is a produce of specified criminality acquired prior to the enactment of the Act as well. It has also the authority to recognize the degrees of harm an identified pejorative conduct has on the fabric of our society and to determine the appropriate remedy for the pathology". In our considered view, the provision of the Act which clearly and unambiguously enable initiation of proceeding for attachment and eventual confiscation of property in possession of a person not accused of having committed an offence under section 3 as well, do not violate the provision of constitution including Article 14,21, and 300A and are operative proprio vigour... While the offence of Money-laundering comprises various degrees of association and activity with knowledge and information connected with the proceeds of crime and projection of the same as untainted property; for the purposes of attachment and confiscation (imposition of civil and economic and not penal sanctions) neither mens rea nor knowledge that a property has a lineage of criminality is either constitutionally necessary or statutorily enjoined..."

In the aforesaid observation the Hon'ble High court has rightly framed that retrospective confiscation of proceeds are within the constitutional framework and not violative of Article 20(1) of the Constitution of India as the produce acquires specified criminality of 'proceeds' prior to the enactment of the Act. The court further observed that The PMLA, 2002 is a special law and a self contained code intended to address the increasing scourge of money laundering and provides for confiscation of property derived from or involved in money laundering. The

[82] See, the Prevention of Money-Laundering (Amendment) Act, 2012 (2 of 2013).
[83] Section 2(1), The Prevention of Money-laundering Act, 2002.
[84] *B.Rama Raju* v. *Union of India* (2011) 164 Compcas 149 (AP); MANU/AP/0125/2011.

provisions of the Act are fair, reasonable and have sufficient safeguards, checks and balances to prevent arbitrary exercise of power and/or abuse by the authorities and provide several layers of scrutiny at various stages of the proceedings.[85]

After going through various provisions of the PMLA, 2002 and other international measures against money laundering the road ahead for the Act in present form does not appear smooth though, the Act has been amended thrice to cope up with the latest developments in international arena. For example, by limiting the scope of definition of money laundering by making it dependent on the references to the scheduled offences under the Act, limits its scope. A huge amount of proceeds of crime which are not covered under the Schedule can still be out of range of the Act.[86]

Challenges

Even after three amendments made to the Act enacted pursuant to India's obligation under various International Conventions, there is a large gap between the international requirement and practice and the provisions of the law. Post enactment three years time taken for enforcement[87] evidences that, the law was enacted in a half-hearted manner. However, it is a welcome step and very fine piece of legislation towards combating perhaps one of the greatest threats posed to the socio-cultural, legal and economic systems of not only India but also other countries of the world. It is the beauty of anti-money laundering legislations that it not only prevents the illicit flows from the country but it checks illicit flows coming to the country also. However, keeping into account the clandestine nature and innovative dynamics of illicit transactions of black money around the globe the prevention of money laundering in *toto* is as difficult as to find out the exact estimate of black money and money laundering. The nature of offence of money laundering requires the legislation and enforcement machineries too to be dynamic and innovative.

The social, political and economic repercussions of money-laundering would be unmanageable if continued unabated. It is capable of undermining the integrity of the financial system which can cause (depending on the extent and the rapidity) the loss of confidence and can have devastating consequences at national and international level.

[85] *Ibid.*
[86] *Id.*, section 2 (1)(y).
[87] The Prevention of Money-Laundering Act, 2002 came into existence on 17th January 2003 with the assent of the President of India but came into force on 1st July 2005.

Hate Crimes in India

Debajit Kumar Sarmah *

Introduction

Hate Crimes as a classified offence is more commonly used in the context of European countries and United States[1]. In the post independence times increasing incidents of hate crimes relating to religion, caste, ethnicity and racial differences are now being reported in India as well.

Also called as biased crimes, hate crimes in common parlance are the criminal manifestations of prejudices. Prejudices are formed against specific groups of people in society based on their identity and affiliations. Identity and affiliations could be based on faith, caste and class, ethnicity and race, sexual orientation, culture, political and social consolidations[2]. A striking feature of hate crimes is that of economic domination over limited resources and opportunities[3]. Therefore it is apparently against minority sections of the society but not necessarily the conflict is majority vs. minority. This could even be minority against majority and also minority against minority.

Hate crime is one which uses power and oppression to reinforce hierarchies in a given society by attempting to ensure domination or control by perpetrator's group and subordination of victims. What is more motivating in hate crimes is affiliations and identity of the victim rather than actual hatred against individuals[4]. Membership of definite consolidation is a crucial denominator in identifying victims of hate crimes worldwide. It is a fight for asserting relative social and economic domination and to reinforce inequality and stratifications. An important impact of hate crimes is that it leaves an indelible fear and insecurity among people being affected by it.

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1 This assumption is based on the premise that Hate Crime or Bias Crimes are more often defined in the penal statutes in U.S.A and European Countries. Researches in the domain of Hate Crime have been conducted by Paul Brass, AshutoshVarshney, Gyandra Pandey, Ashgar Ali Engineer, A.G. Noorani etc. However, most of the research studies conducted in India are more oriented towards political outcomes rather than judicial standpoints.

2 Hate Crime Statistics Act, 1990(USA)

3 Martina Fischer, Civil Society in Conflict Transformation: Ambivalence, Potentials and Challenges ' *Available at* http/www.berghof-handbook.net/documents/publications/fischer_cso_handbook.pdf.(visited on April 15, 2015)

4 Girjesh Shukla, *Exploring Hate Crimes in India* 34(1st Edition, Radha Publications)

Definition of Hate Crime

Hate crime is not a criminal offense that can be comprehended strictly based on its behavioural manifestations, statistical information, or causes. Hate crime is a complex social problem that desires much research pertaining to the manner in which this behaviour is executed. No singular definition can perhaps give a clear picture, and therefore multifarious definitions need to be examined for a definite assessment about Hate Crimes.

Some of the notable definitions of hate crimes are:

i) 'Crime/violence committed because of the victim's actual or perceived race, colour, religion, disability, sexual orientation or origin[5]';
ii) It is an offence that 'manifests evidence of prejudice based on race, religion, disability, sexual orientation or ethnicity'[6];
iii) 'The crimes of hate transcend their immediate victims and cast a shadow of fear and terror throughout entire communities. It creates not only obvious physical damage inflicted during a hate motivated attack but also the fear, the terror that one experience when faced with a passionate rejection because of what one is. An absolute stranger looks at you and hates you'[7];
iv) 'A criminal act motivated by the victims' personal characteristics, such as race, national origin or religion.'[8];
v) The exclusive definition of hate crimes in United States is that 'the defendant intentionally select a victim or in case of property crime, the property that is object of crime, because of the actual or perceived race, colour, religion, natural origin, ethnicity, gender, disability or sexual orientation of any person'.[9]

Hate Crime and Traditional Crime

Hate crimes can be distinguished from traditional crimes based on their effects on the target population and on the society as a whole. In non-hate crimes victim usually is selected based on non-personal reasons and is attacked for a random, impersonal reason. But in hate crimes the victim is selected based on specific, personal reason, such as the victim's race, gender or sexual orientation. As a result, the hate crime victim suffers grater emotional and psychological damage. It is not unusual for a hate crime victim to experience withdrawal, higher levels of depression, anxiety, feelings of helplessness, sleep disorders, loss of confidence, and a sense of isolation.

5 Violent Crime Control and Law Enforcement Act, 1994(USA)

6 Hate Crime Statistics Act, 1990(USA)

7 Troy A. Scotting , *'Hate Crimes and Need for Stronger Federal Legislation'*, *Available at* http/www.uakron.edu/law/lawreview/v34/docs/scotting 344 pdf. (Visited on April 10, 2015)

8 Phyllis B. Gerstenfied, *Hate Crimes: Causes, Control and Controversies* 28 (2004, Sage Publications)

9 US Violent Crime Control and Law Enforcement Act, 994; 28 US Code

Hate crimes have much harmful effect on the society than conventional criminal offences as they are seen to be *'Message Crime'* in relation to the fact that members of a certain group are not wanted in a particular neighborhood, community, workplace, or college campus[10]. This alsocreates a kind of fear psychosis that members of a particular community could become a victim of it at any given point of time. It further generates a feeling of insecurity among the target population and has an isolating effect on the target population from the majority of people in a society. In a nut shell it can be said that, hate crimes affect shared value of equality and fraternity among people and disturb the peaceful existence of members in a society.

Sanction for Hate Crimes

Contemporary debate surrounding hate crimes has given rise to two schools of thought regarding sanction for hate crimes-one is of severe sanction or punishment owing to the fact that *hate motivation* if not punished severely could hardly have any deterrent effect on the society and the second school of thought opine that such crimes should be penalized similar to that of any other crimes in society under the existing penal statutes[11].

One of the strongest criticisms against bias crime law is that enforcement of the same could be counter-productive. Such laws have the inherent danger of being disproportionately used against the very minority groups they were primarily designed to protect. In fact Wisconsin Supreme Court Justice Shirley Abrahamson, author of a dissenting opinion in the *Wisconsin* v. *Mitchell*[12]held that hate crime laws will ultimately be used against the very groups they are designed to protect, and this case illustrates this phenomenon.

The second school of thought points out that criminal law do not merely punish defendants on the basis of harm being caused but severity of punishment depends upon *mens rea,* or criminal intent. Since varying degrees of punishment are prescribed under statutory penal laws, a person should not be punished for his 'character' or 'motivation' but for the 'intent' under the existing penal statues.

The enhanced punishment of the hate crime offender is based on several rationales in criminal theory.

i) The greater wrong doing thesis, which posits that a hate crime harms not only its immediate victim(as all crimes do), but also causes greater injury to the victim's community and society at large;

[10] Frederick M. Lawrence, *Punishing Hate: Bias Crimes under American Law,* PP. 39-41(Harvard University Press)

[11] Fredrick M. Lawrence, '*The Hate Crime Project and Its Limitations: Evaluating the Societal Gains and Risk in Bias Crime Law Enforcement* '*Available at* http/www.ssrn.com.(visited on April 15, 2015)

[12] 508 U.S. 476 (1993)

ii) The expressive theory of punishment, which suggest that the criminal law can and should be used as a toll for expressing society's commitment to the norm against prejudice;

iii) The culpability thesis, which argues that hate crime offenders are more blameworthy than offenders who commit crimes without hate motive, and;

iv) The equality thesis, which sees hate crime law as a means of evenly disturbing the 'State- produced good' of protection against crime.

Theoretical Analysis of Hate Crimes

The following mainstream theories of Criminology explain Hate Crime as a phenomenon in society:

Differential Association Theory[13]

The Differential Association Theory was developed by *Edwin H. Sutherland,* who was a sociologist and a professor. He created the theory to explain the reasons why people commit crime. The theory is based upon the idea that criminals commit crimes based upon their association with other people. Basically, criminal behavior is learned by associating with other criminal individuals. Since hate crimes are committed based on identity and affiliations, people from same identity and affiliation may also at times associate to commit crimes against an another community.

Labeling Theory[14]

Propounded by *Howard Becker and others,* in this theory it is said that deviance does not exist in isolation, the social groups create deviance by making rules violation of which constitutes deviance and by applying these rules to particular people and labeling them as outsiders. Hate Crimes and its effect on the society are closely related to this theory because individuals self-concept is largely derived from the responses of others they tend to see themselves in terms of the label. Perception of police regarding segments of population as criminals is a classic example of the implications of the labeling theory.

Constructionist Theory[15]

Propounded by *Jean Piaget,* the constructionist perspective is based upon the philosophy in which one's social interpretations of society influence their behavior or actions. This social interpretation constructs their reality or world and their subjective interpretations determine what is or is not considered to be deviant behavior posits that individuals that participate in deviant behavior are attracted to this type of behavior for several reasons. It is possible to be seduced by deviant behavior and to find a form of fulfillment in participating in unconventional

[13] See Roger Hopkins Burke, *An Introduction to Criminological Theory,* Third Edition, William Publishing, U.K. 2009

[14] *Ibid*

[15] *Ibid*

behavior. Individuals may also choose to commit a crime with the goal of retaliating to humiliation or limitations placed upon them within their social interpretations which is very common in cases of Hate Crimes.

Constructionists desire to examine the construction of the social world in deviant's and the various influences affecting racial, ethnic, and gender interpretations as well as the environmental and historical materialization of being labeled a deviant. Primarily a theory of Knowledge, this theory influenced the Labeling Theory to a large extent. The constructionist perspective of deviant behavior analyzes the conceptualization of appropriate versus inappropriate behavior.

Social Interaction and Deviant Behavior Behavior[16]

American Sociologist *Robert Merton* gave this theory. It is believed in this theory that, whether it be deviant or not, is judged and held accountable to the traditional normative context of conventional conduct. Social and cultural structures generate pressure for socially deviant behavior upon variously located in the social structure. The social conflict that exists when participating in the course of judging what is considered to be deviant or non-deviant behavior is extremely ambiguous. With that being said, those that are typically on the higher end of the pecking order in relation to social status will discover that their perspective of normative behavior is considered the reference of what is acceptable conduct.

Merton also attributes social disorganization and anomie in a manner of adaptation typologies to represent the various influences of deviant behavior and to adapt to the various set of circumstances and conditions presented in relation to lower class communities, lack of opportunities, and economic difficulties may lead to crimes according to him.

Culture Conflict Theory[17]

Propounded by *Thorsten Sellin*, this theory is based on the assumption that rapid urbanization has created conflicts in society in which law essentially embodies the normative structure of the dominant cultural and ethnic groups. Criminal Law essentially contains crime norms which reflect mostly the values of the groups successful in achieving control of the legislative processes. The basic tenet of the Culture Conflict theory can be related with the process of handing perpetrators and victims of Hate Crimes on the basis of the conduct norms which mirror the socio-cultural values of the dominant cultures in society.

Impact of Hate Crimes

Hate crimes affect the victim not only physically but also psychologically and attitudinally. Not only the victims but also the perpetrator of hate crimes undergoes a psychological intensity of frustration unless harm is caused to the people against

[16] *Ibid*
[17] *Ibid*

whom they have nurtured such hatred and aftermath of such incidents. The stigmatized population who has been the victims of hate crimes may also experience clinical and social maladjustment problems requiring psycho-social interventions along with legal protection. The characteristic of distinctiveness in relation to a person's affiliation of a different group membership is responsible for hate violence and not offender's individual or group characteristics. The distinctiveness is also in terms of the fact that a parallel crime may be any of a number of factors whereas bias crimes are motivated by a distinctive, specific, personal and group-based reason i.e the victim's real or perceived membership in a particular group.

International instruments against Hate Crimes

There are major international instruments ratified by countries including India which are significant in prevention and control of Hate Crimes. These instruments give a global commitment against Hate Crimes and a framework to enact and implement municipal laws relating to Hate Crimes. Some of them are briefly mentioned below:

Universal Declaration of Human Rights, 1948

Freedom of expression is guaranteed in Article 19[18] of the Universal Declaration of Human Rights. Although the Universal Declaration of Human Rights does not expressly prohibit advocacy of racial or religious hatred, the right to freedom of expression is subject to the restrictions found in the general limiting clause, Article 29[19], as well as in Article 7[20], which prohibits incitement to discrimination. The history of those provisions indicates that most of the drafters understood them to allow restrictions on the advocacy of hatred. Although the Universal Declaration does not contain an anti-hate speech clause, its equal protection provision arguably allows restrictions on hate speech.[21]

[18] Universal Declaration of Human Rights, 1948 Article 19, which says that: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

[19] *Id.*, Article 29, which says that: (1) Everyone has duties to the community in which alone the free and full development of his personality is possible.
(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

[20] *Id.*, Article 7, which says that: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

[21] Akhil R. Amar, *"The case of the Missing Amendments: R.A.V. v. City of St. Paul"*, 106 contd...

International Covenant on Civil and Political Rights, 1966

Article 19[22] of the Civil and Political Rights Covenant both protects and limits freedom of expression. While Article 19 includes general standards relating to restrictions on freedom of expression, Article 20 contains a specific prohibition on two types of expression. It proscribes war propaganda[23], as well as the advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence.

Article 2[24] and 20(2) are not the only provisions of the Civil and Political Rights Covenant which require states to take action to protect people from violation of their human rights by private persons; other Articles do so as well. Article 6 of the Covenant, after declaring that everyone has the inherent right to life, states: "This right shall be protected by law." Article 17 is another of the Articles requiring governments to take action to protect individuals against violation of their rights by private persons.

International Convention on the Elimination of All Form of Racial Discrimination, 1963

The International Convention on the Elimination of All Forms of Racial Discrimination seeks to abolish racial discrimination through two methods: prohibiting incitement to racial hatred, and promoting education.

(Harv. L. Rev. 124, 151-61. (1992)).

[22] UDHR, 1948 Article 19, clause (1)&(2), which says that: (1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

[23] *Id.* Article 20(1), which says that: Any propaganda for war shall be prohibited by law.

[24] *Id.*, Article 2, which says that: (1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (2) Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps. in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant. (3) Each State Party to the present Covenant undertakes: (i)To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; to ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (ii) To ensure that the competent authorities shall enforce such remedies when granted.

Hate Crimes in India

Indian society is a diverse society in terms of race, religion, ethnicity and other considerations. Indian society is on the one hand famous for its composite culture and on the other hand pluralistic and multifaceted to the extent distinct from any other civilization in the world[25]. Geographical diversity and stratifications based on different religions, ethnicity, caste, race and cultures have made the country unique and distinct. One can see lot of differences in respect of cultures and rituals between North, South, East, West and North-Eastern areas. People belonging to Hinduism, Islam, Christians, Jains, Jews, Parsis, Sikhs as well as indigenous tribal religions cohabit in this country. And therefore struggle for limited economic resources and political and social opportunities have given rise to conflicts at various points of history among various segments of society.

Noted historian *Romila Thapar* argues that in ancient India there were few religious or caste violence. During the medieval period in India hate violence did occur mostly based on religions and castes. Important feature of such violence was that those were not between two major religions i.e. Hindu and Muslim but often happened between sub-sects of Hindu or Muslims. During 10th century A.D. violence in Gujarat were between two sects of Hindus only. Medieval India hate violence though not much diverse and politicalised but still they had greater role in creation of superstructure of hate violence.[26]

The State and State institutions have also played a crucial role in the modern India hate crimes. The involvement of media and political forces has transformed the very nature of hate violence into more widespread, traumatic and intense. This is evident from the linguistic violence of 1960s, Anti-Sikh riots of 1984, Hindu-Muslim riots of 1992 and caste riots of Bihar during 1990s. In the past they were openly state-sponsored in the name of religion, whereas in modern India, though theoretically they are not state sponsored but practically they are[27].

Indian Culture has evolved and is still evolving through a process of assimilation and amalgamation of the different cultural influxes-the Aryans, the Sakas, the Huns, the Pathans, the Mughals, and the Europeans at different points of history. All these developments in history have contributed towards making the composite culture of India and hence several cultural identities based on language, race, tribe, caste, religion, and region have risen in the country. In this process of transformation, the pattern and pace of developments of different identities have resulted at times into conflicting dimensions. *Professor Dipankar Gupta*, acclaimed Sociologist, emphasizing the role of political vested interests in precipitating ethnic conflicts in India observes as below[28]:

[25] See the official portal of Government of India *available at* http/www.india.gov.in/knowindia/culrture_heritage.php.(visited on April 27, 2015)

[26] *Supra* note 5at pp 1

[27] Paul R. Brass, '*Development of an Institutionalized Riot System in Meerut City, 1961 to 1982*' EPW VOL 39 No. 44 October 30(2004)

[28] Dipankar Gupta, '*Communalism and Fundamentalism: Some Notes on the Nature of Ethnic Politics in India*', 'Economic and Political Weekly, Annual Number, March

contd...

'The manifestation of ethnicity in Indian politics is not so much an outcome of popular grassroots passions as it is a creation of vested political interests. The reason of stressing this is because it is often uncritically accepted that politicians at the secular centre are holding back the popular surge of communalism, for ethicized politics is a natural inclination of the Indian people. On the other hand, I argue that communal ideologies are hatched up at the perennially hot house top, then broadcast below, and only sometimes do they take root. On many other occasions, they languish as amorphous judgments, without concrete action prescriptions'.

'Sanskritisation',[29] a terminology coined by Prof. M.N. Srinivas also requires reference here as many believe that along with other factors this distinct phenomenon in respect of Indian society has also given rise to caste conflicts especially in North-Indian states. The term 'Sanskritisation' stands for a process of social mobility whereby people of lower castes collectively try to adopt upper caste practices and beliefs to acquire higher status and in the process some conflicts are inevitable.

Some of the worth mentioning conflicts in India which assumed the characteristics of hate violence are noted below:

i) During 1960s it was a dominant linguistic conflict in Punjab and in the late 1970s and early 1980s it was rekindled by the rivalry between competing Sikh sects, the Nirankaris and the Akalis. Subsequently, it assumed the character of religious and economic polarization in the shape of Anandpur Sahib Resolution;
ii) In Kashmir the initial movement of State's political and economic neglect has led to strife among Muslims and Hindus and Hindu Kashmiris left the valley;
iii) Indigenous people identity conflicts do continue in various parts of North-East. Recently in Bodoland area of Assam, communal violence erupted among tribal population and immigrants from Bangladesh owing to the question of identity as well as economic opportunities available.;
iv) The Ayodha conflict on the question of Ram Janambhmi and Babri Masjid is well known and recently the Allahabad High Court judgment over the conflict is more based on the principles of natural justice i.e.' Justice, Equity and Good Conscience' rather than strict interpretation of laws of the land.
v) The movements of indigenous peoples in various states in India like Jharkhand, Chhattisgarh, Andhra Pradesh etc. have assumed the characteristics of hate violence named as insurgencies.;
vi) Language issues have taken violent turn among Nepali/Gurkha population living in Darjeeling and Sikkim.

In view of the above it can very well be said that India's economic and political consolidation over the decades since independence have at times also led to alienation and disintegration among different identities and affiliations. This has

(1991) p. 573

[29] *Supra* note 5at p 1

resulted into hate violence at times affecting integration and progress of the country.

Hate Crimes in recent years in India

Religious bias

According to the data released by the Ministry of Home Affairs in India, Communal violence in India has registered a jump with incidents rising by 24% and related deaths too up by 65% in the first five months of 2015 as compared to the corresponding period of last year. The states that reportedly accounted for a major portion of the increase in communal clashes were Uttar Pradesh, Haryana, Maharashtra and West Bengal[30]. As per latest data collated by the Union home ministry, 287 communal incidents were reported from across the country this year until May 31, as compared to 232 over the same period in 2014. Deaths due to communal clashes during January-May 2015 rose to 43 from 26 and the number of injured too were higher at 961 from 701 in the first five months of last year.

Racial bias

The Bezbaruah Committee, headed by Shri M.P. Bezbaruah, Member, North Eastern Council, was set up in February 2014 after the death of *Nido Tania*, a 19-year-old student from Arunachal Pradesh, who died in Delhi on January 29, 2014. The Committee's mandate was to listen to the issues raised by people from Northeast India living in other areas of the country, especially metro cities. The committee was also asked to suggest measures which could be implemented by the Government of India. The Committee filed its report with Ministry of Home Affairs on July 11, 2014. Key recommendations of this Report are promulgation of a new law against racial discrimination or amendment in the IPC, creation of fast-track courts for handling the cases relating to the North East people, creation of a special squad supervised by the North East Special Police Unit for ensuring speedy justice in criminal cases etc. Many incidents of racial discrimination have also been reported against Indians in foreign countries, latest being 80 year old Piara Singh from India being assaulted outside the Southwest Fresno Gurdwara in USA, where the accused have been sentenced to 13 years of imprisonment.

