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Women Empowerment through Right to Information

Dr. Bibha Tripathi*

Women Empowerment

According to T.N. Ray, "Women empowerment is a multidimensional concept, aiming at establishment of a gender just society, based on gender equality though balancing of power". Empowerment is a journey, a continuous process in the fields of social legal, education, health and hygiene, nutrition, drinking water, sanitation, housing and shelter and science and technology.

Women empowerment is an independent subject based on the belief that women have been treated as equal under the Constitution of India. Despite of the equality clause the Constitution provides special protection considering women as vulnerable clause. Number of laws has also been enacted to uplift and empower the condition of women. Against this backdrop if the enactment of Right to Information Act, 2005 is taken into account it becomes aptly clear that though the act has not been enacted exclusively to empower women but it does not mean that it cannot be utilised for the cause of women rather it is a gender just legislation similar to Right to education Act.

Women empowerment has two axes, first, acceptance by the patriarchal system and secondly, acceptance by one's own approach and attitude. Women all over the world are challenged by a number of obstacles that restrict their ability to play significant roles in their communities and societies. Empowered women and girls have a truly transformative role to play in the society, but they are rarely afforded the opportunities that will allow them to fulfil their enormous potential. United Nations Development programme (UNDP) has mentioned that where development is not 'engendered' it is endangered. There are number of legal documents dealing with gender equality at national as well as international level. Still a wide gap is there between the goals enunciated in various documentary provisions and situational reality. The UNDP constituted eight Millennium Development Goals (MDG) for ensuring equality and peace across the world. The third MDG is directly related to the empowerment of women in India. The MDGs are agreed upon goals to reduce certain indications of disparity across the world by the year 2015.

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Today's world is a world of power. Postmodernist thinker Mitchel Foucault's book on 'Knowledge and Power' is an addition to the abovementioned observation. Amongst various methods and mechanisms having information or acquiring information is one of the main significant milestones in the way of empowerment.

Information rights have a history of 248 years. World's first freedom of information Act was issued in Stockholm on December 2, 1766. Right to Information Act 2005 marks a significant shift for Indian democracy. It is an age old believe that greater the access of the citizen to information, the greater the responsiveness of government to community needs. Alternatively, the more restrictions that are placed on access, the greater will be the feelings of 'powerlessness' and 'alienation'. Without information, people cannot adequately exercise their rights as citizens or make informed choices.

The primary power of RTI is the fact that it empowers individual Citizens to requisition information. Hence without necessarily forming pressure groups or associations, it puts power directly into the hands of the foundation of democracy- the Citizen. The main peculiarity of the Act is that it has used the word citizen and not person, meaning thereby it is gender neutral legislation. Though women empowerment and right to information is two different and independent subjects but the combination of the two can be creative and welfaristic leading to the formation of an empowered nation. It is submitted in the paper that such dreams could be turned into reality only after fulfilment of those prerequisites which are quintessential to it. There are some fundamental foundations which require to be changed. The paper will focus some of those quintessential.

Right to Information as a Fundamental Right:

Right to know is considered to be a basic human right. Freedom of information as a part of freedom of speech and expression owes its origin in Article 19 of the Universal Declaration of Human Rights, 1948. Article 19(1) (a) of the Constitution of India adopted the principle at the time of its inception. Thus right to information is an inherent right under Article 19(1) (a) of the Constitution. The same has been decided in various cases.

In ***People's Union for Civil Liberties vs. Union of India*** AIR 2004 SC 1442, a Division Bench of the Supreme Court of India constituted by Justice S.B. Sinha and Justice B.M. Khare held that "45. Right to Information is a facet of the freedom of 'speech and expression' as contained in Article 19 (1) (a) of the Constitution of India. Right to Information, thus, indisputably is a Fundamental Right." Here it is also recognized that a reasonable restriction on the exercise of the right is always permissible for the security of the state.

In ***State of U.P. vs. Raj Narain case*** (1975) 4 SCC 428, it has been held that "in a Government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public

functionaries. They are entitled to know the particulars of every public transaction in all its bearing."

In ***S. P. Gupta vs. Union of India*** (1981) Supp SCC 87, it is observed that to ensure the continued participation of the people in the democratic process, they must be kept informed of the vital decisions taken by the Government. Democracy expects openness and openness is a concomitant of a free society. But in earlier two cases the Apex Court was silent on the relationship between the restriction which should be imposed on the right to know and the reasonable restrictions which are already existing on the freedom of speech and expression under Article 19 (1) (a).

In ***Secretary, Ministry of Information and Broadcasting, Govt. of India vs. The Cricket Association of Bengal*** (1995) 2 SCC 161, the Supreme Court says that freedom of speech and expression includes right to acquire information and disseminate it. It enables people to contribute to debate on social and moral issues. Right to freedom of speech and expression means right to education, to inform, to entertain and right to be educated, informed and entertained. Right to telecast is, therefore, within the ambit of Article 19 (1) (a).

In ***Union of India vs. Association for Democratic Reforms*** (2002) 5 SCC 294, the Supreme Court observed that the voters' right to know the antecedents of the candidates is based on the broader interpretation of Article 19 (1) (a).The foundation of healthy democracy is to have well informed citizens. Free and fair election is the basic structure of the Constitution and for that, information about the candidates, eg., whether the candidate is literate, what is his asset and liability, whether he is charged with any criminal offence, these must be known to every voter.

In ***Bennet Coleman and Co. vs. Union of India*** AIR 1973 SC 60, the Supreme Court looked at the freedom of press which is within the ambit of Article 19 (1) (a) from another angle. The Constitutional Guarantees for the freedom of speech is not so much for the benefit of press as it is for the benefit of the public. The freedom of speech includes within its compass the right of all citizens to read and be informed. Apart from these leading cases there are many cases where people are right to know and right to information have been upheld. The purpose of discussing all these is to show that we already have right to information as guaranteed by Article 19(1)(a) of the Constitution of India. Moreover, as an extended part of the freedom of speech and expression, the right to know and to be known is our Fundamental right as ensured by Chapter III of the Constitution. As per the Constitution if there is violation of Fundamental Right by the state, the aggrieved person may go to the Supreme Court under Article 32 or to the High Court under Article 226 directly. But after passing of the Right to Information ct, 2005, this Fundamental Right becomes only a statutory right.

From Fundamental Right to Statutory Right

Legislative history

In 2000-2