Caste bias

According to Union Home Ministry of India, 33,719 cases, 33,655 cases and 39,408 cases were registered under crime committed against persons belonging to Scheduled Castes (SCs) and a total of 5,756 cases, 5,922 cases and 6,793 cases were registered under crime committed against persons belonging to Scheduled Tribes (STs) during 2011, 2012 and 2013 respectively, showing a rising trend[31].

[30] *The Times of India* dated July 22, 2015

[31] NCRB data

Hate Crimes in India & the Law

Constitutional Premise

The Preamble of the Indian Constitution outlines the basic philosophy of 'social, economic and political justice' and strives for 'Equality of Opportunity'. The same is being guaranteed through many of the substantive provisions. Political justice is guaranteed by universal adult suffrage without specific qualification Article 326. Economic justice is guaranteed primarily through Equality clause (Article 14) and through Directive Principles of State Policy. Constitution in its Article 15 prohibits discrimination by the State only on the basis of religion, caste, sex or place of birth. The Parliament has enacted special legislations in the interests of SC/ST/Backward Classes as well as Women and Children to further ensure equal protection of laws within the framework of equality clause i.e. Article 14. Fraternity is another objective in the Preamble which was further broadened through 42nd Amendment of 1976 by adding on the word 'integrity' in to the Preamble. Liberty of thought, expression, belief, faith and worship etc. is further provided by the Constitution for the fullest development of potential of individuals.

Affirmative action and positive discrimination is ensured though Indian constitution in the interests of dignity of individuals and group irrespective of population concentration in Article 15 and Article 16. Historical inequalities have been attempted to be addressed by guaranteeing individual political rights and right to vote irrespective of their caste, creed of socio-political status. Freedom of Speech and Expression is another significant fundamental right guaranteed through constitutional premise. Group Rights, such as freedom of association, rights of religious, ethnic and cultural sects etc. has been expressly insured not only on the political fronts by having detailed enumeration in the constitution but also political participation of marginalized sections such as dalits and tribals through reserved seats in the Legislative bodies under the Representation of People Act, 1950.

The Indian Penal Code, 1860

Chapter VIII of the Indian Penal Code in its various provisions from Section 141 to Section 160 deals with 'Offences against the Public Tranquility'. It contains various provisions relating to Rioting, Assaulting or obstructing public servant when suppressing riot, etc, Rioting armed with deadly weapons, promoting enmity between different groups on grounds of religion, race, place of birth, residence, language etc. and doing acts prejudicial to maintenance of harmony, Imputations, assertions prejudicial to national-integration so on and so forth. Chapter XV of the IPC also lists 'Offences relating to Religion' from Section 295 to Section 298. Section 505 IPC: Clause (2) deals with Statements creating or promoting enmity, hatred or ill-will between classes.[32]

[32] Section 505 IPC: Whoever makes, publishes or circulates any statement or report containing rumour or alarming news with intent to create or promote, or which is likely to create or promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, feelings of enmity, hatred or ill-will *contd...*

Representation of People Act, 1951 (Corrupt practices)

Under Section 123 of this Act the promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate shall be deemed to be corrupt practices.

The Religious Institution (Prevention of Misuse) Act, 1988

This law was promulgated by the President on 26th May, 1988 to deal with the misuse of religious Institutions and criminalises various activities thereunder.

Prevention of Seditious Meetings Act, 1911

The objective of this legislation is to consolidate and amend the law relating to the prevention of public meetings likely to promote sedition or to cause a disturbance of public tranquillity. By this Act power has been given to State Government for declaring by notification areas where such law will come into force in their respective territories. Section 4 of the Act regulates such meetings and compulsory notice is required for any such meeting. Violation of any order under this Act is punished by up to six month imprisonment.

The Unlawful Activities (Prevention) Act, 1967

This is an Indian law aimed at effective prevention of unlawful activities associations in India. Its main objective was to make powers available for dealing with activities directed against the integrity and sovereignty of India. The Act makes it a crime to support any secessionist movement, or to support claims by a foreign power to what India claims as its territory. It includes the following:

i) Unlawful activity, in relation to an individual or association, means any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise);
ii) Which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a

between different religious, racial, language or regional groups or castes or communities, shall be punished with imprisonment which may extend to three years, or with fine, or with both.
(3) Offence under sub-section (2) committed in place of worship, etc.-Whoever commits an offence specified in sub-section (2) in any place of worship or in an assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.]
(Exception) —It does not amount to an offence, within the meaning of this section when the person making, publishing or circulating any such statement, rumour or report, has reasonable grounds for believing that such statement, rumour or report is true and makes, publishes or circulates it 8[in good faith and] without any such intent as aforesaid.]

part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or:

iii) Which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or;

iv) Which causes or is intended to cause disaffection against India.

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Bill, 2014

The Lok Sabha already passed the bill seeks to amend parent law i.e. the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. This Bill aims to prohibit the commission of offences against members of the SCs and STs and adds provisions for establishing special courts for the trial cases of such offences and the rehabilitation of victims.

The Judicial Approach

In Ramji Lal Modi v. *The State of U.P.* [33] the Supreme Court upheld Section 295A of the Indian Penal Code only because it was read down to mean that aggravated forms of insults to religion must have a tendency to disrupt public order. Similarly, in *Kedar Nath Singh* v. *State of Bihar*[34] Section 124A of the Indian Penal Code was upheld by construing it narrowly and stating that the offence would only be complete if the words complained of have a tendency of creating public disorder by violence. It was added that merely creating disaffection or creating feelings of enmity in certain people was not good enough or else it would violate the fundamental right of free speech Under Article 19(1)(a). In *Dr. Ramesh Yeshwant Prabhoo* v. *Prabhakar Kashinath Kunte and Ors,* [35] Section 123(3A) of the Representation of People Act was upheld only if the enmity or hatred that was spoken about in the Section would tend to create immediate public disorder and not otherwise.

In *S. Khushboo* v. *Kanniamal and Anr.*[36] The Indian Supreme Court stated, in paragraph 45 that the importance of freedom of speech and expression though not absolute was necessary as we need to tolerate unpopular views. This right requires the free flow of opinions and ideas essential to sustain the collective life of the citizenry. The judgment is important in that it refers to the "market place of ideas" concept that has permeated American Law. This was put in the felicitous words of Justice Holmes in his famous dissent in *Abrams* v. *United States,*[37] thus:

> "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution".

[33] AIR 1957 SC 620
[34] *Supp.* (2) S.C.R. 769 ,1962
[35] 1996(1) SCC 130
[36] (2010) 5 SCC 600
[37] 250 US 616 (1919)

Conclusion and Suggestions

Hate Crimes as understood from the above discussion lead us to the conclusion that these crimes are the ones committed out of prejudices formed against segment of population on the basis of religion, caste, ethnicity, sexual orientation, linguistic patterns, racial diversities etc. These crimes leave an irreparable damage not only to singular individuals but to the society at large.

Without peace development is unthinkable and in a state of fear and insecurity the entire development process gets affected and thus the progress of the society gets hampered. India has witnessed number of Hate Violence/Crime in the past in the form of Communal, Caste and Ethnic Conflicts. Communal Violence is a phenomenon of national presence needing national strategy. Caste Conflicts have given rise to negative political mobilization in different parts of the country. Ethnicity has also led to strife in modern India.

In view of the above the following suggestions can be made for prevention and control of Hate Crimes in India:

i) Community Policing i.e. involvement of community in maintaining peace and harmony has proved to be effective in many parts of the country;

ii) Hate Crimes is not merely a law and order problem but a social problem. Law Enforcement Agencies need to recognize it as such;

iii) Psycho-social counseling is a good measure to control Hate Crimes;

iv) Disparities and inequalities in socio-economic and political opportunities need to be addressed to avoid Hate Crimes;

v) Value based quality education at the elementary and secondary levels will help in prevention of Hate Crimes in society.

CRIME VICTIMS IN CROSS FIRE: Alternate Intervention Strategies in a Criminal Trial

Saurabh Rana*

Introduction

The world that we see today evolved from a time when it was all flesh & teeth. As men marched into civilization, they began to attach sentient values to some of their folkways and customs, which in reality were nothing more than their wonted ways of doing things. The inception of religion, conceivably around 25,000 BC, resulted from intelligent men's reluctance to accept themselves as the supreme planner and controller of the world. Thereafter, any act which breached religion or any customary practice was considered to be a 'crime'. Hence, the history of crime is as old as mankind itself. This evil has existed since the dawn of civilization.

In the civilized world today, the criminal law has been maintained and mandated by different instrumentalities of the state. In different times and at different places, the person committing the crime and the victim thereof had been treated differently. In ancient India, a traveler in scarcity of food could, without permission of the owner, take 2 sugarcanes, 2 cucumbers, 5 mangoes and a handful of dates/corn/wheat/rice without being liable to any punishment.[1] However, England wherefrom we substantially borrow our legal system, had formerly an extremely harsh collation of criminal law operating against the accused. As Fitzjames Stephens tells us, in his time, there were 160 Capital offences without benefit of clergy for actions which men were daily liable to commit[2]. During 10 years of the reign of James I (1609-1618), nearly 1500 persons were hanged in the city of London alone.[3] However, as the time passed, the common law system slackened the apparent bias against accused through manifold legal and constitutional maxims, rules of procedure and practical adjustments of one sort or the other.

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1 Manusmriti, VIII- 341; Verses given by sage Manu on how to lead the life according to vedic sanatan dharma, in the vedic state of Brahmavarta, which were later compiled in the form of Manusmriti.

2 FitzJames Stephens, *Juridical Society Paper*, Vol. I, 468

3 *Jeafferson Middlesex County Records*, Vol. II, 16- 21

Be that as it may be, one thing which had conspicuously been absent throughout was the institutional concern for the victim[4] of the crime, and this has been true both for the ancient Indian Legal System[5] as well as the Common Law System[6], which we scrupulously followed while setting-up our contemporary legal system.

In earlier societies, the random relationship between the offender and the victim *au fond* reflected a perennial raw struggle both for survival and ascendancy. With the occurrence of barter economy, the money and goods were accepted as symbolic compensation and restitution of crime in place of the erstwhile corporeal punishment; however, failing that for myriad reasons, the victim had always been almost a 'forgotten' player in the Criminal Justice Administration System (hereinafter referred to as CJAS). It has been the universal observation that when the State instrumentalities take-over the responsibility for enforcement of law and order and there have been more than one theories behind it viz. crime considered as a wrong against the whole society, cost of crime ultimately borne by the State's *welfare-avataar* etc., the victim becomes merely an 'accuser' and the punishment purports to profit none except the law-enforcing State. It is more so because the intrinsic purpose of the State in this plenary mission appears to be confined to maintain public confidence in CJAS and preserve its legitimacy, hence it does not hover beyond the 'proof' or 'no proof' of the guilt of the accused.

This lineament of State instrumentalities inevitably and unfailingly marginalizes the role of the victim and effectively relegates him to a mere witness status. Today, as the drama of criminal trial unfolds before the exasperated eyes of victim, he discovers that he is rather treated as an appendage of a system 'appallingly out of balance'. He seems to learn the hard way that somewhere along the line, the system itself has lost the track of the simple truth that law- both substantive and procedural- is supposed to be fair, protecting those who obey it while punishing those who disobey it. The tremendous consequences accorded to the accused in our CJAS must be rendered even with the victim's rights- so as to give the bereaved victim a chance to grieve as he struggles to overcome insuperable inner torment. This crucial balance shall in the ultimately analysis proffer a

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4 For the sake of simplification, let us assume that victim here includes only the person directly affected by the crime and his family consisting of his relatives.

5 *Supra* note 1 at IX-249, XI-228 says:

;koku o/;L; o/ks rkokUo/;L; eks{k.k
v/keksZ u`irsn`"Vks /keZLrq fofu;PNr% [IX 249]
(A King should never punish an innocent and should never allow guilty to go unpunished)
;Fkk ;Fkk ujksM+/keZa Lo;a dRokuqHkk"r
rFkk rFkk RopsofgLrsuk/kesZ.k eqP;r [XI 228]
(If a man confesses to commit a sin, he castes it off as a snake castes off his slough)

6 As observed by George P.Hetcher, *The Place of Victims in the Theory of Retribution*, 3 Buffalo Criminal Law Review 51 (1999-2000), "Remarkably, the theory of criminal law has developed without paying much attention to the place of victims in the analysis of the responsibility or in the rational for punishment".

manifold mechanism for our society to heal itself through its strongest resource- the people.

Here, we shall examine a system that bends over backwards to protect those who 'may' be innocent, while ignoring 'the innocent'. victims. For the sake of convenience, we divide our discussion into 3 parts i.e. pre-trial position of victim, during-trial position of victim and finally, what the conclusion of trial brings to the victim, including the measures which can be taken to address his predicament at the appropriate places.

Position of the Victim Before the Trial Starts

The general assumption about crime is that it begins and ends with an act causing harm. This is rather a liberal approach to criminal liability. There is another way to cogitate about crime. Crime establishes a particularly relationship between the criminal and the victim. The criminal thereby gains a kind of dominance over the victim, which continues after the crime is committed. The victim often fears his return and feels insecure even in his own homestead. The process of arrest and investigation prima-facie relieves this dominance of the offender over the victim.

Law provides two channels to a victim for putting the CJAS into motion- an FIR (First Information Report) to the police under section 154 of the Criminal Procedure Code, 1973 (hereinafter referred to as CrPC) or a complaint under section 200 CrPC before the court of law. Theoretically, the victim is to be encouraged to report his grievance, which raises a legitimate expectation that he will be treated sympathetically and with a lot of concerns by the concerned State-agencies. Perhaps the most troubling issue that confronts a victim is the gulf that often emerges between this idealistic expectation and the grim reality. Making complaint to the court of law under section 200 CrPC first brings financial constraints in engaging an advocate for his representation in the court of law as the common man of this country still feels the lack of both knowledge and courage to come to the court on his own and make such complaint which though as prescribed by section 2(d) of CrPC can even be made through oral allegations before a magistrate with a view to his taking action under the CrPC. People generally do not carry a positive image of the judiciary especially that functioning at the district level. Among many others, one of the complaints against the magistrates is that they are not competent enough and also that they come from upper and upper-middle class families and therefore, do not do justice to the commonality.[7] After that, it poses procedural restraints to him in producing evidence (which may sometimes include/require scientific evidence) and witness/es in the court on his own so as to make the court satisfied to issue process against the accused under section 204 CrPC.[8]

[7] K. L. Sharma, *Legal Profession and Society: A Study of Lawyers and their Clients* in Indra Deva (eds) "Sociology of Law", Oxford University Press, 2005

[8] Though there is another way open to the Magistrate which is to order investigation by police under section 156(3) Criminal Procedure Code, 1973 without taking cognizance of contd...

Hence right from the British times, the course ordinarily known to the common man of this country is to go to a police-station and tell about his affliction at the hands of the offender, and thereby set the evidence-collecting-mechanism of the state in motion for his cause. Unfortunately, police also has miserably failed to inspire confidence in the rank and file of the society. It is a common perception with the populace that upon the information of the incident by the victim or by any other person, the registration of FIR (the First Information Report) under section 154 CrPC is done in a preferential, weighted and selective manner by the police, may be because the police is over-burdened with multiformity of roles to perform or because of the rampart corruption and political interference in its day-to-day working. Commenting upon this dreadful state of affairs, the Supreme Court observed that the number of FIRs not registered is approximately equivalent to the number of FIRs actually registered. Keeping in view the NCRB figures that show that about 60 lakh cognizable offences were registered in India during the year 2012, the burking of crime may itself be in the range of about 60 lakh every year. Thus, it is seen that such a large number of FIRs are not registered every year, which is a clear violation of the rights of the victims of such a large number of crimes. Burking of crime leads to dilution of the rule of law in the short run; and also has a very negative impact on the rule of law in the long run since people stop having respect for rule of law. Thus, non-registration of such a large number of FIRs leads to a definite lawlessness in the society. According to the Statement of Objects and Reasons (of the CrPC), protection of the interests of the poor is clearly one of the main objects of the Code. Making registration of information relating to commission of a cognizable offence mandatory would help the society, especially, the poor in rural and remote areas of the country.[9]

Non-registration of FIR becomes a further compounded and multifarious issue when the person against whom the allegations are made happens to be rolling in riches or commanding cogency in the society. Article 14 of the Constitution of India guarantees to all persons '*equality before the law*' and '*equal protection of law*' within the territory of India. Police officer must register an FIR immediately on receiving credible information about the commission of a cognizable offence. The Apex Court observed in this respect that if any information disclosing a cognizable offence is laid before an officer-in-charge of a police station satisfying the requirements of Section 154(1) of the Criminal Procedure Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. In fact, the police officer has to draw his satisfaction about the credibility of the information only on the material placed before him at this stage. The core of the Sections 156, 157 and 159 of the Code of Criminal Procedure is that if a police officer has reason to suspect the commission of a cognizable offence, he must either proceed with the investigation or cause an investigation to be proceeded with by his subordinate.[10] The constitutional bench of the Supreme Court also observed that at the stage of

the complaint; discussed later.

[9] *Lalita Kumari* v. *Government of Uttar Pradesh & Ors.* (2008) 7 SCC 164

[10] *State of Haryana* v. *Bhajan Lal,* AIR 1992 SC 604

registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the CrPC, the concerned police officer cannot embark upon an inquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 156 of the Code to investigate. Be it noted that in Section 154(1) of the CrPC, the legislature in its collective wisdom has carefully and cautiously used the expression "information" without qualifying the same as in Section 41(1)(a) or (g) of the CrPC wherein the expressions, "reasonable complaint" and "credible information" are used. Evidently, the non- qualification of the word "information" in Section 154(1) unlike in Section 41(1)(a) and (g) of the CrPC may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, 'reasonableness' or 'credibility' of the said information is not a condition precedent for registration of a case. An overall reading of all the provisions makes it clear that the condition which is sine qua non for recording a first information report is that there must be information and that information must disclose a cognizable offence.[11] However, what happens every day at the *terra firma of the local thana* is anybody's guess. The predicament of the victim becomes all the more grave when just to keep the statistics 'proper', people, a major percentage of whom belongs to the deprived section of the population, are turned away and denied access to the very first phase of the CJAS i.e. the 'registration' of their grievances as FIRs under section 154 CrPC, and triggering of criminal investigation machinery thereupon.

Common man of this country requires to be educated that the SHOs (the Station House Officers or the *Thanedars* as known in vernacular) of their local police station is not all what they got to launch the criminal proceedings; that they can approach the District Superintendent of Police for getting their grievances registered or make a complaint before the magistrate for getting a 156(3) CrPC order which obligates upon the police to register the FIR and start the investigation thereon. It is pertinent here to note that if the magistrate declines to make 156(3) CrPC order, he has to record reasons for the same, which shall be further open to revision as provided under CrPC.[12] The Punjab and Haryana High Court observed that the Magistrates/Judges should not shirk their legal responsibility to pass an order for registration of the FIR and its investigation by the police on the applications under section 156 (3) CrPC in the cases where on the basis of the allegations made therein and the material, if any, brought on record in support thereof, prima facie cognizable offence of serious nature requiring police investigation is made out. In such cases the complainant should not be compelled to

[11] *Supra* note 9

[12] *Shiv Singh* v. *State of M.P.*, 2009 CrLJ 4217

collect and produce the evidence at his cost to bring home the charges against the accused, thereby forcing the complainant to proceed in the manner provided by chapter XV CrPC (i.e. by making a complaint under section 200 CrPC before the court of law, as discussed above).[13]

Once the victim achieves this exiguous feet of getting his grievance registered as an FIR under section 154 CrPC, his statement is recorded and he is sent for medical examination, if need be; and thereafter the only stage at which he comes into picture is that of the evidence, when he is called upon as one of the prosecution witnesses. Under the existing legal setup, the victim is neither reckoned as a guiding light in the investigation nor has he been conferred with any statutory right to ensure that the crime is properly and effectively investigated by police. The Madras High Court in one such case while transferring the investigation to the CBI observed that taking note of the fact that after registration of the case, the police could not even knock at the doors of the main accused, one can conclude that the main accused is still controlling the affairs through his relatives and patrons who are in power. In view of the compelling circumstance, this Court directs the first respondent to forthwith transmit the papers/records, if any, pending with him or CCB, to the Joint director, CBI. The CBI should take into account the serious allegations made against the controversial police officers of the State and proceed strictly in a proper perspective, for, none is above law and if the theory of influence is allowed to rule over the police administration, then injustice would be rampant defeating the rule of law, sometimes even resulting in deprivation of judicial remedies to the victimized persons.[14]

Here it shall be pertinent to note that in case the SHO of a police station considers that the offence does not appear to be serious or there is otherwise no sufficient ground for starting an investigation, he may not investigate the case but then he has to send a report to the Magistrate who can direct the police to investigate or if the Magistrate thinks fit, hold an inquiry himself.[15] Also, section 157 CrPC contemplates the requirement of giving reasons and notifying respectively the court and the informant who is the victim himself most of the times. But the veritable object thereof is not to keep the victim in loop, it is rather to inform the victim that the concerned SHO thinks that there are no sufficient grounds for entering upon the investigation in his case. Here, Police must understand and recognize the fact that the criminal process itself causes humiliation and strain to the victim in more than one ways especially when he is left groping in the dark and know nothing about what is happening around him. Such abasement and ignominy can very well be equated to the degree of dolour caused to him by the offence itself, and hence it has been termed as 'Secondary Victimization' of

[13] *State of Haryana* v. *Chander Lal*, Punjab and Haryana High court CRM M-40078 of 2012 decided on 09-01-2013

[14] *G.Kutty Alias Ramesh* v. *The Superintendent Of Police*, Madras High Court Criminal Original Petition (MD) No.8151 Of 2010, decided on 03-09-2010

[15] *Abdul Mukid* v. *State of U.P.*, 2007 CrLJ (NOC) 407

variable degrees depending upon the particular vulnerability of a victim when confronted with these unpleasant features of the process.[16]

To revivify the sense of self-esteem in the person of victim, it seems pressing that he must have an impression that the society has not left him in lurch and that the state is standing behind him with full vigor and attention. Here, it is suggested that the Right to Information may prove to be a proficient device. A duty should be cast upon the police to apprise the victim of the development, direction and progress in the investigation when duly asked for by the victim, which shall include the steps taken hitherto unless of course, this information by any objective standard is likely to trammel the investigation itself, which conclusion should be made contestable by the victim before a police officer of the rank of Deputy Superintendent of Police or above of the concerned territorial jurisdiction. This way the remedy, in cases of alleged manipulation of investigation, shall come from within the investigation agency, and the trust deficit for the police shall be taken good care of, as we see that both the Parliament and the Supreme Court had given much credence to the upper echelon of the police department.[17]

In fact, realizing the need of keeping tabs on police during the investigation, which in practical terms shall have a direct bearing upon the confidence of the victim that something is being done by the state machinery to redress his sufferings and redeem his fealty, the Supreme Court in *Sakiri Vasu v. State of U.P.*[18] observed that where the Magistrate finds that during investigation, nothing is done at all or it is not being done satisfactorily, he may issue directions under section 156(3) CrPC to carry out the investigation properly and can monitor the same to ensure that it is so done. It follows from this judgment that though investigation is an area falling within the exclusive domains of the police and the courts cannot interfere in it by directing as to in what manner it is to be done or what conclusion to be reached-at by what evidence, however under the Doctrine of Implied Powers, the judicial courts have 'monitoring powers' to ensure that the investigation is being carried out 'properly'. Judicial pronouncements of such kind from the highest court shall eventually germinate confidence in the victim. He can see to it through the medium of courts that investigation by police does not fall to the ground or proceed haywire. Further, the Supreme Court through *Bhagwant Singh v. Commissioner of Police*[19] has read into the wordings of Section 173 CrPC that no Closure Report, wherein the police draws to a close that the offender remained untraced or that the reported offence has not occurred et al, presented by the police in culmination of the investigation shall be so accepted by the court without notice

[16] Helen Fenwick, *Procedural Rights of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?*, The Modern Law Review, Vol. 60, 1997 (3)

[17] The Supreme Court in *Kartar Singh* v. *State of Punjab*, 1994 Cr L J 3139 upheld the validity of Section 15 TADA wherein confession before a Superintendent of Police was held admissible in the court of law, which was otherwise barred by virtue of section 24, 25 of the Indian Evidence Act, 1872.

[18] (2008) 2 SCC 410

[19] (1985) 2 SCC 537

to the de-facto complainant and providing him with an opportunity of being heard: the same requirement of notice applies squarely to the case when the Magistrate on consideration of the police report under section 173 CrPC decides not to take cognizance and proceeds to drop the case. Here, it is pertinent to note that the Magistrate can take cognizance (even) on the Closure Report and issue process against the accused[20] or without taking cognizance he may order further investigation into the case under section 156(3) CrPC[21].

The whole idea seems to converge on removing the possibilities of police thwarting the initiation of criminal process in a partisan manner and subverting the whole CJAS in its nethermost plinth. The courts must also keep in view that the complainant-to-court channel under section 200 CrPC read with section 2(d) CrPC should not be crippled on mere technicalities. A different approach would foster abuse and defeat the whole purpose of law which is to provide victims an alternative access to CJAS which is independent of police. In fact, it was observed by the Calcutta High Court that where the allegations in the complaint clearly make out the elements of offence, the non-examination of the complainant and the witness/es from his side under section 200 CrPC would not vitiate the taking of the cognizance by the Magistrate provided the accused is not prejudiced thereby, because such omission to examine them may be treated as an error of procedure curable under section 464 CrPC.[22] Also pertinent to note here is that section 203 CrPC itself mandates the grant of hearing to the complainant before a complaint under section 200 CrPC is dismissed thereunder; and also that the Magistrate has to record the reasons for such dismissal of complaint. The Kerala High Court observed on this issue that even in case of piecemeal (partial) dismissal of a complaint, the Magistrate is bound to record reasons for the same otherwise it would be impossible for the High Court to consider whether the discretion had been properly exercised or not.[23] Hence, the courts of law especially the Magistrate Courts have an unparalleled and unrivaled role to play in ensuring that the victims derive an unfettered and unshackled access to the CJAS.

Now, we have reached at a stage where the Court can be considered to have seized of the matter and the criminal trial starts.

Position of The Victim During The Trial

Now, that the Accused enters the realm of trial, it becomes a contest rather between the accused and the State which is represented by the public prosecutor in courts. Theoretically, the main reason that criminal offences are prosecuted by the State is that the criminal conduct is regarded as a threat against the whole society, and hence it requires a 'community response'. This justification is supplemented by the financial burden that the crime imposes on the State. Also, there breaths a cabalistic

[20] *Union of India* v. *Prakash P. Hinduja*, AIR 2003 SC 2612

[21] *State of Bihar* v. *J.A.C. Saldanah*, AIR 1980 SC 326

[22] *Deepak Ghosh Dastidar* v. *Sant kumar Mukherjee*, 2003 (1) Crimes 297 (302) Cal

[23] *Prakashan Vijay Niwas* v. *State of Kerala*, 2008 Cr.LJ 1272

timidity that if the victims are supplied with a reticulated role in transacting the prosecution, they shall by all odds strive for more serious charges and stiffer penalties. Consequently, the primitive retributive elements would creep in the criminal trial. Also, in absence of the public-prosecutor[24] from the arena, the prosecution by a pleader for the private party may degenerate into a legalized means for wreaking private vengeance[25] and consequently, the provisions like newly introduced section 265 A to L of the CrPC[26], Section 320 of the CrPC[27] etc. would be rendered practically redundant. Any alternative arrangement will lead to more contested cases and a greater volume of trials, with an ineluctable offshoot that an already overburdened CJAS would cripple and collapse under an ever exponentially increasing amplitude of pendency in courts.

However, demands are often raised by the victims to let their counsels carry-out the prosecution. The role of the public prosecutor has now become an enormous issue after the Supreme Court proscribed the role of prosecutor in *Zahira Habibullah H. Sheikh* v. *State of Gujarat*[28] wherein it was observed that though the witnesses or the victims do not have any choice in the normal course to have a say in the matter of appointment of a Public Prosecutor, in view of the unusual factors noticed in this case, to accord such liberties to the complainants party, would be appropriate. Frequent recurrence of such instances at all levels where state-run-prosecution evinced vested interests in the accused has consistently corroborated the public distrust.

If we read Section 225, 301, 302 CrPC together, we reach at a conclusion that in a criminal trial before the Magistrate, prosecution can be conducted by any person not necessarily a public prosecutor, if the Magistrate so permits; but it cannot so happen in the Court of Session which in fact is a contrariety to fairness towards the victim since almost all the heinous offences are Sessions triable. With abysmally low rate of conviction, deterrence as one of the major aims of CJAS is gradually becoming inanity. Inefficient rather dubious handling of prosecution has now become a norm instead of oddity. In this state of affairs, victims should be allowed to 'participate', and there should be laid down a charter of rights through which he can have practically meaningful interventions in the trial. To achieve this purpose, the victim must have a right, in all trials including Sessions Trial, to get his counsel stand parallel and in synchronization with the public prosecutor. The apprehension that such interventions of the victim may open a flood gate for vengeful traits of the victim, can be allayed by keeping a balanced approach and

[24] The Public Prosecutor is not a protagonist of any party though in theory, he stands for the state in whose name all prosecutions are conducted. He is to aid the court by examining all witnesses who had knowledge of all the relevant facts. Ratanlal and Dhirajlal, *The Code of Criminal Procedure*, p. 68, 19th Enlarged Edition 2013, Lexis Nexis

[25] *Shiv Kumar* v. *Hukam chand*, (1999) 7 SCC 467

[26] Provisions for plea bargaining, vide Amendment 2006 in the Criminal Procedure Code, 1973

[27] Provisions for compounding of certain offences

[28] (2004) 4 SCC 158

allowing him limited interventions at selective points in the trial so as to ensure fairness to all the stakeholders therein.

In this context, descending to the component level of a criminal trial, we see the victim remains a non-participant at all but one stage, and that is the stage of prosecution evidence at which he appears as one of the prosecution witnesses. Apart from that, at all the climacteric junctures of all the crucial stages of the trial till the last stage of final arguments on the case, be it the bail stage, the charge framing stage, the prosecution evidence stage etc. the victim finds himself totally alienated and estranged.

In fact, at the crucial stage of prosecution evidence, everything appears to be in complete chaos and disarray. Investigating Officer and other formal witnesses from the police department usually do not turn up for giving evidence on the scheduled dates without successive coercive process issued against them. There seems to be a complete deficiency of cohesion and co-ordination among the concerned court/state agencies so far as the production and examination of prosecution evidence is concerned. It is of the common experience in the courts that a raft of successive 'dates' spanning over years and years together for calling prosecution witnesses fetch no results. In one such situation, the Apex Court observed that it appears that accused wants to frustrate the prosecution by unjustified means and it appears that by one way or the other the Addl. Sessions Judge as well as the Public Prosecutor have not taken any interest in discharge of their duties. It was the duty of the Sessions Judge to issue summons to the investigating officer if he failed to remain present at the time of trial of the case. The presence of investigating officer at the time of trial is must. It is his duty to keep the witnesses present. If there is failure on part of any witness to remain present, it is the duty of the court to take appropriate action including issuance of bailable/non-bailable warrants as the case may be. It should be well understood that prosecution cannot be frustrated by such methods and victims of the crime cannot be left in lurch.[29] As if it is not enough, the hostility of the prosecution witnesses particularly when the accused happens to be an influential entity, brings another enigma to the victim. Here, it is pertinent to note that the '*Witness Protection Scheme*', has remained a cipher in India, which is squarely to be blamed for the stifling and ultimately the unnatural death of a vast majority of criminal trials in India.

Finally, when the victim himself steps up in the witness box, he normally picks-up the perception that by contrast, the accused is subjected to far less compulsion and harassment. While the victim is required to make comprehensive formal statements, disclose intimate details and endure allegations which would be defamatory in other context; the accused on the other hand, can conveniently choose not to step in the witness-box and to remain silent on his sweet will.[30] Law of Evidence is seen by many a victims as being unduly favorable to the accused. Particularly in sexual offence trials, the fate of the case usually turns on the

[29] *Shailendra Kumar* v. *State of Bihar and Ors.* (2001) 8 SCC 13

[30] Article 20(3) of the Constitution of India

credibility of the victim, who is then placed under intense scrutiny for horrifying factual details of the crime.[31]

In these circumstances, an urgent need stands for an effective participation of the victim leastways at some selected points in the criminal trial. As also noted by the *Malimath Committee, 2003* the victim must be heard by the court at the Bail Stage and the Charge Framing Stage. Not only this, the victim must also be given an opportunity to supplement the evidence both oral and documentary if he feels that something material has been left or dropped by the prosecution. Also, he must have opportunity to examine the witnesses produced both by the prosecution and the defence side, may be through a supplementary examination on his own or through the court under section 165 of the Indian Evidence Act, 1872 (hereinafter referred to as IEA) or under section 311 CrPC, if he feels that justice has not been done to his cause. Here, it would not be out of place to realize that even the courts frequently indulge in dereliction of the duty cast upon them under section 165 IEA or under section 311 CrPC, sometimes to avoid the impression that the 'Chair' is acting partisan by trying to fill the gaps and lacunas of the prosecution version of facts and events, and at other times due to sheer indifference or the exasperating work pressure in the trial courts.[32]

Moving further, the Amendment Act, 2006 (2 of 2006) w.e.f. July 5, 2006 in the CrPC is a welcome step introducing the concept of 'Plea Bargaining' in the Indian CJAS, wherein the victim 'participates' in arriving at a Mutually Satisfactory Disposition' in cases which qualify under section 265A CrPC to be considered for this settlement-mechanism. In the same vein, the victim must also participate and be heard by the Court when public prosecutor seeks to withdraw the prosecution under section 321 CrPC. The court before judiciously exercising its discretion in granting or with-holding its consent, which is a statutory requirement section 321 CrPC, must also take into account the averments of the victim.

Also, the victim must be given an opportunity to address concise oral arguments and submit a memorandum of written arguments supplementing that of the public prosecutor after the close of the Prosecution Evidence. An amendment to this effect is much needed in section 314 CrPC.

Position of Victim at The Conclusion of The Trial

Now, the case enters the last spell of the criminal trial where in case the accused is found guilty, the court is to choose from various options available for punishment, which include the ones with reformative overtones viz. section 360 CrPC and various provisions in the Probation of Offenders Act, 1958, Juvenile Justice Act, 2000 etc. Here the courts are not only to explore the possibilities of the reformation

[31] *State of Punjab* v. *Gurmeet Singh*, (1996) 2 SCC 384. Here the Supreme Court noted that "the courts should not sit as a silent spectator. It must ensure that the cross-examination is not made a means of harassment and humiliation to the victim of the crime of rape".

[32] As observed by the Supreme Court in *Zahira Habibullah H. Sheikh* v. *State of Gujarat*, *supra* note 28 at 165

of accused but also, it is to be seen that both the victim and the society must carry home the impression that ultimately after the ordeal of criminal trial, justice has been done to their cause.

The criminal trials which culminate in conviction signify a fact that the victim and the prosecution witnesses, who may be family members or otherwise related to the victim or may be totally unrelated to him, have put in persistent efforts in carrying out the prosecution this far by keeping at bay all kinds of fear and influence, and playing truant to all considerations- cash or kind. In such wise, if the accused is let-off the hook with a relatively minor punishment (here let us take 'punishment' in pure corporeal sense, as we shall consider the relevancy of monetary compensation as part of the punishment/sentence later in our discussion), the victim feels derided, swindled and persecuted, which can be considered as 'Tertiary Victimization'[33] and hence, in many countries viz. Australia, England, Canada and USA, particularly after the U.N. Declaration, 1985,[34] the victims at the stage of sentencing have been provided with an opportunity to address and inform the court about their plight and predicament. Although apprehensions have been noted[35] that these statements at the sentencing stage may not have any therapeutic effect on the victim, rather harassment may be caused to him *et cetera* while he recapitulates the traumatic experience before the court. Be that as it may be, I am of the opinion that the balance lies in favor of such statements be allowed in the court at the sentencing stage as otherwise throughout the trial there occurs no specific occasion for the victim to communicate or for the court to fully appreciate the crisis undergone by the victim triggered by the crime, and the whole application of the criminal trial seems to have been narrowed down to the issue as to whether or not it could be proved beyond reasonable doubt that it was the accused who committed the offence under the scanner. Another reason is that such statements would help the criminal court to disembark upon a better understanding of the 'gravity' of the offence which in turn, shall be one of the many factors for the court to arrive at the 'appropriate' final order culminating the criminal proceedings. The same shall also hold true when the court exercises its discretion to release the offender on probation under section 360 CrPC or under the provisions of the Probation of Offenders Act, 1958. The victim must be given an opportunity to state whether he has any anxiety or concern about the release of offender on probation viz. the place/s to which the movement of the offender should be restricted or barred, or such other condition as may be applied to the offender while so releasing him. The court may incorporate these aspects into formulating its discretion as to whether and to what extent the legal provisions with liberal connotations and reformative undercurrents may be extended to the accused in a particular case.

[33] Primary Victimization: when the crime against the victim was committed. For Secondary Victimization, see *supra* note 16

[34] United Nation's Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985

[35] Geoffrey Flatman and Dr. Mirko Bagaric, ***The Victim and the Prosecutor: The Relevance of Victim in Prosecutor Decision Making***, Deakin Law Review, Vol.16 No. 2, 2001

Now moving on to the monetary compensation aspect in a criminal trial, it is understandable that many victims have a desire to see that the offenders are given harsh corporeal punishment, which only seems to assuage their gush of anger; however, monetary compensation has also sustained itself as a 'tool' for 'negotiation' in a wide variety of cases. In fact, the offences punishable upto 7 years of imprisonment[36] may now be placed under the plea bargaining regime under chapter 21A of the CrPC, wherein section 265B explicitly mentions that the 'Mutually Satisfactory Disposition' may include giving to the victim by the accused the compensation and other expenses. It being so, we more often come across a set language format in such dispositions which contains phrases for example "If I am paid this sum of Rs.__ lacs, I shall have no concern whether thereafter the accused is given any punishment of imprisonment or not at all". The same shall be true for offences which qualify to be compoundable under section 320 CrPC although the language of section 320 does not explicitly admit the consideration of monetary compensation. It would not be desultory here to note that even in the case involving heinous offences, which do not admit falling in either of the two categories, money does bring-down the curtains as the hostility of the prosecution witnesses in such like case is nothing but the manifestation of an 'out of court' settlement generally grounded in numismatic considerations.[37]

In other instances, the money moves not sequent upon a 'settlement' between the victim and the accused, but because the Judge exercised its discretion under section 357(1) CrPC. Evidently, under section 357(1) CrPC, if it is the court of Judicial Magistrate, the amount of compensation shall be circumscribed by his competency to levy fine as defined under section 29 CrPC.[38] However, this restraint is relieved by Section 357(3) CrPC, according to which a compensation simpliciter can be ordered without it being made a part of any fine.[39] This mechanism has a great potential vis-à-vis the victims because in the Indian society, irrespective of the economic and social strata to which one belongs to, it is rather despised and disdained that a crime be 'traded' with the offender. Hence, the money moving to the victims through judicial mechanism itself would be of really great help. However, again it has great limitations viz. it can be set rolling only at the stage of sentence and, it intrinsically depends upon the paying capacity of the accused. The Apex Court observed in this respect that although a provision has been made for compensation to victims Under Section 357 Code of Criminal Procedure, there are several inherent limitations. The said provision can be invoked

[36] For other qualifications, see section 265 A Criminal Procedure Code, 1973

[37] Though perjury may follow the suit, but due to heavy pendency and an unwritten policy of courts, these instances are pretermitted.

[38] Under section 29 of Criminal Procedure Code, 1973, the Court of a Magistrate of first class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding ten thousand rupees or both.

[39] *Hari Singh* v. *Sukbir Singh*, (1988) 4 SCC 551. The Supreme Court deplored the fact that courts in India rarely invoke the provisions contained in section 357 Criminal Procedure Code, 1973, and then recommended its judicious exercise by the courts especially by the sub-ordinate judiciary.

only upon conviction, that too at the discretion of the judge and subject to financial capacity to pay by the accused. The long time taken in disposal of the criminal case is another handicap for bringing justice to the victims who need immediate relief, and cannot wait for conviction, which could take decades. The grant of compensation under the said provision depends upon financial capacity of the accused to compensate, for which, the evidence is rarely collected. This is perhaps why even on conviction this provision is rarely pressed into service by the Courts. Rate of conviction already being low inter-alia for incompetence of investigating agencies, apathy of witnesses and strict standard of proof required to ensure that innocent is not punished, the said provision is hardly adequate for addressing the needs of victims.[40]

These limitations have been taken care of by the Amendment Act, 2009 (5 of 2009) w.e.f. 31-12-2009 which added section 357A to the CrPC which provided for compensation (even) in cases of Acquittal, Discharge or Untraced-Accused, mainly for restoration and rehabilitation purposes; and which also took away its dependency upon the paying capacity of the accused by mandating a State Victim Compensation Scheme to be prepared by every State Government in co-ordination with the Central Government of India. The Apex Court observed that the legal position that emerged till recent times was that criminal law need not concern itself with compensation to the victims since compensation was a civil remedy that fell within the domain of the civil Courts. This conventional position has in recent times undergone a notable sea change, as societies world over have increasingly felt that victims of the crimes were being neglected by the legislatures and the Courts alike. Legislations have, therefore, been introduced in many countries including Canada, Australia, England, New Zealand, Northern Ireland and in certain States in the USA providing for restitution/reparation by Courts administering criminal justice. (In India) The amendments to the Code of Criminal Procedure brought about in 2008 focused heavily on the rights of victims in a criminal trial, particularly in trials relating to sexual offences. Though the 2008 amendments left section 357 unchanged, the Parliament introduced Section 357A under which the Court is empowered to direct the State to pay compensation to the victim in such cases where the compensation awarded under section 357 is not adequate for such rehabilitation, or where the case ends in acquittal or discharge and the victim has to be rehabilitated. Under this provision, even if the accused is not tried but the victim needs to be rehabilitated, the victim may request the State or the District Legal Services Authority to award him/her compensation. This provision was introduced due to the recommendations made by the Law Commission of India in its 152nd and 154th Reports in 1994 and 1996 respectively. The Apex Court further observed that the expanding scope of Article 21 is not limited to providing compensation when the state or its functionaries are guilty of an act of commission but also to rehabilitate the victim or his family where crime is committed by an individual without any role of the state or its functionary. Apart from the concept of compensating the victim by way of public law remedy in writ jurisdiction, need was felt for incorporation of a specific provision for

[40] *Suresh* v. *State of Haryana*, 2014 (4) Crimes 363 (SC)

compensation by courts irrespective of the result of criminal prosecution, and accordingly, section 357A has been introduced in the CrPC.[41]

In this connection, the Supreme Court in *Ankush Shivaji Gaikwad* v. *State of Maharashtra*[42], with reference to the development in law (of awarding compensation to the victim) observed that the clock appears to have come full circle by the law makers and courts going back in a great measure to what was in ancient times common place. The Apex court further observed that the Harvard Law Review (1984) in an article on "Victim Restitution in Criminal Law Process: A Procedural Analysis" sums up the historical perspective of the concept of restitution as far from being a novel approach to sentencing, restitution has been employed as a punitive sanction throughout history. In ancient societies, before the conceptual separation of civil and criminal law, it was standard practice to require an offender to reimburse the victim or his family for any loss caused by the offense. The primary purpose of such restitution was not to compensate the victim, but to protect the offender from violent retaliation by the victim or the community. It was a means by which the offender could buy back the peace he had broken.

Further, paving the way for the subordinate judiciary to follow, the Supreme Court pronounced some landmark judgments wherein it observed that regarding monetary compensation to be granted to the dependants of the victim who suffered death in a police encounter, the scheme provided under Section 357A of the CrPC must be applied[43]; that the compensation payable by the State Government under Section 357A shall be in addition to the payment of fine to the victim under Section 326A (voluntarily causing grievous hurt by use of acid etc.) or Section 376D (gang rape) of the Indian Penal Code[44]; and stressing upon the need of uniformity in providing compensation under section 357A of the CrPC, the Apex Court observed that,

> "Pursuant to this provision, 17 States and 7 Union Territories have prepared 'Victim Compensation Scheme' (for short "Scheme"). (However) As regards the victims of acid attacks the compensation mentioned in the Scheme framed by these States and Union Territories is not uniform. While the State of Bihar has provided for compensation of Rs. 25,000/- in such scheme, the State of Rajasthan has provided for Rs. 2 lakhs of compensation. In our view, the compensation provided in the Scheme by most of the States/Union Territories is inadequate. It cannot be overlooked that acid attack victims need to undergo a series of plastic surgeries and other corrective treatments. Having regard to this problem, learned Solicitor General suggested to us that the compensation by the States/Union Territories for acid attack victims must be enhanced to at

[41] *Ibid*

[42] (2013) 6 SCC 770

[43] *PUCL* v. *State of Maharashtra*, (2014)10SCC635

[44] *In Re: Indian Woman says gang-raped on orders of Village Court published in Business and Financial News*, Suo Motu Writ Petition (Criminal) No. 24 of 2014, (2014) 4 SCC 786

> least Rs. 3 lakhs as the after care and rehabilitation cost. The suggestion of learned Solicitor General is very fair. We, accordingly, direct that the acid attack victims shall be paid compensation of at least Rs. 3 lakhs by the concerned State Government/Union Territory as the after care and rehabilitation cost. Of this amount, a sum of Rs. 1 lakh shall be paid to such victim within 15 days of occurrence of such incident (or being brought to the notice of the State Government/Union Territory) to facilitate immediate medical attention and expenses in this regard. The balance sum of Rs. 2 lakhs shall be paid as expeditiously as may be possible and positively within two months thereafter. The Chief Secretaries of the States and the Administrators of the Union Territories shall ensure compliance of the above direction."[45]

As we have noted before, commencing from the ancient times when it was crudely done under a barter-system, there has been a concatenation when today the monetary compensation is accepted as a settlement or mutually satisfactory disposition within (and even outside)[46] the legal framework. However in cases where it does not happen, an obligation is cast upon the courts to ascertain at the stage of sentence as to which permutation and combination of corporeal punishment along with the monetary compensation shall best respond to the collocation of both the accused and the victim. This can be deduced by carefully looking at among other factors the gravity of offence, the financial position of the accused[47] and the predicament of the victim and his family. Here, (even) at the cost of repetition it seems worth harping upon that the victim must be given a sensitive hearing at the stage of sentence, and the requisite amendment in CrPC must be brought into effect as soon as possible.

Conclusion

In India, the percentage of both crime-reporting and crime-detection remains low due to a wide variety of reasons. Even for the offences which somehow land-up in the courts, we have a low conviction rate[48] which seems to further plunge the percentage of 'crime-reporting'.

In criminal trials, the prevalent pre-occupation with the due process towards the accused must not eclipse the exigency to ensure that the victim's participation at all the stages of CJAS and his other interests be cogitated and considered as no subaltern to the quintessence of a fair trial. Participation in all forms of government,

[45] *Laxmi v. Union of India and Ors,* (2014) 4 SCC 427

[46] read with *Supra* note 37

[47] However, once section 357A Criminal Procedure Code, 1973 is actually implemented by all the State Governments, this factor would no longer be considered in this respect as far as the state victim compensation scheme is concerned.

[48] NCRB (National Crime Record Bureau) 2013: Total Violent Crimes- 300357, Conviction rate- 25.4%; Total Crimes Against women- 309546, Conviction Rate- 22.4%; Total Economic Crimes- 129306, Conviction Rate- 24.4%, http://ncrb.gov.in/CD-CII2013/figure%20at%20a%20glance.pdf

and that shall include prosecution in criminal trials, is the essence of a real democracy.[49] It will not be correct to say that it is only the accused that must be fairly dealt with in a criminal proceeding. This would be turning a Nelson's eye to the sentiments of society in general and the yearning of the victim in particular. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution.[50] It appears to be inevitable and unqualified that taking note of victim's interests at all stages of a criminal trial shall not only improve the conviction rate, but shall also inspire the 'crime-reporting'; and hence, all put together, it shall help check the rising graph of crime. Criminal Justice Administration Policy formulated and implemented after considering these dimensions shall pose effective deterrence to the potential criminals and shall re-ideate victim's rights as a trajectory towards the consummate, constructive and convincing social welfare ideology as distinct from the characteristics of a contracted, calamitous and convoluted conventional CJAS.

[49] Bill Clinton (Former President of the United States of America) noted while announcing his support for the Constitutional Amendment on Victims' Rights, 32 Weekly Compilation of Presidential Documents, U. S. Government Printing Office, 1134 (July, 1996)

[50] *Supra* note 28

TRADITIONAL CULTURAL EXPRESSIONS: An Analysis

Irwin L. Hnamte[*]

"Every view of the world that becomes extinct, every culture that disappears, diminishes a possibility of life!"

–The Lancet

Introduction

An unprecedented growth in the area of legal protection of folklore has been witnessed in the recent past. The protection of Traditional Cultural Expressions (TCEs) has not been without debates within the international community on questions regarding whether TCEs should be protected by intellectual property rights (IPRs). The work on the codification of law on TCEs has reached a new level with the recent working document titled "The Protection of Traditional Cultural Expressions: Draft Articles". This working document was tabled at the Twenty-Fifth Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC), which took place in Geneva from July 15 to 24, 2013. It is this Draft Article that is expected to create a binding legal instrument so as to provide the much required protection for TCEs which has been sought by various indigenous communities all over the world.

This study argues the non practicability of evolving a sui generis intellectual property (IP) or IP related system which would take a long time to establish and may not be politically feasible anyway. 'Origin related intellectual property rights' such as trademarks, certification and collective marks and geographical indications, as well as passing off and laws against misrepresentation, appear to be conceptually best suited for the protection of TCEs, because of their specific nature and characteristics. Such characteristics include the fact that they are usually produced within a community, which is often linked to a specific place, and according to traditional methods and know-how transmitted from generation to generation, often using raw material from sustainable resources. In addition, this method of protection also seems to accommodate the fact that the TCEs are usually already in the public domain and to take into consideration some of the aims of TCE holders, such as the fact that they would like a protection that is unlimited in time. It is not

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within the scope of this study to discuss whether or not TCEs should be protected but rather to identify what is the best option for their protection.

What Are Traditional Cultural Expressions/TCEs

TCEs is a product of century old customary and traditional practices of the people, a legacy of the older generation passed on to the next generation. TCEs are generally transmitted orally by the elders to the younger. TCEs are in two forms, tangible and intangible. These include:

(i) Verbal expressions or symbols (stories, epics, legends, tales, riddles, etc.)
(ii) Musical expressions (songs, instrumental music)
(iii) Expressions by action (dance form, play, ritual, etc.)
(iv) Tangible expressions (drawings, designs, paintings, body art, carvings, sculptures, pottery, terracotta, mosaic, woodwork, rockwork, metal work, jewellery, basketry, needlework, glassware, textiles, carpets, etc.)
(v) Intangible expressions reflecting traditional thought forms
(vi) Architectural forms

From the foregoing discussion it can be concluded that TCEs have the following characteristics:

i) They are handed down from one generation to another, either orally or by imitation;
ii) They reflect a community's cultural and social identity;
iii) They consist of characteristic elements of a community's heritage;
iv) They are made by authors unknown and/or by individuals communally recognized as having the right, responsibility or permission to do so;
v) They are often not created for commercial purposes but as vehicles for religious and cultural expressions; and
vi) They are constantly developing and being recreated within the community.

Expressions of traditional culture, may either be tangible or intangible or most usually a combination of the two. The U.S.A has a number of examples of TCEs that combined intangible and tangible elements: African American quilts depicting Bible stories in appliquéd designs; the practice of 'mummering' in Newfoundland, Canada, during Christmas season where villagers act out elaborate charades, play music, eat, drink, dance and make disguising costumes etc.[1] On the other hand expressions of traditional culture and knowledge are derived from intangible elements. Examples of this would be a painting depicting an old myth or legend- the myth and legend are part of the underlying intangible 'folklore' as are the knowledge and skill used to produce the painting, while the painting itself is a tangible expression of that folklore.[2]

Another category of folklore is that which is neither oral nor written. Folk dances, folk arts and crafts, folk paintings, sculptures etc., are transmitted not orally

[1] http://www.wipo.int/edocs/pubdocs/en/tk/785/wipo_pub_785.pdf. Last visited on 28th October 2015.
[2] *Ibid*

or through written medium, but through visual tradition, imitations, observations, through training and performances. The tribal communities are the primary source of folk culture and folk tradition. A very important and popular component of folk literature is folk tales. These include myths, legends, fairy tales, anecdotes, short stories etc. Most of these elements which form part of folk literature have been created and passed on by word of mouth. Thus folklore includes literature, performing and non-performing arts, paintings, sculptures, arts and crafts, embroidered quilts and their related mechanisms and designs. These have been handed down by tradition to the societies from previous generations through word of mouth or traditionally by non- oral means. It is important to understand that the creation of these products is not known and affording protection helps these communities in preserving their age old tradition.

TCEs and its Legal Protection under Indian Laws

India is a country of rich and diverse culture and religions. It is a country where one can find big city culture and village/country side culture co-exist peacefully. Tribal culture is one of India's proudest symbols of heritage. A strong value system which manifests itself in the form of self-respect, honesty, integrity, sincerity and contentment is the main force that sustains the tribal communities to tackle the complex problems attendant on human existence even today. The tribal communities in India are the primary source of folk culture and folk tradition. Rich folk literature and handicrafts, handlooms, folk painting, etc., contributed by these communities are significant components of the folklore of India. Handicrafts are a major element of folklore developed in India. The tribal villages create various objects of handicraft covering large segments like textiles, floor coverings, pottery and terracotta, woodwork, metal ware, jewelry, stone carving, cane furniture, ivory and horn carving, basket making, mat weaving and many other festival and ritual crafts.[3]

Folk agricultural practices again cover a wide spectrum of activities leading to the development of the most important occupation of India. The practices cover a range of sciences from appropriate weather forecast devices, seed development, animal husbandry to water management technologies, agricultural tools and pesticides, and fertilizers. There are well-developed cultivation practices like the jhoom and terrace cultivation patterns in the North East, and plantation cultivation programs in the South.

The Constitution of India recognizes 22 languages. In addition, there are numerous dialects and sub languages spoken in different parts of the country and each language is rich in literature. Folk art and literature also form a very vital component of the cultural heritage of the country. Collections of folk tales, myths, fairy tales, legends, animal tales, anecdotes, short stories, dramas, proverbs, riddles, ballads, songs, lullabies, rhymes, chants, charms, speeches, etc., form a major part of the literary treasure that each language or dialect can feel proud of.

[3] http://www.wipo.int/tk/en/studies/cultural/expressions/study/kutty.pdf. Last visited on 7th October, 2015.

The Constitution of India, the basic law of the land, has not directly addressed the issue of protection of the folklore. Article 29 of the Constitution recognizes as a "Fundamental Right" (Part III) the protection of the culture of minorities. According to Article 29, "any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same." It is possible to protect the folklore of the distinct groups in India based on this provision. However, the majority of the folklore existing and misused now in India belong to small communities who do not come under the scope of the aforementioned constitutional provision. But no legislation has been enacted to protect the same. The only other general provision in the Constitution that can be identified as a source to protect folklore is Article 51A (f).[4]

Irrespective of the constitutional provisions envisaging protection and preservation of distinct cultural groups, there is no special law prohibiting the exploitation of folklore of these communities without permission. The reason for lack of adequate protection for TCEs/ folklore in India is the lack of knowledge and awareness about the need for IP protection. It is very important to understand the need to protect the TCEs/folklore and the expectations and needs of the communities who are the owners/custodians of TCEs.

The Copyright Act, 1957 as amended in 2012

In India the legislation that takes care of the rights relating to literary and artistic works, sound-recordings, films, and the rights of performers and broadcasting organizations, is the Copyright Act, 1957 as amended in 2012. The Indian Copyright Act does not contain any provisions for the protection of folklore or expressions of folklore even after the amendment made in 2012. The possibility of the inclusion of TCEs would have been in Section 2(c) of the Act. This Section contains the meaning of "artistic work" such as painting, sculpture, drawing, engraving, architectural work and any other work of artistic craftsmanship.[5]However, TCEs is not expressly mentioned as a separate category although a liberal interpretation of the section would seem to include TCEs within the meaning of "artistic work".

Section 2(d) defines "author" as including those creations created by an individual or the concerned artist(s) as the creator or the source. The meaning of author therefore does not include the outcome of the creation of TCEs originating from a particular community which cannot be attributed to a single author or creator. TCEs are held collectively and regarded as the common property of the particular community, tribe or village where it originates.

As far as protection of TCEs as Performer's rights is concerned, Sections 38 to 39A incorporates the provision of different rights of the performer in relation to its

[4] Constitution of India, Article 51A(f): It shall be the duty of every citizen in India to value and preserve the rich heritage of our composite culture.

[5] Copyright Act, 1957 s 2(c)

performance. "Performer" as defined in Section 2 (qq) includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance. Folk artists may use these provisions in a general way to claim protection of its performance. However, it is doubtful whether it will prove efficient for the protection of TCEs as they require a different approach altogether. Individual propriety rights on TCEs do not go well with the notion of collective ownership of TCEs by the community.

Therefore, in light of the above mentioned reasons it is not wrong to conclude in saying that the Copyright Act, 1957 as well as the Amended Act of 2012 has failed to give protection of TCEs which would otherwise have been the most effective framework for its protection.

The Trade Marks Act, 1999

A trade mark is a word, phrase, symbol or design, or a combination of words, phrases, symbols or designs, that identifies and distinguishes the source of the goods of one party from those of others. Trades and entrepreneurs dealing with traditional tangible products as well as services such as carpets, handlooms, furniture, jewelry, food items, toys etc can make effective use of the Trade Marks provisions pertaining to "collective marks". TCEs can therefore be registered by using such "collective marks" as a mark of the community from which it originates. This would enable others from misusing traditional names or symbols as a trade mark. This will also boost the economy of local small enterprises and artisans.

"Collective marks" are usually defined as signs which distinguish the geographical origin, material and mode of manufacture, quality or other common characteristics of goods or services of different enterprises using the collective mark. The owner may be either an association of which those enterprises are members or any other entity, including a public institution or a cooperative. Under the Trade Marks Act, 1999, "collective mark" means a trade mark distinguishing the goods or services of members of an association of persons, which is the proprietor of the mark from others.[6]

However, while these marks maybe able to provide some valuable protection for TCEs, they cannot provide the all-round protection TCEs require. Although trademarks serve well as indicators of source and authenticity, the protections they provide do not extend to the actual expression of the TCEs. In addition, the effective use of these marks by indigenous groups is barred by practical limitations such as the financial investment involved and a lack of knowledge of how to best use them.[7]

[6] Trade Marks Act, 1999 S 2(g)

[7] *Supra* note 76

The Designs Act, 2000

The law protecting designs is governed by Designs Act 2000. It may be seen that just as the Copyright Act has no express provisions on TCEs, similar is the case with the Designs Act. However, there are some interesting features which could prove useful to various stakeholders of TCEs particularly the provision pertaining to registration of "design".[8] Also, the broad definition of design is a good thing for TCEs. Many traditional features of designs held by the communities which are being applied on handicrafts, jewelry, artifacts etc. can be legally registered in their name by applying for the registration of such designs. If successful the registration would bestow copyright on their TCE based designs and secure proprietary right for the communities.[9]

The Designs Act provides a negative right to TCEs in the form of Section 4 wherein grounds for prohibition of registration of certain designs are mentioned e.g.. if the design is not new or original; has been disclosed to the public anywhere; not significantly distinguishable from known designs or combination of known designs; comprises or contains scandalous or obscene matter.

There is also no separate legislation along the lines of the Model Provisions, to serve the purpose of offering legal protection to expressions of folklore. From the aforesaid it is clear that like many countries of the world India too has no provision to protect expressions of folklore in the intellectual property laws or in any other legislation. As such, exploitation of folklore expressions without taking the permission of the communities and compensating the communities concerned is not illegal. The general outlook of those business interests who extensively borrow from the collection of the folklore of the communities or tribal settlements is that of exploitation of material available in public domain.

Intellectual Property Protection Relating to TCEs

The Berne Convention for the Protection of Literary and Artistic Works[10] (Berne Convention) as an international convention "treats folklore as a special category of anonymous works." Article 15(4) of the Berne Convention was amended in the year 1967 to introduce optional copyright protection for folklore. The Article states that

> "in the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of the country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union."[11]

[8] *Supra* note 93 at 156

[9] *Ibid.*

[10] Berne Convention for the Protection of Literary and Artistic Works

[11] Berne Convention, Art. 15(4)

The World Intellectual Property Organisation began to explore the field of TCEs in 1978. It convened three meetings of experts in cooperation with the United Nations Educational, Scientific and Cultural Organisation that led to the adoption in 1982 of the **Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions ('the Model Provisions')**. The Model Provisions developed a sui generis model for the IP- type protection of TCEs. They establish two main categories of acts against which TCEs are protected, namely 'illicit exploitation' and 'other prejudicial actions'.

In late 2000, the **WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)** was established. Representatives from the WIPO member states, ethnic communities and NGOs joined the discussions. The Committee has made substantial progress in addressing both policy and practical linkages between the IP system and the concerns of practitioners and custodians of traditional cultures. The studies have formed the basis for ongoing international policy debate and assisted in the development of practical tools. Drawing on this diverse experience, the Committee is moving towards an international understanding of the shared objectives and principles that should guide the protection of TCEs.

Since 2012, the **IGC** has already held 28 sessions relating to genetic resources, TK and folklore and the latest session was held between July 7 – 9, 2014. In this session the WIPO Secretariat prepared a text titled **'The Protection of Traditional Cultural Expressions: Draft Article'**. The provisions of the Draft Articles are more practical and operational than previous international and regional provisions relating to folklore. Although its provisions normally have two to three option provisions in each article, due to representatives' different views, the Draft Articles on TCEs are still a very good model to be referenced in other countries' national laws relating to the protection of folklore.

The Protection of Traditional Cultural Expressions: Draft Article Prepared by WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) at its 28th Session held in July, 2014.

The provisions of the Draft Articles are more practical and operational than previous international and regional provisions relating to folklore. Although its provisions normally have two to three option provisions in each article, due to representatives' different views, the Draft Articles on TCEs are still a very good model to be referenced in other countries' national laws relating to the protection of folklore.

The beneficiaries of protection in Article 2 of the Draft[12] extends to indigenous peoples and local communities only but not other communities. While the

[12] *Protection of Traditional Cultural Expressions*: Draft Article Prepared by WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) Article 2

concept of "peoples" includes "nations" and acknowledges that within a "people", families, individuals and other subsets thereof may have closer association to the TK and TCEs, ownership of the knowledge remains with the collective. Thus there is no need to enumerate subsets of peoples when identifying branches. This option makes it clear that the people given protection will be within this definition.

Article 3 of the Draft incorporates the scope of protection and states that Indigenous Peoples have the right to maintain, control, protect, and develop their intellectual property interests over their TCEs. This protection maybe made possible through indigenous laws, customs and regulations administered through their own institutions and decision- making procedures.

States will need to take effective measures, including financial and technical assistance for ensuring that Indigenous Peoples are empowered to exercise these rights at the local, national, regional and international levels. To prevent unauthorized access to and utilization of their TCEs, Indigenous Peoples should be empowered to: define the subject matters using their terms; identify rightful holders; affirm that agreements are reached with free and prior informed consent (FPIC) and mutually agreed terms (MAT); ensure fair and equitable benefit- sharing; ensure adequate and appropriate disclosure and determine limitations on the utilization of TCEs. States may be required to affirm these provisions in national laws but in no way should such laws deprive Indigenous Peoples of their rights.

The standard for protection should be equal and be based on whether or not FPIC has been obtained to prior access and utilization of the knowledge, even if it is not secret or sacred.

Administration of Rights (Article 4) states that Indigenous Peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions. In order to fulfill this Member States/Contracting parties are obligated to establish any national administrative body upon request of Indigenous Peoples, in full partnership with them, for their benefit and only with their FPIC. Indigenous institutions at the national level, created by Indigenous Peoples themselves, and provided with financial and administrative support from the Government would be an appropriate institution for protection of Indigenous Peoples' rights to their TCEs.

Exceptions and Limitations as per Article 5 of the Draft states that it should be determined by the Indigenous Peoples. The General Exceptions Clause[13] incorporates that such limitations and exceptions must be made available provided the use of protected TCEs acknowledges the beneficiaries, where possible; is not offensive or derogative to the beneficiaries; is compatible with fair use/dealing/practice; does not conflict with the normal utilization of the TCEs by the beneficiaries and does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties. The Specific Exceptions Clause[14] mentions that subject to the limitations in the previous

[13] *Ibid* Arts 5.1 and 5.2
[14] *Ibid* Arts 5.3, 5.4 and 5.5

paragraph. Member States/Contracting Parties may adopt appropriate limitations or exceptions, in accordance with national law, for the purposes of teaching, learning but not research resulting in profit-making or commercial purposes[15]; for preservation, display, research and presentation in archives, museums, libraries or cultural institutions, for non-commercial cultural heritage or other purposes in the public interest[16]; and the creation of an original work of authorship inspired by TCEs[17]. This provision is not applicable to protected TCEs described in Article 3.2. Regardless of whether such acts are permitted under Paragraph 1, the use of TCEs in cultural institutions recognized under the appropriate national laws, archives, libraries and museums for non-commercial cultural heritage or other purposes in the public interest, including for preservation, display, research and presentation should be permitted[18] and also the creation of an original work of authorship inspired by TCEs[19].

Article 5.5 is an Exception Clause providing for the protection of secret TCEs against disclosure, to the extent that any act would be permitted under the national law for works protected by copyright, or signs and symbols protected by trademark law, such act is not to be prohibited by the protection of TCEs.

Article 6 - Term of Protection provides two options of protection. Option 1 allows the Member States/Contracting Parties to determine the appropriate term of protection of TCEs in accordance with Article 3 and they may also determine that the protection granted to TCEs against any distortion, mutilation or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the beneficiaries or region to which they belong and that such protection to last indefinitely.[20]

In Option 2 of Member States/Contracting Parties may determine the term of protection of TCEs, at least as regards their economic aspects and is to be limited.[21]

Sanctions, Remedies and Exercise of Rights in Article 8 make mention of two (2) Options wherein Member States/ Contracting Parties can provide appropriate legal, policy or administrative measures, in accordance with national law, to ensure the application of this instrument[22]OR provide accessible, appropriate and adequate enforcement and dispute resolution mechanisms, border measures, sanctions and remedies, including criminal and civil remedies, to ensure the application of this instrument.[23]

Transitional Measures in Article 9 lays down the opportunity to be given to Indigenous Peoples to account for knowledge that has been misappropriated from

[15] *Id.* Article 5.3(a)
[16] *Id.*Article 5.3(b)
[17] *Id.*Article 5.3(c)
[18] *Id.*Article 5.4(a)
[19] *Id.*Article 5.4(b)
[20] *Id.*Article 6.1
[21] *Id.*Article 6.2
[22] *Id.*Article 8.1 Option 1
[23] *Id.* Article 8.1 Option 2

their communities and provided with fair, independent, impartial, open and transparent remedies to address misappropriated TCEs.

Article 10 – Relationship with other International Agreements – Member States are required to implement this instrument in a manner mutually supportive of other existing international agreements and nothing in this instrument is to be construed as diminishing or extinguishing the rights that Indigenous Peoples or local communities have now or may acquire in the future.[24]

National Treatment (Article 11) – The rights and benefits arising from the protection of TCEs under national measures or laws that give effect to this instrument is to be made available to all the beneficiaries that meet the criteria outlined in Article 2 who are nationals or residents of Member State/ Contracting Party to this instrument.[25]

Foreign beneficiaries that meet the criteria outlined in Article 2 are also entitled to enjoy the same rights and benefits enjoyed by beneficiaries who are nationals of the Member State/Contracting Party of protection.[26]

Article 12 and Trans-Boundary Cooperation provides that in instances where TCEs are located in territories of different Member States/Contracting Parties, the states/parties are to cooperate in addressing instances of trans-boundary TCEs, with the involvement of Indigenous Peoples and local communities concerned, where applicable, with a view to implementing this instrur nt.[27]

A regional indigenous body, set up with minimal intervention from States, could be a model for dealing effectively with Indigenous Peoples TCEs in a trans-boundary context.

Conclusion

Indigenous Peoples have a Right to Self- Determination[28] and by virtue of this right they freely determine their political status and freely pursue their economic, social and cultural development. Indigenous Peoples have sovereignty over their resources[29] and by virtue of this sovereignty; they retain their rights over their resources even in cases of unauthorized access and when the term of legitimate use has expired. There is therefore an inherent incompatibility between the existing intellectual property regime, which is trade and market-based, and the way Indigenous Peoples view their TCEs. The Draft Article prepared by WIPO is a very good model however it may be seen that this document is not without flaws and some further suggestions may be incorporated before the Draft becomes acceptable as a binding document.

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24 *Id.* Articles 10.1 and 10.2

25 *Id.* Article 11.1

26 *Id.* Article 11.2

27 *Id.* Article 12

28 United Nations Declaration on the Rights of Indigenous Peoples, Art 3

29 http://www.un.org/esa/socdev/unpfii/documents/Report%20by%20Erica%20 Irene%20A.%20Daes.pdf (last visited on 20th May 2015)

JOURNEY FROM PATRIARCHAL NOTIONS TO FEMININE RIGHTS: The Development Related to Rape Law in India

Alok Sharma[*]

Introduction

Rape! Gang rape! Gang rape! Rape! This is something which we come across almost every day as news as sexual violence against women and children is drastically increasing. It is a disgusting scenario after the Delhi gang rape case which invoked large scale demonstrations by common people especially youth all over the country forcing the State to take prompt action in changing the rape law to make it more stringent. The worst aspect of it is that in many such cases the victims are minor girls and offenders are juveniles.

According to statistics, crimes against women including rape and particularly gang rape are rising at a very fast rate. According to the latest report,[1] an increasing trend in cases of rape has been observed during the periods 2010-2014. These cases have reported an increase of 9.2% in the year 2011 (24,206 cases) over the year 2010 (22,172 cases), an increase of 3.0% in the year 2012 (24,923 cases) over 2011, with a further increase of 35.2% in 2013 (33,707 cases) over 2012 and increase of 9.0% in 2014 (36,735 cases) over 2013.[2]

Recently, the Delhi Police has released its statistics on crime in Delhi in their annual press conference.[3] According to which crime against women also remained a worrying subject for the force, with a rape being reported every four hours in the Capital in 2015. The number of rape cases grew to 2,095, up by 0.48% from 2014 (2,085 cases). 1,958 rape accused were arrested in 2015 out of which 149 were juveniles.

The Concept of Rape

The word 'rape' is derived from Latin *'rapio'* which means to snatch i.e. a forcible seizure. It may also be defined in the narrow sense as ravishment of a woman without her consent by force, fear or fraud or as the carnal knowledge of woman by

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1 *Crime in India 2014*, published by National Crime Records Bureau, Ministry of Home Affairs, Government of India.

2 *Id.* at p. 85.

3 *"Crime high, detection low: Delhi Police solved only 27% cases in 2015,"* Hindustan Times, New Delhi dated 5th January, 2016.

force against her will. The very act of rape is outrageous, inhuman and derogatory. The effect and consequences of rape are so deplorable that it shatters the confidence and faith not only of the victim but also of the society as a whole. Rape is explicitly prohibited under the International humanitarian law governing both international and national conflicts.[4] Rape committed not in the course of conflict but as part of political repression is also prohibited under international law as torture or cruel, inhuman or degrading treatment.

Earlier Definition of Rape in India

The earlier legal definition of rape was incorporated in Section 375 of the Indian Penal Code, 1860 (hereinafter the Code) and its Section 376 (1) and (2) prescribed the punishment for rape. Further, by the Criminal Law (Amendment) Act, 1983, certain other categories of sexual intercourses which were not rape had been incorporated in the Code. This legal definition of rape focused only on vaginal — penile penetration while oral, rectal penetrations and digital rape (rape with objects), which is very common and has the same impact on the victim, remained completely unacknowledged.

It is contrary to the contemporary understanding of rape, as intent to humiliate, violate and degrade a woman or child sexually and, therefore, adversely affect the sexual integrity and autonomy of women and children. This definition could be extremely wide and took within its sweep various forms of sexual offences as the terms 'sexual intercourse' and 'penetration' had not been defined in the Code. As per Explanation attached to the aforesaid section, the only thing to prove was entry of man's private parts into the woman's person. The slightest penetration was sufficient to constitute the offence and a completed act of sexual intercourse and emission was not required.

The Exception to section 375 embodied that when the woman was married and not less than 15 years of age, sexual intercourse, by the husband was not rape. The reason being that on marriage, the wife consented to the husband's exercising the marital rights of intercourse, which she could not retract. The consent required by law had not to be given at the time of each act of intercourse between husband and wife even if the act was dangerous to the health of the wife. Therefore, the definition of rape did not go beyond the parameters of a patriarchal value system and old notions of chastity, virginity and marriage.

Section 376(1) of the Code provided for a minimum sentence of 7 years imprisonment and a maximum of imprisonment for life to a term of ten years and fine. And clause (2) of S. 376 made gang rape, custodial rape and rape on a pregnant woman an offence and provided for-a rigorous imprisonment for a term not less than 10 years for these categories of rape. A court might alternately award life imprisonment. However, both the clauses allowed a court, for 'adequate and special reasons', to impose a sentence of imprisonment for a term lesser than 7 years and rigorous imprisonment for a term lesser than 10 years, respectively.

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4 Article 27, The Fourth Geneva Convention of 1949; Article 7 and Article 8, The Rome Statute of the International Criminal Court.

The Law Commission of India on Rape

In the post-independence period the rape law has received a serious attention of the Law Commission of India in its various reports *viz.*, 42nd, 84th, 156th and 172nd.

The 42nd Report of the Law Commission

In 1971, the Law Commission in its 42nd report[5], *inter alia*, thoroughly scanned the Macaulian perception of rape. It, in its ultimate analysis, recommended that Section 375 of the Code be split into three categories, namely rape proper (rape on a woman other than wife); rape on a child wife (wife below 12) and a separated wife; and statutory rape (consensual sexual intercourse with a girl below the stipulated age).[6] Therefore, they re-drafted Sections 375[7] in 42nd Report. The Law Commission observed that the latter part of Section 376 had to be omitted. Further, in place of the punishment then provided in the Section, *viz.*, imprisonment for life or imprisonment of either description for ten years, it proposed to substitute rigorous imprisonment for fourteen years. It considered the question whether the minimum sentence of say, three years imprisonment, should be provided for this offence, but decided against it. Adequate punishments were imposed by Sessions Court by which this offence is ordinarily tried.[8] They also re-drafted Sections 376[9].

The Law Commission in this 42nd Report also recommended various other provisions regarding different categories of rape, *viz.*, Section 376A regarding 'sexual intercourse with child wife'[10] which distinguished sexual intercourse between a wife of 12 to 15 years of age and a wife of less than 12 years of age, sexual intercourse with the wife over fifteen years of age without her consent not being an offence. It also recommended rigorous imprisonment up to 7 years if the wife was under twelve years of age and in other case, imprisonment up to 2 years of either description. The 42nd Report's signal contribution to the reform of rape laws was the introduction of the concept of 'custodial rape' in the form of Section 376B regarding 'illicit intercourse with a girl between twelve and sixteen,'[11] Section 376C regarding 'illicit intercourse of public servant with woman in his custody,'[12] Section 376D regarding 'illicit intercourse of superintendent etc. with inmate of women's or children's institution'[13] and Section 376E regarding 'illicit intercourse of manager etc. of a hospital with mentally disordered patient.[14]

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5 42nd Report on "The Indian Penal Code," 1971.
6 *Id.* Paragraphs 16.113 to 16.123 at pp. 275-280.
7 *Id.* Paragraph 16.117 at pp. 277-278.
8 *Supra* note 5, paragraph 16.118 at p. 278.
9 *Id.* Paragraph 16.118 at p. 278.
10 *Id.* Paragraph 16.119 at p. 278.
11 *Id.* Paragraph 16.120 at pp. 278-279.
12 *Id.* Paragraph 16.123 at pp. 279-280.
13 *Ibid.*
14 *Ibid.*

The 84th Report of the Law Commission

In 1980, the Law Commission submitted its comprehensive 84th Report[15] to the Government. Interestingly, the Law Commission did not lend its support to the 'restructuring' of Section 375 of the Code, by splitting it into three categories of rape, mooted by the Law Commission in its 42nd report.[16] On the question of consent, the Commission observed that they would not only include the suggestions made in the 42nd Report but suggested further amendments which would strengthen the concept of "free consent" for the purposes of Section 375.[17] The Commission felt that the term "consent" was inadequate and should be substituted by the phrase "free and voluntary consent."[18] The Commission further stated:

> "The modifications recommended by us in the third clause vitiated consent not only when a woman is put in fear of death or hurt, but also when she is put in fear of any "injury" being caused to any person (including herself) in body, mind, reputation or property and also when her consent is obtained by criminal intimidation, that is to say by any words or acts intended or calculated to put her in fear of any injury or danger to herself or to any person in whom she is interested or when she is threatened with any injury to her reputation or property or to a reputation of any one in whom she is interested..."[19]

The Commission made significant recommendations on age of consent. It recommended that "since marriage with a girl below eighteen years is prohibited... sexual intercourse with a girl below eighteen years should also be prohibited."[20]

[15] 84th Report on *'Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence,'* 1980.

[16] "Suffice to say that the Commission now feels that such a restructuring would be out of tune with the current thinking on the question of trial of offences for rape and, therefore, the structure of Section 375 should not be altered. Since the making of the recommendation by the Commission in its earlier Report, there has been a radical and revolutionary change in the approach to the offence of rape; its enormity is frequently brought into prominence and heightened by the revolting and gruesome circumstances in which the crime is committed; the case law has blurred the essential ingredients of the offence and introduced instability into the previously well established law bearing on the offence of rape. The Commission feels that re-structuring will produce uncertainty and distortion in Section 375, which should, in its opinion, retain its present logical and coherent structure." *Id.* Paragraph 2.21 at p. 9.

[17] *Ibid.* Paragraph 2.22.

[18] The Commission observed: "The substitution of the expression "free and voluntary consent" for the word "consent" in the second clause makes it clear that the consent should be active consent as distinguished from that consent which is said to be implied by silence."[18] The Commission proceeded to say: "Under the amendment as recommended, it would not be open to the Court to draw an inference of consent on the part of woman from her silence due to timidity or meekness or from such circumstances without any more, - as that the girl meekly followed the offender when he pulled her, catching hold of her hand, or the woman kept silent and did not shout or protest or cry out for help." *Ibid.*

[19] *Ibid.* Paragraph 2.9.

[20] *Id.* Paragraph 2.20 at p. 9.

The 84th Report by introducing a broader concept of "misconception of fact" has eliminated any examination of morality or the sexual antecedents of the victim of rape. Section 375, fourthly (b) allows this under a broader misconception of fact which includes the narrower mistake of identity.[21] The Commission recommended the omission of Section 376A and 376*B*. The Commission also recommended leaving rape of child wife (Section 376A) in general Section 375 instead of placing it in a separate section. Section 376*B* which dealt with the rape on a girl between 12-16 years of age with her consent was omitted altogether. Further, the Commission retained Sections 376C, 376D and 376E which dealt with custodial rape but renumbered them as Sections 376A, 376B and 376C.[22] Consequently, it revised Section 375[23] of the Code.

As far as Section 376 is concerned it has been suggested that in Section 376 of the Code, which deals with the punishment for rape, the situation where more than one person join in the act should be dealt with by stringent provisions, by providing, say, a minimum punishment of 10 years' rigorous imprisonment but the Commission has rejected this suggestion in its 84th Report.[24] Further it says that a rule prescribing a certain minimum punishment would not be in consonance with the "modern penology" which has been of late expounded in many cases by the Supreme Court. The circumstances in which the offence of rape is committed differ from case to case. Section 376 permits the Court to award life imprisonment or imprisonment up to ten years. The discretion of the Court in the matter of punishment should not be fettered by prescribing a certain minimum sentence. If the sentence awarded is heavy or light, it can always be corrected by the appellate or revision court.[25]

The 156th Report of the Law Commission

The Law Commission has submitted its 156th Report[26] on the Indian Penal Code on August 30, 1997 where it recommended that penile/oral penetration and penile/anal penetration be covered by the Section 377 of the Code and that the present Section 354 of the Code is adequate enough to bring in its ambit the finger penetration and object penetration into vagina or anus. However, it recommended that clause Thirdly in Section 375[27] to be amended by adding "or of any other injury" in the last. The words "or of any other injury" expand the scope of this clause to provide for situations of rape by persons in position of trust, authority, guardianship or of economic or social dominance. These cases will include incestuous rape and other instances where a victim of rape is totally dependent on the offender who is in a dominant position.[28]

[21] *Infra note 26,* Paragraph 9.20 at p. 145.

[22] *Supra* note 15, paragraph 2.23 at p. 9 and paragraph 9.15 of the 156th Report at pp. 141-142.

[23] *Id.* Paragraph 2.24 at p. 10.

[24] *Id.* Paragraph 2.25 at p. 10.

[25] *Id.* Paragraph 2.27 at p. 11.

[26] 156th Report on *'The Indian Penal Code'* Vol. I, 1997.

[27] *Id.* Paragraph 9.34 at pp. 160-161.

[28] *Ibid.*

Regarding Section 377 of the Code it recommended that in view of the growing instances of child sexual abuse in the country, where unnatural offence is committed on a person under the age of eighteen years, there should be a minimum mandatory sentence of imprisonment of either description for a term not less than two years, but which may extend to seven years and fine, with a proviso that for adequate and special reasons to be recorded in the judgment, a sentence of less than two years may be imposed.[29]

The 172nd Report of the Law Commission

In 1997 'Sakshi', a voluntary organization, through a Public Interest Litigation petition[30], approached the Supreme Court of India with a plea that existing Sections 375 and 376 of the Code and judicial interpretations thereof are not in tune with the current state of affairs and it should be broadened to include all forms of penetrations. The Supreme Court directed on August 9, 1999 the Law Commission to examine the issues submitted by the petitioners and examine the feasibility of making recommendations for amendments of the Code or deal with the same in any other manner so as to plug the loopholes. After a careful review of the rape law in vogue and an intensive deliberations with Sakshi, the National Commission for Women, and other organizations, the Law Commission, in its 172nd report[31] submitted to the Government of India on March 25, 2000, recommended, *inter alia,* that the law relating to 'rape', be made gender neutral, wider and more comprehensive to bring it in tune with the current thinking.

The Law Commission accordingly, recommended that the offence of 'rape' be substituted by the offence of 'sexual assault', a gender neutral phrase, and that 'all kinds of penetration' in the vagina, anus or urethra of another (whether by a part of body of a human being or by an object) as well as oral sex be brought within purview of the proposed 'sexual assault'. It also recommended minor changes in the clauses First to Sixthly of Section 375 of the Code to make them gender neutral. The existing age of the 'wife', mentioned in Exception to Section 375 of the Code and of the person assaulted sexually referred to in clause sixthly, according to the Law Commission, be raised to sixteen from fifteen.

The Law Commission in its 172nd Report, thus, while perceiving the terms 'penetration' and 'sexual intercourse', key terms in the offence of rape, in a very wide sense, not only brought 'all kinds of penetration' within the purview of these terms but also recommended a comprehensive gender neutral law relating to rape ('sexual assault'). Therefore it recommended substitution of the then existing Section 375. It also recommended recasting of Section 376. The Commission recommended modification in Section 376A, Section 376 and Section 376C. The Commission also modified Section 376D and inserted a new section, namely, Section 376E.

[29] *Id.* Paragraph 9.52 at pp. 175-176.
[30] *Sakshi* v. *Union of India and others,* 2004 (2) JCC 892; AIR 2004 SC 3566.
[31] 172nd Report on *'Review of Rape Laws,'* 2000.

The Criminal Law (Amendment) Bill 2012

On the basis of the recommendations of the Law Commission in its 172nd Report as well as the recommendations of the National Commission for Women for providing stringent punishment for the offence of rape, a High Power Committee was constituted by the Government consisting of the representatives of the Ministry of Women and Child Development, Ministry of Law and Justice, National Commission for Women, Law Commission of India and the Ministry of Home Affairs to examine the matter considering the suggestions of various quarters on the subject. The Committee submitted its report along with the draft Criminal Law (Amendment) Bill, 2012[32] to the Government and recommended for its enactment. The draft Bill was further examined by the Government.[33]

Therefore, the Bill was drafted to amend the Code *inter alia,* so as to substitute Sections 375, 376, 376A and 376B by replacing the existing Sections 375, 376, 376A, 376B, 376C and 376D of the Code[34] and replacing the word 'rape' wherever it occurs by the words 'sexual assault', to make the offence of sexual assault gender neutral and also widening the scope of the offence of sexual assault.[35] This Bill was introduced in the Lok Sabha on 4th December, 2012 in order to provide for stringent punishments for crimes against women, as also to provide for more victim friendly procedures in the trials of such cases.[36] The Department-related Parliamentary Standing Committee on Home Affairs examined this Bill and tabled its Report in Parliament on 1st March, 2013 which was considered by the Government in drafting the present Law.[37]

The Verma Committee Report

On 16th December 2012 a young female physiotherapy intern was beaten along with her friend and gang raped in a moving bus in Delhi. She died from her injuries thirteen days later, despite receiving treatment in India and Singapore. This horrendous incident of gang rape generated international coverage and was condemned by the National as well as the International Community. There was a demand from all corners to the Government to do everything including taking up radical reforms, ensuring justice and reaching out with robust public services to make women's lives more safe and secure. Public protests especially by young males and females took place in Delhi for so many days. Similar protests took place in major cities throughout the country making the demands of safety, security and justice to women.

In view of this public outrage, on 22nd December 2012, the Government had to constitute a committee to make recommendations on amending the various laws to

[32] The Criminal Law (Amendment) Bill, 2012 (Bill No. 130 of 2012).
[33] *Id.* The Statement of Objects and Reasons, paragraph 1.
[34] *Id.* Chapter II, Amendments to the Indian Penal Code, Paragraph 5.
[35] *Id.* paragraph 2.
[36] Criminal Laws (Amendment) Act, 2013(Bill no. 63 Of 2013), Statement of Objects and Reasons, paragraph 1.
[37] *Id.* Paragraph 3.

provide for speedy justice and enhanced punishment for offenders in cases of sexual assault of extreme nature including the rape law and other issues related to women and their safety and security under the chairmanship of Justice J.S.Verma, a former Chief Justice of India, which had submitted its report[38] after 29 days on 23rd January, 2013, after considering 80.000 suggestions received by it during the period from public in general and eminent jurists, legal professionals, NGOs, women's groups and civil society in particular. The report indicated that failures on the part of the Government and Police were the root cause behind crimes against women. The Verma Committee had comprehensively dealt with various issues and recommended a number of changes in the then existing law immediately and also mentioned that President could issue an Ordinance in that regard.

Proposed Changes in Section 375

The Committee also had taken note of the Criminal Law (Amendment) Bill, 2012 and observed that it had provisions that were somewhat protective of the right of safety of women but were insufficient. It needs a series of revisions, many of which the committee has recommended in the Report.[39] The Bill used the term sexual assault in lieu of rape to cover a wider gamut of offences including penetrative sexual assault which had thus far been called rape in the Code. However, while the new provisions widen the definition of 'penetration' beyond vaginal penetration, the new offence remains limited to that of 'penetration'. Other types of sexual assault are not subject to appropriate legal sanction.[40]

Further, the Committee found that the Protection of Children from Sexual Offences Act, 2012 defined the term 'sexual assault' in a limited context. Section 7 of that Act confines sexual assault to acts that involve physical contact without penetration. Hence if rape were to be redefined as 'sexual assault' in relation to the Code then there would be a clear contradiction between them. Hence the Committee recommended that the term 'rape' be retained in the Code and that to 'by man' to denote the highest categorization of sexual assault, i.e. penetrative sexual assault.[41]

Further, the Committee also considered UK and Wales's legislations, Canadian legislation and South African legislation to modify the then definition of rape and approved the definition provided in South African legislation.[42] The Committee has widened the then definition of rape by broadly construing the terms 'sexual intercourse' and 'penetration.' It has included penetration not only of the vagina but also of anus or urethra of a person and that too with any part of his body including his penis or any object manipulated by him or by manipulating any part of the body of a person so as to cause penetration of the vagina or anus or urethra of another person.

[38] The Report of the Committee on Amendments to Criminal Law, 2013.
[39] *Id.* Chapter III, paragraph 41at p. 95.
[40] *Id.* Chapter III, paragraph 64at p. 106.
[41] *Id.* Appendix 4 at p. 434.
[42] *Id.* Chapter III, paragraph 68 at pp.111-112.

The Committee has not incorporated the then sixthly of Section 375 where rape occurs when a sexual intercourse has taken place with a girl, with or without her consent, when she is below sixteen years of age. It has replaced sixthly as the rape amounts to when the person is unable to communicate consent either express or impliedly. In Explanation IV it defines consent as an active consent and excludes passive submission as consent. However, the Committee has dealt separately with then sixthly in a new Section 376B[43] with aggravating punishment of rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life and further in the course of such commission of offence if he inflicts an injury which causes the death of the person, or causes the person to be in a persistent vegetative state shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but may be for life, which shall mean the rest of that person's natural life.

As far as marital rape is concerned, the Committee examined legislations of England, Wales, South Africa, Canada and Australia and found that in all these legislations marital rape has been recognized.[44] Therefore, the Committee recommended[45] that:

i. The exception for marital rape be removed.
ii. The law ought to specify that:
   a. A marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation;
   b. The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity;
   c. The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.

Therefore, the Committee suggested various modifications in the Bill[46] including the definition of rape in Section 375[47] which it replaced, and by recommending the inclusion of marital rape in the Code.

Proposed Changes in Section 376

It recommended firstly, that the punishment in Section 376(1) must be seven years minimum which can extend to imprisonment for life with compensation to the victim, which shall be adequate to meet at least the medical expenses incurred by the victim. Secondly, the inclusion of marital rape and lastly abolition of judicial discretion in awarding less punishment than the minimum prescribed.

[43] *Id.*, Paragraph 12, pp .443-444.
[44] *Id.* Chapter III, pp. 113-118.
[45] *Id.* Chapter III, paragraph 79 at p.117
[46] *Id. Appendix 4*, Chapter 1: Proposed Amendments to the Indian Penal Code at p. 434.
[47] Report of the Committee on Amendments to Criminal Law, 2013, Appendix 4, Paragraph 7at pp. 439-440.

As far as Section 376(2) is concerned certain new grounds have been incorporated like rape by a member of the armed forces; by a relative, guardian or teacher of, or a person in a position of trust or authority towards the person assaulted; where person assaulted is incapable of giving consent; while committing rape the accused causes grievous bodily harm or maims or disfigures or endangers the life of the person assaulted; or if he commits rape repeatedly on the same person. The punishment prescribed is rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to pay compensation to the victim which shall be adequate to meet at least the medical expenses incurred by the victim. Again the judicial discretion of awarding lesser punishment has been taken away.

The Committee also observed that the brutalities of the armed forces faced by residents in the border areas have led to a deep disenchantment, and the lack of mainstreaming of such persons into civil society. Serious allegations of persistent sexual assault on the women in such areas and conflict areas are causing more alienation. Therefore, this has to be included in the punishment of rape.[48] According to the Committee, the then existing section of punishment would be amended as new Section 376.[49] The Committee also recommended that a new Section, Section 376(3) providing for heavy punishment for causing death or a persistent vegetative state in the course of committing rape should be added.[50]

According to the Committee, the then Section 376A should be repealed[51] as the marital rape has to be included as the offence of rape and be replaced with new Section 376A about sexual intercourse by a person in authority and shall be punished with rigorous imprisonment for a term which shall not be less than five years but which may extend to ten years and shall also be liable to a fine without any judicial discretion to lower the sentence.[52]

As per Committee, the offence of gang rape should be defined and punished separately and severely by a new Sectio*n 376C*.[53] The most important aspect of this provision is the clarification of the position in these cases by incorporation of the phrase 'regardless of their gender' so as to make females also responsible for the offence if all ingredients of gang rape have been satisfied. It also recommended that a new offence of Gang Rape causing death or a persistent vegetative state as Section 376D should be added with very stringent punishment.[54] Therefore, Sections 376 B, C and D should be replaced accordingly.[55]

It further suggested that a new Section 376E providing for increased punishment for offenders with a prior conviction for rape should be added.[56] A very

[48] *Id.* Chapter 20, Conclusions and Recommendations, paragraph 17at p. 414.
[49] *Id.* Appendix, 4, Paragraph 8 at pp. 440-442.
[50] *Id.* Appendix 4, Paragraph 9 at p 442.
[51] *Ibid.* Paragraph 10.
[52] *Id.* Paragraph 11 at pp. 442-443.
[53] *Id.* Paragraph 13at p.444.
[54] *Id.* Paragraph 14 at pp. 444-445.
[55] *Id.* Paragraph 11 at p.442.
[56] *Id.* Paragraph 15 at p. 445.

important recommendation of the Committee was inclusion of a new Section 376F defining and punishing the offence of breach of command responsibility under certain circumstances.[57] It is a remarkable recommendation which has not been suggested by any of the bills of the Government. However, it does not recommend death penalty for any of the offences.

The Criminal Law (Amendment) Ordinance 2013

It was felt necessary to bring the revised laws into effect as soon as possible, as any crime against women committed during the period when the law was in making would be punishable only under the existing laws.[58] In view of the urgency of the matter, the Government of India on 1st February 2013 approved for bringing an Ordinance, for giving effect to the changes in law as suggested by the Verma Committee Report. However, the Ordinance was subsequently replaced by the Criminal Laws (Amendment) Act, 2013 with numerous changes. The Criminal Law (Amendment) Ordinance, 2013 was promulgated by the President on February 3, 2013.

The most important change that had been made was the change in definition of 'rape' under the Code. The word '*rape*' had been replaced with '*sexual assault*' in *Section 375* and had added penetrations other than penile penetration as an offence. The definition was broadly worded and gender neutral, using term 'person' in place of 'man,' in some aspect, with acts like penetration of penis, or any object or any part of body to any extent, into the vagina, mouth, urethra or anus of another person or making another person do so, apply of mouth or touching private parts constituted the offence of sexual assault. The section had also clarified that penetration meant "penetration to any extent", and lack of physical resistance was immaterial for constituting an offence. The age of consent in India had been increased to 18 years, which meant any sexual activity irrespective of presence of consent with a woman below the age of 18 would constitute statutory rape. But it also excluded marital rape from the purview of the offence however, with increase in the wife's age as 16.

The Ordinance has incorporated certain new grounds as punishment which were not even present in Verma Committee Report like commission of sexual assault on a person when such person is under eighteen years of age; being in a position of economic or social dominance, commits sexual assault on a person under such dominance; and commits sexual assault on a person suffering from mental or physical disability. As far as punishment for sexual assault is concerned, except in certain aggravated situation the punishment would be imprisonment not less than seven years but which might extend to imprisonment for life, and should also be liable to fine. In aggravated situations, punishment would be rigorous imprisonment for a term which should not be less than ten years but which might extend to imprisonment for life, and should also be liable to fine.

[57] *Id.* Paragraph 16 at p.445.
[58] *Supra* note 36, Statement of Objects and Reasons, paragraph 2.

A new Section 376A had been added which dealt with infliction of an injury which caused the death of the victim or caused the victim to be in a persistent vegetative state while committing the offence of sexual assault. The Ordinance even recommended death penalty for that offence. It is an important development. The Ordinance has replaced then Section 376A with 376B but with two differences. First difference is the enhanced punishment and the second one is inclusion of minimum punishment in the proposed section regarding sexual assault on one's own wife living separately. Further the Ordinance has replaced Sections 376B, C and D with Section 376C with enhanced and minimum punishments.

Another proposed new Section 376D is that in case of "gang rape", persons involved regardless of their gender should be punished with very heavy punishment including compensation to the victim which should be reasonable to meet the medical expenses and rehabilitation of the victim. A very important provision in the Ordinance was the punishment for repeating the commission of some of the offences even up to the death penalty. Therefore, for then Sections 375 to 376D new sections have been incorporated.[59]

However, the Ordinance had been strongly criticized by several human rights and women's rights organizations for not including certain very important suggestions recommended by the Verma Committee Report like, marital rape, reduction of age of consent, amending Armed Forces (Special Powers) Act so that no sanction was needed for prosecuting an armed force personnel accused of a crime against woman. But the important fact is that it provides for death penalty for two offences which the Verma Committee has not recommended at all.

The Present Law: The Criminal Law (Amendment) Act 2013

Keeping in view the recommendations of the Department-related Parliamentary Standing Committee on Home Affairs, the recommendations of Justice Verma Committee and the views and comments received from various quarters including women groups, the Government has drafted the Criminal Law (Amendment) Bill, 2013.[60]The Criminal Law (Amendment) Act, 2013 has been passed by the *Lok Sabha* on 19th March 2013 and by the *Rajya Sabha* on 21st March 2013 after making certain changes from the provisions in the Ordinance. The Act received Presidential assent on 2nd April 2013 and deemed to come into force from 3rd February 2013.

The Criminal Law (Amendment) Act, 2103 seeks to amend the Code and other laws. These amendments, *inter alia,* seek to:—

> "...(*c*) widen the definition of rape; broaden the ambit of aggravated rape; and enhance the punishment thereof;
> (*d*) prescribe for punishment extending to the sentence of death, for an offence where in the course of commission of an offence of rape, the offender inflicts any injury which causes the death of the victim or causes the victim to be in a persistent vegetative state;
> (*e*) punish the repeat offenders of rape with imprisonment for life (which shall mean the remainder of the person's natural life), or with death;
> (*f*) prescribe that those convicted for the offence of gang rape shall be punished with rigorous imprisonment for a minimum of twenty years extendable to life (which shall mean the remainder of that person's natural life) and fine; to be paid to the victim to meet the medical expenses...."[61]

[59] The Criminal Law (Amendment) Ordinance, 2013, paragraph 8.

[60] The Criminal Law (Amendment) Bill, 2013, Statement of Objects and Reasons, paragraph 3.

Differences among the Present Law and Previous Law and Bills

Section 375

Although, the Act has incorporated most of the provisions of the Ordinance still there are few differences between them. The main difference, as far as the definition of rape in Section 375 is concerned, is that the words 'sexual assault' has been replaced back to 'rape.' Therefore, the offence is no longer gender-neutral, only a man can commit this offence. It is interesting to note that in Criminal Law Amendment Bill, 2012 the definition of rape was drafted in gender neutral terms by using 'Sexual Assault' in place of 'Rape' and 'Person' in place of 'Man' which was followed by the Government in drafting the Ordinance. But the Verma Committee has used the terms 'Rape' and 'Man' as was used in the earlier law to make the offence more effective. The Parliament accepted this suggestion.

Another important aspect is the age of consent for the sexual activities. Both the Bill of 2012 and the Ordinance have suggested that in sixthly of Section 375 the age of consent should be eighteen years, the Verma Committee has not suggested any age of consent in Section 375 but suggested in a separate Section 376B that it should be sixteen years. The present law retained the earlier sixthly having sixteen years as the age of consent.

As far as marital rape is concerned, both the Bill of 2012 and the Ordinance have included the Exception clause by virtue of which sexual intercourse by a man with his wife of sixteen years of age and above is not rape. The Verma Committee has completely removed this clause and thereby treating marital rape as an offence of rape. But the present law retained the earlier position with the same age that is fifteen years. Further, the clause related to touching of private parts has also been removed. This clause has been suggested by the Ordinance only and was not present in any of the Bills. A new clause has been incorporated in Section 375 as seventhly which says that it is rape when she is unable to communicate consent for sexual intercourse. The Ordinance has the same provision in seventhly and the Verma Committee has it in sixthly with addition of phrase 'either express or impliedly' after 'consent'.

[61] *Ibid.*

Section 376

The present law incorporates certain new clauses in the punishment Section 376 and that too with the aggravated punishment. These are the cases where accused being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; commits rape during communal or sectarian violence; commits rape, on a woman incapable of giving consent; being in a position of control or dominance over a woman, commits rape on such woman; commits rape on a woman suffering from mental or physical disability; while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; and commits rape repeatedly on the same woman.

Most of these clauses have also been suggested by the Bill of 2012, the Verma Committee and the Ordinance but the Clause (g) of Section 376(2) of the present law which talks about commission of rape during communal or sectarian violence has not been suggested by any of the authority. It is a commendable inclusion but at the same time the present Act has not included the offence of breach of command responsibility as recommended by the Verma Committee in Section 376F of the Report.

Other provision regarding sexual intercourse with a separated wife is common in all three drafts except the Verma Committee which completely excluded any relaxation to husband. Another common provision in all the four drafts is custodial sexual intercourse having the same punishment. Other provisions are more or less similar except a big difference that Verma Committee has not recommended death penalty but the Act has. For Sections 376A, 376B, 376C and 376D of the Code, the Section 376A, Section 376B, Section 376C, Section 376D and Section 376E shall be substituted.[62]

Conclusion

It is evident that how the law on rape has been developed over a large span of time. There is no doubt that it has traveled from a clear patriarchal notion to the current more pro-woman approach but unfortunately there is no mitigation in these cases. Despite this stringent law which even talks about imposition of death penalty in certain circumstances, there is no reduction in number of rape cases rather it can be seen that after the Delhi gang rape case there is a sharp and notable increase in such cases especially in gang rape cases involving juveniles and that too with minor girls.

There can be various reasons for it including reporting of these cases or the intervention and presence of media. The available (reported) statistics is horrible what about the unreported one. Therefore, so many questions arise in this scenario especially about the effectiveness of the (stringent) law. As the Verma Committee has also mentioned in its Report that then existing law was not that bad but what

[62] CRLA, 2013, Chapter II, Amendments to the Indian Penal Code, Paragraph 9.

was required was the implementation of law in a correct way. The main objective of criminal law is deterrence which it failed completely. Despite serious punishments like death penalty, life imprisonment which includes whole natural life, twenty years imprisonment etc. there is no fear as such in the minds of perpetrators and there is a continuous increase in these cases every day.

Actually, this is the matter of great concern. Only enacting the stringent law is not sufficient but the more important task is the implementation of such law which require action, contribution by and improvement in all sectors of the criminal justice system including humanitarian approach towards the victim. The only solution which comes to my mind is the effective and quick implementation of the law in and disposal of these cases because without it people have no fear or deterrence as they know that trial and final disposal of these cases shall take so many years and even if conviction takes place then the convicts shall ask to compromise the case even on inadequate grounds like delay; having settled in their lives (both the convict and victim); married; having children etc. which is actually happening in these cases in various courts including the Apex Court. Compounding of rape cases has been taking place which is another dangerous development. However, the Apex Court has recently criticized this approach of Courts to compound rape cases.

Therefore, merely stringent law is not sufficient but its effective, speedy and honest implementation by all the functionaries of the Criminal Justice System is the only solution to this aggravating situation as the prospective offenders shall have some fear in their mind which can prevent them to commit such crimes. Another suggestion can be sensitization of our society especially males with respect to females, their dignity, self respect, emotions and aspirations then only this society will become a place to live in for the fair sex respectfully.

GENDERED HONOUR KILLINGS
A Criminal Act in India

Dr Shabnam[*]

Introduction

Honor killing is a heinous crimes which a perpetrator engages in to avenge his shame at the cost of the life of a woman. The honor maybe avenged in a myriad number of ways which takes the shape of domestic violence, acid attack, murder etc.[1] The Indian law perceives it only as any other criminal act where the dishonored family, caste, clan or community are involved in the brutal act of murder or other penal crimes and regain 'honor'. The reasoning behind such crimes is by eliminating the woman, honor is restored.[2] It is in the name of justice for family, culture or religion that the crime is justified. However, a distinction has been made between passionate crimes and honor killing by scholarly reasoning.[3] This distinction is based on the views of the western world with countries like France reasoning of passionate crimes and the Middle Eastern and the Indian sub-continent reasoning of honor killing.[4] Honor crimes happen for a number of reasons, as women who break or go against the moral norms and values upheld by a society, like marriage outside the community, victimized due to sexual assault or living away from a boy's family or an abusive husband or having extra-marital affairs. These acts by the woman are regarded as bringing dishonor to the family, which may lead to affecting her in the form of being eliminated or killed by the family members themselves and which leads to a restoration of their honor. In such cases, the community evokes responses that the perpetrator deserves leniency. Honor killings in Muslim countries depict the issue as a social and cultural problem, which do not reconcile with the standards of the Universal Declaration of Human Rights.[5] It adds to a special category of violence against women even though it may or may not form a part of domestic violence. When the west is associated with only values and modernity[6] and the non-west with traditions and ancient norms, a cultural clash appears amidst this controversy.[7] Feminists may use

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1 See, Arnold, Kathryn Christine. "*Are the Perpetrators of Honor Killings Getting Away With Murder? Article 340 of the Jordanian Penal Code Analyzed Under the Convention on the Elimination of All Forms of Discrimination Against Women.*" Vol. 16. No. 5, American University International Law Review, 1343-1409 (2001).

2 *Ibid.*

3 See, Wasti H. Tahir, " *The Law on Honour Killing: A British Innovation in the Criminal Law of the Indian Subcontinent and its Subsequent Metamorphosis under Pakistan Penal Code*", Vol. 25, No. 2, Journal of South Asian Studies, pp. 361-411, July-December 2010

4 *Ibid.*

5 *Ibid.*

6 See, Cohen M.H., "*The Condition of Women in Developed and Developing Countries*", Vol. XI, n. 2, The Independent Review, pp. 261-274, Fall 2006, ISSN 1086-1653.

7 See, Terman L. Rochelle, "*To Specify or Single Out: Should We Use the Term "Honor Killing?*", Vol. 7 Is. 1, Art. 2 Muslim World Journal of Human Rights, [2010]. *contd...*

the culture clash logic to discuss human rights and violence against women in the pivotal nature of honor killings. Honor killings can be seen within the larger category of culturally-justified violence against women that is not limited to Muslim, Arab, or South Asian communities but that still exist among these groups of people.[8] Where issues of migrant minority communities arise in the western ambience, they often fail to acknowledge the role of honor prevalent in other parts of the world. The justice system then fails to understand or explain the cultural pressures on women experiencing violence.[9] Fear of losing cultural identity in a foreign land makes the community hold on to the values more tightly than the homeland leading to extreme situations.[10]

Honor Based Violence is usually differentiated from other forms of domestic violence on the grounds that it

(a) occurs within the framework of collective family structures, communities, and societies;
(b) involves a premeditated act, designed to restore a societal construction of honor as a value system, norm or tradition; and
(c) is based on men's putative right to control women's sexual and social choices, with a concomitant perception of women as the property of men.[11]

Historical Background for Honor Killings

Honor killings has been associated with in the past across the world with the women who had not adhered to the society's norms and customs and for daring to venture outside the traditional setup were to be murdered. In India however, the term has been meaning to include not only the women but also killing the men whereby they have brought dishonor to the family, clan or the community name. In other countries, sometimes it was found in their cultural practices and at times in their national legal codes. There are certain countries where law is there and interpreted in a manner which prescribes lesser punishment for honor killings.[12] Cases of honor killings can be cited in the past texts in ancient male dominated societies as that of Rome, where men had the right to kill the women in case she indulged in dishonorable acts not permissible in the society at that point of time.[13] Status of women in the Roman society was death for adultery for the women[14] and the power of life and death transferred to a husband after marriage.[15] A felony

http://www.bepress.com/mwjhr/vol7/iss1/art2 DOI: 10.2202/1554-4419.1162

8 *Ibid.*

9 *Ibid.*

10 *Ibid.*

11 See, Gill Aisha, "*Honor Killings and the Quest for Justice in Black and Minority Ethnic Communities in the United Kingdom*", 20: 475, Criminal Justice Policy Review, 7 January 2009, DOI: 10.1177/0887403408329604, http: // cjp.sagepub.com/content/20/4/475]

12 *Supra* note 1.

13 See, Goldstein A.M., "*The Biological Roots of Heat-of-Passion Crimes and Honor Killings*", Vol. 21, no. 2, Politics and the Life Sciences, pp. 28-37, September 2002.

14 Cato the Eldor, at http://www.hoflink.com/~jhlb/cato1.htm (May 26, 1995).

15 Jane F. Gardner, *Women in Roman Law and Society* 131 (1986); Douglas Maurice *contd...*

under the Roman law and the husband's right to kill can be traced back before the Romans to the Codes of Hammurabi, Nesilim, and Assura and afterwards in the said codes itself.[16] Similar norms existed among cultures of ancient America. "In the Valley of Mexico, between 150 B.C.E. and 1521 A.C.E., Aztec laws punished nearly every crime with death. Death sentences for female adultery were performed by strangulation or stoning, which typically involved the crushing of the offender's head."[17] In Peru, between 1200 B.C.E. and 1532 A.C.E., the Incas punished adulterers by tying the lovers' hands and feet to a wall and leaving them to starve to death.[18] The Old Testament and New Testament under Christianity and the Quran under Muslim laws make similar references f prohibitions and punishments.[19] Adulterous behavior finds mention in Shakespeare's *Othello*, of punishing the unfaithful wife for such behavior.[20]

Human Rights: The International and Indian Law

Honor killings is a grave violation of human rights in the name of honor specifically against women.[21] A non acceptance of violence against women and girls that customs, traditions and religious considerations in differential situations are invoked to avoid obligations.[22] The female right to choices contrasted to traditional norms and values are to be challenged in the modern ambience of lifestyles of living. Violence in this form must be combated from a rights based perspective.[23] Human rights are imperative for the survival of democracy and it includes women's rights to enjoyment of these rights.[24] Interpretations relating to honor on terms of women not as property but as a separate entity needs to be made

MacDowell, *The Law in Classical Athens* 114 (1978).

[16] *Internet Ancient History Sourcebook*, Fordham University, at http://www.fordham.edu/halsall/ancient/asbook03.html (Aug. 1, 2002).; Eliza Griswold, "*Faith of Her Fathers,*" The New Republic at http://www.uiuc.edu/ro/amnesty/faith.html (Feb. 26 2001).

[17] Von Hagen, Victor Wolfgang. *The Ancient Sun Kingdom of the Americas* 108 (1961); Richard Hooker, *The Mexica/Aztecs*, Washington State University, at http://www.wsu.edu/~dee/CIVAMRCA/AZTECS.HTM; *Pre-Hispanic and Colonial Eras*, at http://icg.harvard.edu/~hsa23/handouts/lecture_1.htm

[18] SophiaA. McClennen, *Latin American Chronology*, at http://lilt.ilstu.edu/smexpos/website/latin_america_history.htm (last modified Jan. 18, 2001).

[19] [Old Testament] Holy Bible, King James Version, Leviticus 20:10; Deuteronomy 22:21; Deuteronomy 22:22.; [New Testament] Holy Bible, King James Version, St. Matthew 5:27–29 Koran, 24:1–3.

[20] William Shakespeare, *Othello*, Act V, sc.II.

[21] See, Mayell H., "*Thousands of Women Killed for Family Honor*", http://news.nationalgeographic.com/news/pf/15061734.html

[22] See, The Swedish Ministry of Justice and The Swedish Ministry for Foreign Affairs, Stockholm *"Combating Patriarchal Violence against Women—Focusing on Violence in the Name of Honor,"*, p.51, Dec. 7-8, 2004.

[23] *Ibid.*

[24] *Ibid.*

acceptable.[25] International human rights conventions and norms need to be made as an intrinsic part of national legislations so to permeate measures taken in areas of legislation, employment, education, and sexual and reproductive health and rights.[26] The UN reports and other documents contemplate their occurrence in Bangladesh, Brazil, Ecuador, Egypt, India, Israel, Italy, Jordan[27], Morocco, Pakistan, Sweden, Turkey,[28] Uganda and the UK and across Sikh, Muslim[29] and Christian communities with exceptional cases in Africa and the Caribbean.[30] The common rights or the human rights are enforceable with the legislative force to provide protection to the women of these countries.[31]

International Law

The international law has various frameworks and conventions which provide for provisions as to the meaning of human rights and the acts which result in its violation. They are the International framework for human rights has the Universal Declaration of human Rights, 1948 (UDHR); The International Convention on Civil and Political Rights, 1966 (ICCPR); The International Convention on Economic, Social and Cultural Rights,1966 (ICESCR); The International Convention on the Elimination of all forms of Racial Discrimination,1966 (CERD); The Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT); and The Convention for the Elimination of all forms of Discrimination against Women,1979 (CEDAW).[32] India has been a signatory to these international Conventions but has not yet ratified or acceded to some of these regimes. CEDAW requires nations that have ratified the convention to undertake affirmative measures to change laws, practices, and customs that are discriminatory to women.[33] CEDAW broadly defines discrimination against women as —any distinction, exclusion or restriction made on the basis of sex, which serves to impair the fundamental human rights in the political, economic, social, cultural[34] or civic

[25] *Ibid.*

[26] *Ibid.*

[27] See, Plant V., *"Honor Killings and the Asylum Gender Gap"*, Vol.15, J. of Transnational Law & Policy, pp109-129, Fall 2005.

[28] See, Boon, Rebecca E., "*They Killed Her for Going out with Boys: Honor Killings in Turkey in Light of Turkey's Accession to the European Union and Lessons for Iraq*," Vol. 35: Iss. 2, Article 17.*Hofstra Law Review*: 2006. Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol35/iss2/17.

[29] See, Aref Abu-Rabia, *"Family Honor Killings: Between Custom and State Law", Vol. 4, The Open Psychology Journal, pp. 34-44, 2011.*

[30] See, Meetoo V. & Mirza S. H., *"There is nothing 'honourable' about honour killings"*: Gender, Violence and the limits of multiculturalism" pp.1-40, 2007.

[31] See, J.E.S. Fawcett, *The Law of Nations*, p.151

[32] See, Choudhury C. K., "*Exporting Subjects: Globalizing Family Law Progress Through International Human Rights*," 32 Mich. J. Int'L. L., pp. 259, 282 (2011).

[33] *Supra* Note.1.

[34] See, Cihangir, S., *"Gender Specific honor codes and cutural change"*, XX(X), *Group Processes & Intergroup Relations, pp. 1-15, 2012*, gpir.sagepub.com, DOI: 10.1177/1368430212463453.

fields. ICESCR guarantees the right of self determination and equality of opportunity.[35]

Honor Killings and the Indian Law

The Indian Constitutional law

India fosters respect to these obligations and has included within the Constitutional framework under Article 51(c) which states that "the State (India) shall endeavor to foster respect for international law and treaty obligations in the dealings of organized peoples with one another". Besides this the aspect of Human Rights is included within the ambit of and scope of Articles 14, 15, 19, 21 and 39 (f) whereby 'equality before the law', the 'right to live with dignity', 'Fraternity' and 'Liberty' has been guaranteed by the laws which may be enforced through the due process of law. Rights relating to women are well incorporated in the fundamentals rights as well as obligatory duties of the constitutional provisions. It includes the essence of international law for right of self determination and equality of opportunity for women.

The Penal Law (Indian Penal Code, 1860)

Murder, homicide, Cruelty against women

Other Laws

Protection of Women from Domestic Violence Act, 2005.

The act aims to expand existing definitions of domestic violence[36] to include verbal, emotional, sexual, and economic abuse, and allows women civil and/or criminal redress for violations of the Act. In 1983, the Indian government, for the first time, recognized domestic violence as a specific category of crime through the introduction of section 498A into the Indian Penal Code, outlawing —a husband or relative of a husband and subjecting a woman to cruelty.

Dowry Prohibition Act of 1961

Commissions

The Indian government has successfully implemented new domestic violence laws by founding two commissions with mandates related to women safety issues: the National Commission for Women and the National Human Rights Commission. The National Commission on Women was created by the National Commission for

[35] See, Kirti A., Kumar P. & Yadav R., *"The Face of Honour Based Crimes: Global Concerns and Solutions"*, ©Vol. 6 Issue 1 & 2, International Journal of Criminal Justice Sciences pp. 343–357, January- December 2011.

[36] Available at, Gretchen E. E., Dulmus C. N., Wodarski J.S., *"Domestic Violence: A literature review Reflecting an International Crisis"*, Stress, Trauma, and Crisis, 7: 77_91, 2004, Copyright # Taylor & Francis Inc., ISSN: 1543-4613 print/1543-4591 online, DOI: 10.1080=15434610490450860.

Women Act of 1990 (NCWA) and was set up as a statutory body in January 1992.[37]

In the Indian scenario, the Constitution speaks about the principles of Equality, Fraternity, Liberty and these principles are also part of State policy. But where their presence is most felt is the social fabric. Honor killings are homicide and murder which are serious crimes under the Indian Penal Code (IPC). It also amounts to the violation of the rights ensued under Articles 14, 15(1), 15(3), 19, 21 and 39(f) of the Constitution of India.[38] Because of the seemingly strict punishments prescribed by section 498A, including making it a non-compoundable offense, which means that an accusation triggers immediate arrest of the perpetrator and cannot be easily withdrawn, this section has generated considerable controversy.[39] In 2003, the Malimath Committee on Reforms of the Criminal Justice System called for section 498A to be amended to make the offenses bailable and compoundable in order to allow for the possibility of reconciliation.[40]

Honor Killings and the Indian Judicial Interpretations

Human Rights Watch (2001)[41] defines "honor killings" as follows: "Honor crimes are acts of violence, usually murder, committed by male family members against female family members, who are held to have brought dishonor upon the family. A woman can be targeted by (individuals within) her family for a variety of reasons, including: refusing to enter into an arranged marriage, being the victim of a sexual assault, seeking a divorce even from an abusive husband, or (allegedly) committing adultery. The mere perception that a woman has behaved in a way that "dishonors" her family is sufficient to trigger an attack on her life."[42] More than 1.000 young people in India have been done to death every year owing to 'Honor Killings' linked to forced marriages and the country needs to introduce stringent legislation to deal firmly with the heinous crime.[43]

In India, the word honor related to issues of *Sati*, a practice of a woman to immolate herself live in a pyre after her husband's death thereby maintaining her purity.[44] The other issue was a Muslim women's right to divorce or seek

[37] See, Sujata Gadkar-Wilcox, *Intersectionality and the Under-Enforcement of Domestic Violence Laws in India*, 15 U. Pa. J.L. & Soc. Change 455 (2012). Available at: http://scholarship.law.upenn.edu/jlasc/vol15/iss3/5

[38] *Ibid.*

[39] *Ibid.*

[40] Ministry Of Home Affairs, Govt. Of India, Committee on Reforms of Criminal Justice System: Report 191 (2003), available at http://www.498a.org/contents/general/Malimath%20Committee_ Selected Sections.pdf.

[41] Hussain M., "*Take My Riches, Give Me Justice":A Contextual Analysis Of Pakistan's Honor Crimes Legislation*", Vol.29, Harvard J. of Law & Gender, pp.223-246, 2006.

[42] *Supra*, note.35.

[43] See Subrata Paul, *"Combating Domestic Violence Through Positive International Action in the International Community and in the United Kingdom, India, and Africa"*, 7 Cardozo J. Int'L & Comp. L., 227, 237 (1999).

[44] See, Chaudhuri Maitrayee, *"Indian "Modernity" and "Tradition": A Gender*

contd...

maintenance from her husband in cases of marital disputes.[45] The current situation of honor killings lays emphasis on inter-caste and inter-gotra marriages in both rural and urban areas. The Apex Court [46]interpreted the law on this matter of public concern, as: "once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such marriage the maximum they can do is that they can cut off social relations, but they cannot give threats or commit or instigate acts of violence and cannot harass the person." The Supreme Court has further reiterated that "There is nothing honorable in such practices, and in fact they are barbaric and shameful acts committed by brutal, feudal minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism".[47] In many cases[48], the police protection was provided to the couples who were major and faced threats from their family.[49] Bails were also refused in cases of honor killing.[50] The Supreme Court's decisions indicate that laws about domestic violence in certain cases cannot be properly enforced because a traditional mindset[51] regarding inter-caste relations, gender roles, and marriage persist.[52] In certain cases loyalty may be shown by eliminating other members of the family by the dishonored family.[53] The entire structure of caste and its reproduction, as a system, was contingent upon carefully controlled endogamous marriages within certain bounded groups.[54] Reproduction everywhere has historically been a social rather than an individual act, but it is also inextricably linked to the political economy of communities and the ways these communities organize and reproduce themselves as 'identifiable communities'.[55]

Khap Panchayats and Their Role in Implementation of the Law

Khap panchayats performed positive role during the ancient and mediaeval periods such as promotion of education, settling the community disputes, donation of lands

Perspective", 2(178), Polish Sociological Review, pp. 278-289, 2012, ISSN 1231 – 1413; *Roop Kanwar's* case 1983.

[45] *Ibid*, The *Shah Bano* case 1987.

[46] *Armugam Servai* v. *State of Tamil Nadu*, 2011 (2) SCC(Cri) 993

[47] *Lata Singh* v. *State of UP*, 2006 AIR(SC) 2522

[48] *Geeta Sabharwal* v. *State of Haryana* (2008), *Diwan N Mahemadsha* v. *State of Gujarat* (2011), *Asari Manishaben* viz. *Jivabhai* v. *State of Gujarat* (2011), *Asmitaben* v. *State of Gujarat* (2011) etc.

[49] See, Kachhwaha K. *"Khap Adjudication in India: Honoring the Culture with Crimes"*, Vol. 6(1&2) International Journal of Criminal Justice Sciences (IJCJS), pp 297-308, January – December; ISSN: 0973-5089

[50] *Ramjee Yadav* v. *State of Bihar*, 2010

[51] See, Niaz U., *"Violence against Women in South Asian Countries"*, Vol. 6, Arch. Women's Ment. Health, pp. 173-184, 2003, DOI 10.1007/s00737-003-0171-9

[52] *Dilip Premnarayan Tiwari & anr.* v. *State of Maharashtra*,2008

[53] See, Sujata Gadkar-Wilcox, *Intersectionality and the Under-Enforcement of Domestic Violence Laws in India*, 15 U. Pa. J.L. & Soc. Change 455 (2012). Available at: http://scholarship.law.upenn.edu/jlasc/vol15/iss3/5

[54] *Supra* note 35.

[55] *Ibid.*

for the opening of schools, curbing lavish display of wealth during marriages to name a few. At the same time, these Khaps over the centuries have not approved inter caste or class marriages. These marriages were and are considered immoral, deserving rigorous reprimand, and developed a culture of intolerance. Fear of being ostracized force the parents of these errand boys and girls to be a part in the 'jacobean' murder, which is considered as a heavenly duty and the executioners feel proud in displaying their cruelty. Women, prior to her marriage, as a daughter and a sister, represents the 'Honor' of her father and brother. After her marriage, as a wife, she represents the honor of her husband and as a mother, she symbolizes the honor of her sons.[56] Functioning of Khaps was based on the social norms and values of the community.The Khap Panchayats are village councils usually comprising of 10-15 elderly men of a community that set the rules in an area comprising of one or more villages inhabited by the members of a single clan (caste). A number of Khaps formed a 'Sarva Khap' embracing a full province or state. Their elected leaders would decide which units would be represented at the Khap level. These Khaps are found in North-western India, primarily in Haryana, Eastern Rajasthan, Punjab and Western Uttar Pradesh. Many puts emphasis on that these Khap panchayats were performing in a very positive manner in past and judgments given by them were for a better society.[57] They had earlier advocated widow remarriage which is implemented across the communities. It is in this reformation that Khaps had played a positive role for the betterment of women. The social fabric of the rural community prohibiting any other marriage than those prescribed in the normative traditional manner indicates the existence of patriarchal rigidity leading to honor crimes in India. Prohibition or restrictions on marital choices is offensive to the fundamental rights emphasized by International and national Conventions and Declarations. Indian Law denounces all forms of violence derogatory to women and allows marriage as a mutual contract between two persons irrespective of caste or religion. It does not legalize any form of discrimination as these laws are applicable wherever abuse of human rights take place. Inter-caste marriages have been validated in India as early as in 1949 by the Hindu Marriages Validity Act, 1949. The Special Marriage Act, 1872 and 1954 legalize marriage between members of different castes and religions.[58]

If it relates to a marriage outside the caste or community there is no reason as to why a personal choice of marriage where the couples are willing should be felt dishonorable. It is the question then of marriage within the same caste which needs to be looked into. The reason behind leaving the seven degrees of relations mentioned under the customary law owes it to the scientific reasoning, which lays down that by marrying within these seven degrees brings certain serious health

[56] Rana. R., "*Concept of Honor Killing: A Study of Manju Bajaj's Come Before Evening Falls*" Vol.II. Issue III, The Criterion: An International Journal in English, pp.5, ISSN 0976-8165, 1 Sept 2011.

[57] *Ibid.*

[58] See, Vishwanath J. & Palakonda S.C., *"Patriarchal Ideology of Honour and Honour Crimes in India"*, Vol. 6 Issue 1 & 2, International Journal of Criminal Justice Sciences, pp. 386–395, January- December 2011 ISSN: 0973-5089

problems in the subsequent generations. But the manner of enforcement should not come by killing the family members. They need to be informed and made literate for this reasoning to be understood. This is the dishonor in the honorable killing and not the restoration of honor of the caste, community or the family. The Khap Panchayat have not received legal recognition although they still exist within castes and communities to maintain the social order. Poverty and custom in developing countries drive extended families to live together under the same roof, which means that young couples are subordinated to the traditional values of their parents and grandparents, making a normative change difficult if not impossible.[59]

Conclusion

The failure of the mindsets to radically change with the changing dimensions in the society has resulted in a cultural clash between the old and the new generation. The rigidity of the patriarchal system which had once restored the law, order and peace in the society appears to have taken an opposite turn with regard to honor killings. India though having a legal, structural and the legislation in place faces a dilemma in the implementation of offences against women related to honor killings. It remains an intimidation effect by elders for the young generation to go against their wishes and make spousal choices within or outside their caste system. The witnesses are not easy to come by in cases of honor killings. The courts look into the circumstantial evidence to bring the perpetrators within the fold of the law. The killings are though condemned by the society, media and the courts, but it still remains an unwritten law in the mindsets of the people to follow the norms of their culture. Cases of women going missing or killed go unreported and at times killers are let off for want of evidence to be present in cases. The absence of a specific law for implementation remains the need of the hour as generation gap clashes take ugly turns in the form of honor killings. Cultural and family bias and caste and economic status may serve as impediments for legislative and judicial implementation of law.

[59] *Supra* Note.6

FUNCTIONALISM TO ADVENTURISM: Journey of Indian Judiciary

*Madhukar Sharma**

Judicial Activism as Judicial Functionalism

People's understanding of judicial activism depends on their conception of the proper role of a constitutional court in a democracy.[1] In the words of Justice A.H. Ahmadi, the former Chief Justice of India, 'judicial activism is a necessary adjunct of the judicial function because the protection of public interest, as opposed to private interest, is the main concern.'[2]

Hence, before we understand the term 'judicial activism', it is important to know those basic functions of the Judiciary [herein, it is referred to functions of High Court & Supreme Court] that are essential for the very survival of the Judiciary itself. Such functions are stated in Constitution of India. In this respect, we may refer Articles 13, 131, 132, 133, 142, and various other Articles of the Constitution. Interpretation of the Constitution, and interpretation of any other Law, is one of the inherent powers of the Supreme Court & the High Courts. In other words, we may say that these are the essential functions of the Judiciary for keeping itself alive.

When we speak of 'judicial activism' in the context to 'judicial interpretation', we speak how the Judiciary in India has expanded the scope of various 'fundamental rights', especially 'right to life' as so declared under Article 21 of the Constitution. When the Court interprets and expands the scope of 'fundamental rights', it is one of the essential function of the Court, essential for its very being.

In my opinion, since one of the constitutional duties of the Judiciary is to interpret the Constitution or any other law, such functionary mechanism of the Court may not be termed as 'judicial activism'.

Functionalism to Adventurism: Journey of Indian Judiciary

When we trace the history of Indian Judiciary, the most noticeable role played by the Judiciary is development of Human Rights Jurisprudence. In this history, the

* Asst. Prof.

[1] S.P. Sathe, "*Judicial Activism in India: Transgressing Borders and Enforcing Limits*", Oxford University Press, New Delhi.2002, p. 31

[2] A.M. Ahmadi, "*Judicial Process: Social Legitimacy and Institutional Viability*", (1996) 1 SCC pp. 1-10

most significant period is the post emergency period. The post emergency period (1977-98) is known as the period of judicial activism because it was during this period that the Court's jurisprudence blossomed with doctrinal creativity and processual innovations.[3]

This post-emergency judicial activism was probably inspired by the Court's realisation that its elitist social image would not make it strong enough to withstand the future onslaught of powerful political establishment; therefore, consciously or unconsciously, the Court began moving in the direction of the people.[4]

During this period, the Judiciary had explored & expanded the meaning of 'right to life', a fundamental right under Article 21 of the Constitution, the most. While interpreting the meaning of 'right to life', the Judiciary has included various 'rights' as part & parcel of 'right to life'. Such 'rights' are: **'right to bail'[5], 'right to speedy trial'[6];'right to legal aid in criminal proceedings'[7], 'right to health'[8], 'right to housing & shelter'[9], 'right to livelihood'[10], 'right to enjoyment of pollution-free water'[11], and other 'rights'.**

The Supreme Court in a case, *P. Nalla Thampi* v. *U.O.I.*[12], has stated that 'right to life includes the finer graces of human civilization'. In another case, *Francis Coralie* v. *U.O.I.*[13], the Supreme Court has defined 'right to life as right to basic necessities of life, and the right to carry on such activities as constitute these bare necessities of life'. In one more case, *Chameli Singh* v. *State of U.P.*[14], the Supreme Court has declared 'basic necessaries of life as basic human rights known to any civilized society'.

The above mentioned cases show that attitude and intention of the Judiciary towards any social issue or towards any other problem should never be doubted upon, nor should the judicial approach ever be put under scanner. The Judiciary has always been a 'guiding principle' and a 'source of inspiration' for all those who are either victims of social injustice, or those who are championing the cause of these helpless and hapless victims. But, there is other side of the story too.

While reviewing the judicial pronouncements, sometime, we may notice a tendency of Judiciary to shift responsibility on the shoulder of others. As in *Arnit Das* v. *State of Bihar*[15] the Court said that: "the exercise of interpreting the Juvenile Justice Act would have been avoided if only the legislature would have taken care not to leave any ambiguity", or, when in *Sushila Gothala* v. *State of Rajasthan & Ors.*'[16], the High Court says that: 'to eradicate the child marriage, the responsibility lies upon the society itself', and when the Supreme Court in *Hira Devi* v. *Distt. Board, Shahjahanpur*[17] says that 'it is not the duty of the Court to stretch the words used by the Legislature to fill in gaps or omission in the provisions of an act'. The impression given by these pronouncements of the Supreme Court is of shirking away from 'its' Constitutional duty of interpreting the legislative enactments. And, it is ironical.

On one hand, the Judiciary is very cautious while dealing with social issues, on the other hand, it's giving orders to the Executive to implement the policies; its laying down the guidelines for implementation of policies wherever there is failure in achieving desired results; or its expanding the scope of 'human rights jurisprudence'.

But, this all comes with a caution, a caution of not to tinker with its 'roots'. It's important that the Judiciary does not tread upon the prohibited territory and resort to adventurism.

Judicial Adventurism

The meaning of the word 'adventurism' as defined in Webster's dictionary is: 'adventurism is improvisation or experimentation in the absence or in defiance of accepted plans or principles'. When we trace the history of working of Indian Judiciary during the last six decades, we can see that for quite no. of times, the Judiciary has ventured into experimentation mode. Here comes the risk of giving meaning to a 'word' which is quite antonym of the original word. This may be explained with help of the following metaphor:

A Metaphor on 'Meaning of Colour Black'

This metaphor says how the meaning of colour 'black' may be interpreted as including the colour 'white', an antonym of the original word 'black'.

Step by step, while interpreting and expanding the meaning of colour 'black', we may see how 'black' becomes something which is 'white' in colour.

[Let's say that here 'black' represents 'right to life', and 'white' represents 'right to die']

- Step I: black is something which is 'grey black' in colour
- Stet II: 'grey black' is something which in 'grey' in colour
- Step III: 'grey' is something which is 'light grey' in colour
- Step IV: 'light grey' is something which is 'creamy grey' in colour
- Step V: 'creamy grey' is something which is 'creamy' in colour

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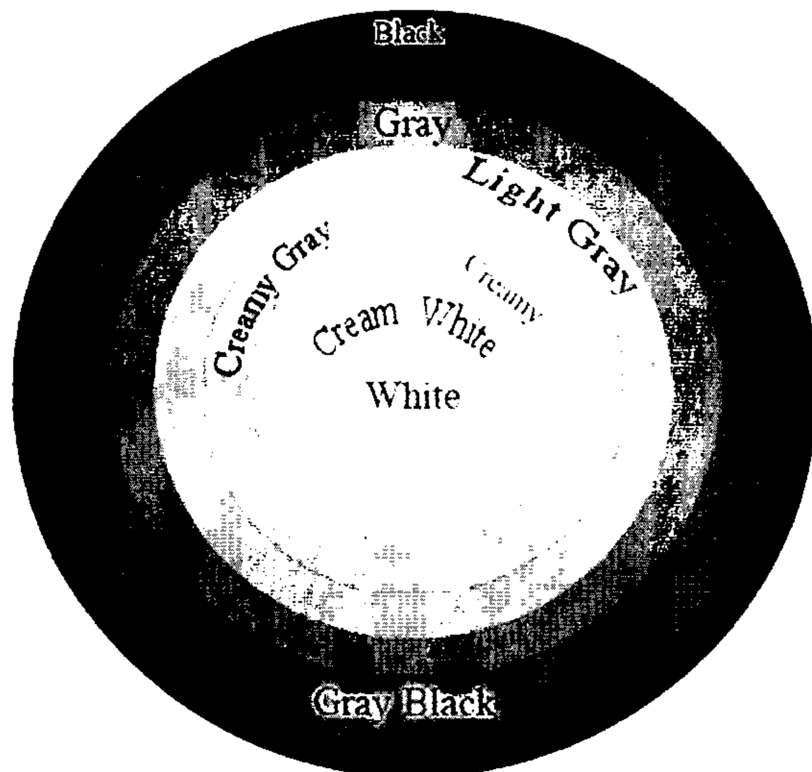
3 *Supra* note 1 at p. 43
4 *Id.* at p. 51
5 *Hussainara Khatoon* v. *State of Bihar*, AIR 1979 SC 1360
6 *Sheela Barse* v. *Union of India*, AIR 1986 SC 1773
7 *M.H. Hoskot* v. *State of Maharashtra*, AIR 1978 SC 1548
8 *State of Punjab* v. *Mahinder Singh Chawla*, AIR 1997 SC 1225
9 *U.P. Awas Evam Vikas Parishad* v. *Friends Coop. Housing Society Ltd.*, AIR 1996 SC 114
10 *Narender Kumar* v. *State of Haryana*, J.T. (1994)2 SC 94
11 *B. L. Wadhera* v. *U.O.I.*, AIR 1996 SC 2969
12 AIR 1985 SC 1133
13 AIR 1998 SCC 597
14 1996 SCC 549
15 AIR 2000 SC 2264
16 AIR 1995 Raj. 90
17 AIR 1952 SC 362

- Step VI: 'creamy' is something which is 'creamy white' in colour
- Step VII: 'creamy white' is something which is 'white' in colour
- **Hence, 'black' is something which is 'white' in colour**



Right to Life v/s Right to Die

The question whether 'right to die' should be included in the meaning of 'right to life' was raised and dealt with by the Supreme Court in Gian Kaur's case[18]. Even though in the said case, the Supreme Court had categorically negated to give such interpretation of the term 'right to life', but, the thing to be noted here is that that an attempt was being initiated in such direction.

Earlier, in *M.S Dubal* v. *State of Maharashtra*[19], the Bombay High Court has observed that the 'right to life provided by the Constitution may be said to bring into its purview, the right not to live a forced life'.

In *Aruna Ramchandra Shaunbaug* v. *U.O.I.*[20] case, the Supreme Court has allowed passive euthanasia though the plea for active euthanasia was rejected by

[18] *Gian Kaur* v. *State of Punjab*, AIR 1996 SC 946
[19] 1987 (1) Bom.CR 499
[20] (2011)4 SCC 454

the Court. We may say that somewhere we are near to the position where 'right to life' may include 'right to die by passive euthanasia'.

A Caution on Judicial Adventurism: Judicial Pronouncements

In the words of Mr. S.P. Sathe[21] 'activism can easily transcend the borders of judicial review and turn into populism and excessivism.'[22] It is further elaborated that 'excessivism is when a court undertakes responsibilities normally discharged by other co-ordinate organs of the government'.[23] Hence, there is a caution that 'Judicial activism must also function within the limits of the judicial process'.[24]

Even the Judiciary in a few cases has recognized the need of caution on its own part. In one of such case[25], the Supreme Court has said, 'with a view to see that judicial activism does not become judicial adventurism; the Courts must act with caution and proper restraint'. In another case[26] it was pointed out by the Supreme Court in the words: 'when the court entertains public interest litigations, it does not do so in a caviling spirit or in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it, but its attempt is only to ensure observance of social and economic rescue programmes, legislative as well as executive, for the welfare of have-nots.'

The point to be noted here is that even the Court itself realizes somewhere to have caution on its own part. This point may be substantiated by quoting words of the former C.J.I., Justice S.H. Kapadia, when he said, 'the Supreme Court might have overstretched the human rights jurisprudence to include right to sleep in the bouquet of fundamental rights, as enforcing such a right would be very difficult'.[27]

Conclusion

Self-discipline/Self-restraint: Need of the time

It is well said that all power is of an encroaching nature, if it is not put under self-restraint. It is a human weakness. And judicial power too is not immune against this human weakness. While delivering a lecture on 'Jurisprudence of Constitutional Structure' at the India International Centre, the then C.J.I., Justice S.H. Kapadia had said, 'there is need of judicial self-introspection, and judicial activism could be permissible when it comes to extending human rights principles to give them a constitutional cloak but the policy and legislative domains must not be encroached by the judiciary'.[28] These words were spoken by Justice S.H. Kapadia in context to

[21] Former Dean, ILS Law College, Pune, India
[22] *Supra* note 1 at p. 43
[23] *Ibid.*
[24] *Id.* at p. 106
[25] *Common Cause (A Regd. Society)* v. *Union of India*, (2008)5 SCC 517
[26] *Bandhua Mukti Morcha* v. *U.O.I. & Ors*, [1984]2 SCR 67
[27] Times of India, New Delhi, 26th Aug. 12, p. 12,
[28] *Ibid.*

Supreme Court's declaration of 'right to sleep' as 'fundamental right' in one of its judgment.[29]

In conclusion, the words of the Supreme Court of the United States may be quoted that 'it (Judiciary) must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint'.

[29] *In Re: Ramlila Maidan Incident dt. 4/5-6-11 v. Home Secretary, U.O.I.* [Suo Motu W.P. (CRL) No. 122 of 2011]

TOURISM AND ENVIRONMENT: Issues of Concern in the Dal Lake of Kashmir

Insha Hamid[*]

Introduction

Dal Lake, situated in the north east of Srinagar[1] in Kashmir valley, it is one of the most beautiful lakes in India and the second largest lake in Jammu and Kashmir. Around 1200 AD, the lake spread over an area of 75 km². At present, it covers about 21.1 km and has a maximum depth of 5.4 m, and a shoreline of 15.4 km. Of the total area, only about 11.4 km is open water and the rest is under floating gardens most of which have now settled permanently. The lake has a large mountainous catchment spread over 316 km

The renowned Mughal gardens (Nishat, Shalimar, Chashma Shahi) on the gentle slopes of the hills along the shores and an island in the lake make it a major and fascinating tourist attraction. The lake is unique in having hundreds of houseboats, where the tourists can reside in peace and tranquillity. The houseboats are served by shikaras (small boats) for transport and leisure.[2]

The lake has four main interconnected basins namely, Hazratbal, Bod dal, Gagribal and Nagin[3]. More than 90% of the water enters the lakes from its catchment through a perennial inflow channel, the Telbal Nallah which enters the Hazratbal basin on its northeast side. Hazratbal basin receives water also from Doubkoul, Harishkoul and Boutkoul. Many springs rising from the lake bed contribute the remaining 10% water. The lake water drains out into a tributary of the River Jhelum through Nallah[4] Amir Khan towards its southwest. Water also flows out of the Dal through a weir and lock system at Dal gate[5]. Parallel to this exit is a stone lined canal, which connects the lake with the tributary. This channel is used for the movement of boats in and out of the lake and prevents inundation of floating gardens during high floods.[6]

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[1] The capital of Jammu and Kashmir

[2] Parwez Dewan I.A.S,*The natural Heritage of Jummu & Kashmir Ladhak, wild life – forests-flora-rivers-lakes.*

[3] Sometimes refered to as separate lake, but is actually part of Dal lake.

[4] Nallah means stream.

[5] Name of a place , which is adjacent to Dal Lake.

[6] Ashok K. Pandit, *Natural resource of Western Himalya*

The lake receives large quantity of sediments and nutrients with the runoff from its catchment through Telbal Bota Khul. Sewage from the settlements around the lake and the large population (estimated 50,000) living on hamlets within the lake on floating islands and houseboats enters the lake without treatment. About 111 tons of Phosphorus and 380 tons of nitrogen are estimated to flow into the lake and 4.5 tons of Phosphor and 18.1 tons of Nitrogen. The drains also carry sludge and solid wastes from the surrounding areas into the lake. The channel connecting Dal with Nagin and the Pokhribal and Baba Demb basins were choked by solid wastes.[7]

Floating gardens[8] spread from Hazratbal to Gagribal basins and extensively used for cultivating vegetables. High nutrient loads in the lake promotes excessive growth of submerged and floating leaved plants.[9]

The National Lake Conservation plan has allocated large funds for the rehabilitation of the lake. The activities undertaken in this programme include prevention and control of pollution by domestic sewage, prevention of erosion in the catchment, trapping the sediments in a settling basin, extensive deweeding by mechanized weed harvesters (besides the usual manual harvesting),and desilting in the peripheral areas by suction dredging. Steps are being taken to alter the agricultural practices in the catchment and improving the water circulation within the lake by facilitating inflow and outflow of water. Besides controlling further encroachments, there are plans for removing large areas of floating islands and the state government has developed plans for rehabilitating the lake- dwelling communities in other areas.[10]

Dal Lake as a Resource of Tourism

Tourism has always remained an instrument of economic growth in the state of Jammu and Kashmir and has contributed a lot in developing the economy, particularly in the valley of Kashmir. Tourism is the most important industry of 21st century. This sector provides employment to a large number of people and generated economic activities especially in the tertiary sectors. Tourism open up a new window for resources, both investment and employment generation as well as socio-economic development of the local population at large. The state of Jammu and Kashmir has three distinct regions, viz. Jammu, Kashmir and Ladakh and all three have immense potential for employment generation in tourism both from domestic as well as international tourists. There are number of locations which are untapped and can be developed as major tourists destinations, having all the natural

7 Mir Ashiq Husain, *Lakes of Jammu, Kashmir & Ladakh.*

8 floating gardens are also called Radh in Kashmiri, its actually built up earth in the shallows of dal lake, by raising beds above the water level these crops enjoy constant irrigation and produce huge harvest.

9 Shamim A. Shah ,*Tourism and Lake Sustainability: A Case Study of Dal Lake,* International Journal of Environmental Sciences Vol. 1 No. 4. 2012.

10 Mudasir Ahmad Wani, Ashit Dutta, M. Ashraf Wani, Umer Jan Wani, *Towards Conservation of World Famous Dal Lake – A Need of Hour*, International Research Journal of Engineering and Technology Volume: 01

as well as cultural resources for attracting tourists. Some of the important natural resources are excellent climate, locations for adventure sports, wild life, Pastures, natural and man made parks like Shalimar, Nishat and Chashma-e-shahi of the Mughal period, flora, fauna, alpine forest, natural water falls streams, beautiful lakes, and one of the best tourist destination is Dal Lake, which is probably the most sold tourist destination of Kashmir and hence attract a good flow of domestic, foreign and local tourists. It has contributed enormously towards the prosperity of the people living around it[11]. lake has numerous sites and places of interest, like char chinar, mughal gardens (Shalimar bagh and Nishat Bagh[12] shankaracharya temple, Hari Parbat, the Nagin lake, the Chashme shahi, the Hazratbal shrine, out of the all most outstanding feature of Dal lake is the house boats,[13] pleasure residence of many visitors, a house boat stay has always been a fascinating experience for the tourists and there by turning out to be a unique selling preposition for the tourism industry in Kashmir .Most of these house boats are seen on Dal Lake , Nagin Lake , they stand by the shores of the lakes and add to the stunning beauty of the Lake . Travellers from far and wide areas visit the dal lake, it is one of the ,most popular tourists attraction of the valley.[14]

Environmental Impact

The development of Tourist destination is though beneficial in many ways but it has a flip side also and that is its impact on the environment. In many developing countries, the costs of environmental degradation have been estimated at 4 to 8 per cent of GDP annually. Natural resources degradation – depleted soils, insufficient water, rapidly disappearing forests, collapsed fisheries – threaten the quality of life of millions; an estimated 6 million people die annually, and many more get sick, in developing countries from water-related diseases, indoor air pollution, urban air pollution, and exposure to toxic chemicals. Environmental degradation also increases the vulnerability of people to natural disasters.[15] The impact of environmental degradation threatens the basis for growth and livelihoods today and in the future.

Positive Effects of Tourism on Dal lake

Despite its many adverse impacts, tourism can have positive impacts on both natural and artificially constructed environments, as well as on destination

11 Abrar M. Shah & Dr shabnam Ali, *House Boat a Component of Tourism Industry in Kashmir.*

12 Built during the region of Mughal Emperor Jahangir.

13 A boat that serves as place of residence ,it is also called floating hotel , nicknamed as floating palaces

14 See *supra* note 7.

15 1, Md. GhulamRabbany, 2. Sharmin Afrin, 3. Airin Rahman, 4. Faijul Islam, 5. Fazlul Hoque, *Environmental Effects of Tourism*, American Journal of Environment, Energy and Power Research Vol. 1, No. 7.

communities. In fact, tourism has motivated the preservation of such sensitive ecosystems[16]

Tourism plays a crucial role in employment generation from ancient times with a great potential of further opportunities for the generation to come. There are multiplicity of tourist attractions in the region. The tourism resource of the region has vast potential and can transform the whole economy as a tourism driven economy by providing jobs with all its concomitant trickling affect.[17]

Infrastructural Development

The tourism activities at a particular place are directly related to the arrival of tourists at that place. The more the arrival, the more economic activities get generated and making impact on the related sector accordingly. Accommodation and infrastructure development is basic requirement for the tourists. Infrastructure development is a major sign of development of any region. When there is better infrastructure development, food and facilities the tourist attraction to visit the area increase which directly and indirectly helps the area to enhance its economy through tourism by generating employment. To handle such a traffic flow, the development of infrastructure has to match these projections. [18]

Financial Contributions

Tourism can contribute directly to the conservation of sensitive areas and habitat. Revenue from park, lake entrance fees and similar sources can be allocated specifically to pay for the protection and management of environmentally sensitive areas. Special fees for park operations or conservation activities can be collected from tourists or tour operators. Contributions to government revenues .User fees, income taxes, taxes on sales or rental of recreation equipment, and license fees for activities such as hunting and fishing can provide governments with the funds needed to manage natural resources. Such funds can be used for overall conservation programs and activities.[19]

Improved Environmental Management and Planning

Sound environmental management of tourism facilities and especially hotels can increase benefits to natural areas. But this requires careful planning for controlled development, based on analysis of the environmental resources of the area. Planning helps to make choices between conflicting uses, or to find ways to make them compatible. By planning early for tourism development, damaging and expensive mistakes can be prevented, avoiding the gradual deterioration of

16 Andereck , *Everglades National Park in Florida*, 1993, p.30

17 Glenn Kreag, *The Impacts of Tourism*

18 Dr Nawaz Ahmad, *Potentiality of Employment Generation and Socio-Economic Development in Tourism Sector of Jammu and Kashmir,* Volume 2 Issue 4, April. 2013, P.26-38

19 World tourism organisation (WTO) 1997, *Directory of multilateral and bilateral source of financing for tourism development.*

environmental assets significant to tourism. Cleaner production techniques can be important tools for planning and operating tourism facilities in a way that minimizes their environmental impacts. For example, green building (using energy-efficient and non-polluting construction materials, sewage systems and energy sources) is an increasingly important way for the tourism industry to decrease its impact on the environment. And because waste treatment and disposal are often major, long-term environmental problems in the tourism industry, pollution prevention and waste minimization techniques are especially important for the tourism industry.[20]

Raising Environmental Awareness

Tourism has the potential to increase public appreciation of the environment and to spread awareness of environmental problems when it brings people into closer contact with nature and the environment. This confrontation may heighten awareness of the value of nature and lead to environmentally conscious behaviour and activities to preserve the environment. If it is to be sustainable in the long run, tourism must incorporate the principles and practices of sustainable consumption. Sustainable consumption includes building consumer demand for products that have been made using cleaner production techniques, and for services including tourism services that are provided in a way that minimizes environmental impacts. The tourism industry can play a key role in providing environmental information and raising awareness among tourists of the environmental consequences of their actions. Tourists and tourism-related businesses consume an enormous quantity of goods and services; moving them towards using those that are produced and provided in an environmentally sustainable way could have an enormous positive impact on the planet's environment.[21]

Protection and Preservation

Tourism can significantly contribute to environmental protection, conservation and restoration of biological diversity and sustainable use of natural resources. Because of their attractiveness, pristine sites and natural areas are identified as valuable and the need to keep the attraction alive can lead to their protection and preservation.[22]

Social contacts between tourists and local people may result in mutual appreciation, understanding, tolerance, awareness, learning, family bonding respect, and liking. Residents are educated about the outside world without leaving their homes, while their visitors significantly learn about a distinctive culture. Local communities are benefited through contribution by tourism to the improvement of the social infrastructure like schools, libraries, health Care institutions, internet

20 UNEP, 1995, *Environmental codes of conduct for tourism.* 1997,WTO,Environmental good practices in Hotels, case studies

21 United Nations environment Program, (UNEP, 1992). *Tourism Focus*, quarterly bulletin included in the Industry and Environment review and issue of the Industry and Environment review on *Sustainable Tourism.*

22 World Tourism Organization (WTO) (1998), *Guide for Local Planner Authorities in Developing Sustainable Tourism.*

cafes, and so on. Besides, if local culture is the base for attracting tourists to the region, it helps to preserve the local traditions and handicrafts which maybe were on the link of the extinction.[23]

Regulatory Measures

Regulatory measures help offset negative impacts; for instance, controls on the number of tourist activities and movement of visitors within protected areas can limit impacts on the ecosystem and help maintain the integrity and vitality of the site. Such limits can also reduce the negative impacts on resources. Limits should be established after an in-depth analysis of the maximum sustainable visitor capacity.[24]

Adverse Effects of Excessive Tourism on Dal Lake

Water Quality

The tourism industry impacts water quality through construction and maintenance of tourist infrastructure, house boats, recreational boating, fishing, swimming. Construction of hotels, recreation and other facilities often leads to increased sewage pollution. Waste water pollutes lake and surrounding tourist attractions, damaging the flora and fauna. House boats in the lake lack the proper sewage treatment, thereby sewage goes direct into the lake. The most significant problem from the standpoint of human health is the discharge of sewage into lake, Diseases that can be potentially transmitted through human contact with fecal discharge or ingestion of contaminated fishes include typhoid fever, dysentery, infectious hepatitis, and non specific gastroenteritis [25]Sewage runoff not only causes serious damage to human lives but lake as well, this sewage contains lots of nutrients which stimulates the growth of algae.[26] According to World Fund for Nature, Switzerland,

"The entire Kashmir valley forms the catchment area of lake and it carries a large amount of untreated organic and inorganic waste from township and house boat moorings" it is slow poisoning of the water that is daily killing a part of the Dal Lake. The pollution control board says that the "*Dal lake is dying slowly*" as pollutants were eight to six times more then the permissible limit as prescribed by Water Act (Prevention and Control of Pollution) and also by the Central Board of Pollution (CPCB).[27]

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23 Sharma Prabha Shashi, *Tourism and Environment, Concept, Principles and Approaches.*
24 World Tourism Organization (WTO) (1994), *National and Regional Tourism Planning*, First edition.
25 Seabloom, Plews, & Cox; 1989
26 Shafiq ur Rehman, *Pollution in the Red Bloomed Himalyan Dal Lake of Kashmir*, 2009, p.82
27 See *supra* note 7

Besides, the known factors, like human settlements (60,000 people) hotels (300), floating gardens, dhobhi gharts on the periphery are generously contributing to the lake's slow death. [28]

Habitat/Ecosystem Alteration and Fragmentation

Ecosystems and natural habitat can be damaged by tourist infrastructure, tourist activities, recreational boating[29] and by the house boats. Tourists can damage ecosystems by leaving behind leftovers, bottles, cans, polythene packs. This type of damage is cumulative in nature. One or two tourists may not cause visible harm, but hundreds over time can do substantial damage. This does not only give dirty look to the landscape but also destroy the scenic beauty.[30]

Impact on flora and fauna

Dal lake was not a point of attraction to the tourists and people only but it was the attraction for birds also. This beautiful lake used to yield plentiful fish, now almost vanished from the Lake. Geese, duck, teal and other game birds were also found in thousands. But gone are the days when these birds used to fly on the Dal Lake, which used to add to its beauty. Some of the birds who were often found flying over the Dal Lake were king fishers, white breasted king fisher, pied king fisher, korcush, golden orioles, wagtails, wryneck, white-cheeked bulbul and swallows etc but due to increasing pollution and human interferences in Dal lake these birds can hardly be seen[31] .Nadru[32] that grows in the shallow parts of lake is highly liked ingredient in kashmir cuisine. Experts say that both production and quality of the Nadru is on the decline.[33]

Degradation caused by infrastructure

Tourism can diminish the aesthetic appeal of a destination through the construction of buildings that clash with the surrounding environment, creating "architectural" or "visual" pollution.[34]In Dal lake people have turned Floating gardens[35] into a permanent land and have also made concrete constructions on these lands which has degraded its scenic beauty. These floating gardens cover an area of 7.5 km^2 with in the Dal lake[36]and in recent years more than 200 new settlements were erected in the Dal lake[37] .

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28 *Ibid.*
29 Shikara rides
30 Shastri Prabha Sharma ,*Tourism and Environment concepts ,principles and approaches.*
31 Yasir Muhammad Baba, *My Land My People Kashmir in Perspective.*
32 Nadrus scientific name Nelumbo nucifera
33 *Supra* note 7.
34 Andereck, 1993, p. 30; Mathieson & Wall, 1982, p.121).
35 Radh in Kashmir, used for cultivating vegetables, High nutrient loads in the lake promotes excessive growth of submerged and floating leaved plants
36 Palria, S. Singh,T.S Muley, M.V Chakraborty, M.Tamilarasn v. and Kawosa M.A.(1987) *Water quality mapping in Dal Lake and the Wallur Lake of Jummu and Kashmir using Lansat images and aerial photographs.technical Report*, Scientific note of space

contd...

Sewage

The local officials say that house boats contribute thousands of litres of untreated human waste into the lake waters.[38] Construction of hotels, recreation and other facilities often leads to increased sewage pollution. Wastewater pollutes the lake and its surrounding tourist attractions, damaging the flora and fauna. The enrichment of water by sewage or plant nutrients [39] cause major problems throughout the world , such as blocking of vital water ways, making water hard to treat for drinking supplies, decreasing oxygen levels making fish stocks harder to support, reducing diversity of fauna and lowering the amenity value of water[40].

How to Minimize the Adverse Environmental Impact on the lake

Strategic Objectives of Environment Strategy could be:

1. The government must frame policies for the construction of buildings in environmentally sensitive areas Jammu and Kashmir. The policies should promote eco-friendly mode of construction, thereby minimizing the negative environmental impacts.
2. House boats owners must be forced to adopt safer and special methods of sanitation to prevent water from pollution. Proper sewage collection and disposal system in the lake needs implemented.
3. It is required all the hotels in the vicinity of the lake adopt fully efficient sewage treatment facilities as they play a major role in polluting the lake by discharging their untreated sewage into the lake.
4. Construction of STPs[41] at all inflow channels.
5. Deweeding of lake must be regular affair.
6. Increasing population pressure of Dal dwellers is one of the problems in the deterioration of Dal Lake. This problem can be solved by rehabilitation of lake dwellers.
7. Enhancing Livelihoods. Protect the long-term productivity and resilience of natural resources and ecosystems on which people's livelihoods depend.
8. Improving the quality of growth Promote better policy, regulatory, and institutional framework for sustainable environmental management; help improve safeguard systems and practices; and promote environmentally and socially sustainable private sector development. The private sector is becoming a major player in many areas previously controlled by the public sector. It should be ensured that the private sector becomes a driving force in sustainable development.

applications centre(ISRO), Ahmadabad and department of Ecology, environment science and technology, Srinagar, india (1-42)

37 Shafiq ur Rehman, *Pollution in the Red Bloomed Himalyan Dal Lake OF Kashmir*, 2009, pp- 82

38 *Supra* note 7

39 A process called Eutropication

40 *Supra* note 37

41 Sanitation treatment plants.

9. Improving the Regional and Global Commons.
10. Focus on the positive linkages between poverty reduction and environmental protection.
11. Raising public awareness of Tourism development and building pride with local communities and visitors through conservation education.
12. Using tourism generated funds to supplement site conservation and protection costs.
13. Long term tourism development strategy for the lake is the need of the hour. This can go a long way in preserving the beauty of our environment.
14. Government should go ahead with declaration of the tourism zones to protect Kashmir's tourism wealth. All the stakeholders, including the industry should influence the government to take immediate action in this regard. Government must abide to the principle that environmental protection is an integral part of tourism development. Education and awareness raising campaigns at all levels are therefore imperative.

Conclusion

Our perception and natural expectation is that 'though I will create pollution someone else will take care of it particularly the government.' In our system there is no genuine Accountability in meeting the challenges of environment. we consciously pass the buck .This type of attitude is harmful for the development of dependable and accountable system, Ours is a unique situation where there is lack of vision enforcing environmental problems we never evolved appropriate policies, plains and programmes. Whatever little we do, it is non-dynamic, reactive rather than being pro-active.

Law is an accepted strong medium of regulating behaviour of the people but our environmental regulative laws are not consistent. Several bills are presented and rushed through the legislators with the members devoting very little of their quality time to deliberate, debate and decide on their contents and impacts on environment. Both the government and people are not taking any necessary action against pollution which is contributed through them, If we think efficiently and effectively we will definitely feel that we are ourselves guilty. If the serious and timely measures will not be taken on priority basis the lake will die of its own death.

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Book Review

Service Tribunals—An Introduction *by* Dr. Sarbjit Kaur. *Satyam Law International,* New Delhi. ISBN 978-93-82823-19-3. Pp 542+xxxviii. Price Rs. 1,500/-

Saurabh Rana*

The idea of modern welfare state has given rise to greater encounters of administrative powers with the revered rights of citizenry. In India, consequent to the mushroom growth of public services and public servants, there was a long felt need for specially constituted tribunals to relieve the courts from almost immeasurable and practically unmanageable burden of litigation and at the same time to render affordable justice to the aggrieved. Forty-second amendment of the Constitution of India is the foundation stone of administrative tribunals for service matters, which inserted Article 323A in the Constitution. Parliament, in pursuance of Article 323A enacted the Administrative Tribunals Act, 1985 for establishment of service tribunals for deciding service disputes of civil servants of the Centre as well as the States.

The book under review is an analytical, astute and attuned study of the law related to 'Service Tribunals'. The book deals with a vast compass of legal cogitation in a very effective manner. Service Tribunals – *An Introduction* contains a scholarly and lucid exposition of all aspects of service tribunals in a minute detail. In fact, the fascination for this book lies in the fact that though the subject appears to be quite complex, every chapter of it seems immediately comprehensible. The book has been divided into 7 chapters. In each chapter, there are headings and sub-headings to make the topic commented upon easy to understand

Chapter 1 provides a descriptive account of the need, nature, meaning and features of administrative tribunals. It gives a comprehensive insight into the history and development of service tribunals in India. The techniques adopted by administrative tribunals in France, U.K. and U.S.A. are also covered in this chapter.

The main thrust of Chapter 2 is upon the analysis of the scheme and the salient features of the Administrative Tribunals Act, 1985 and the establishment of Service Tribunals. This chapter makes a detailed study of the provisions of the 1985 Act dealing with composition of Administrative Tribunals, qualifications for appointment of Chairman, Vice Chairman and other Members especially with reference to position before and under Administrative Tribunals (Amendment) Act,

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2006. The provisions relating to vacancy, tenure, salary, resignation and removal of the members are also discussed.

Chapter 3 is completely devoted to the jurisdiction and role of the service tribunals encompassing within its ambit a lucid comprehension of the concepts of civil services, civil posts and All-India services. Also, a detailed exposition of service tribunal's review jurisdiction as recommended by the Law Commission of India in its 162nd Report, 1998 and 215th Report, 2008 is offered to the readers.

Chapter 4 elucidates the powers- administrative, financial and contempt of the service tribunals together with the procedure to be adopted wherein the author notes that the tribunals shall not be bound by the strict procedural requirements as laid down in the Code of Civil Procedure, 1908 but the principles of natural justice shall be followed therein. Thereafter, the author elaborately notes the entire procedure adopted in these tribunals right from the consideration of 'person aggrieved' to the 'final order'.

The major part of Chapter 5 is devoted to the service matters of the relevant sections of employees of the Government of India or State or any local authority, corporation or society owned or controlled by the government. The labyrinthine discourse in this chapter, which incidentally is the longest one in this book, exhaustively covers the entire range of pertinent issues viz. recruitment, appointment, seniority, promotion, transfer, reservation, disciplinary matters, resignation and retirement etc.

In India, the doctrine of judicial review forms the basic structure of the Constitution. In Chapter 6, the author thoroughly examines this doctrine of judicial review with special reference to the decisions of administrative tribunals including the international perspective thereof. The author in this chapter also analyzes the exclusion of power of judicial review over the decisions of administrative tribunals with a special coverage of the *L. Chandra Kumar* v. *Union of India*[1] judgment and its ramifications.

In Chapter 7, the author has endeavored to fathom as to how the theory of alternate institutional mechanism and the concomitant institution of the Central Administrative Tribunal has fared in practice and on *terra firma*. The significance of this chapter has been greatly enhanced by the author's suggestions appended at the end of it, so that the institution of tribunals may inspire confidence in the same manner as is enjoyed by the judicial courts and the real purpose of 'tribunalisation' as the author denotes it, can be attained.

The welfare activities of modern social welfare state which today pervades every aspect of human life required a 'new machinery' as the author puts it, and thus have emerged a plethora of tribunals diversified in structure, jurisdiction, procedure and power to adjudicate over disputes between the administration and the individuals. The present book provides a perfervid perceptivity into the purpose, practice and performance of this alternate institution of tribunals in India. The author has poured-in her immense insight, enormous experience and animated

[1] (1997) 3 SCC 261

acquisitiveness while producing this engaging work. Overall, this is an important book both for the case law discussed therein and as a clear, considered statement of the author's approach to the law related to tribunals. The book shall definitely find place in the legal arena for providing an exhaustive coverage of the subject in simple language and with concision and precision. It is highly recommended for use in all institutions engaged in imparting legal education or practice of law.

Form IV

Statement of Ownership and other particulars about the **Delhi Law Review**

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I, Ashwani K Bansal, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-

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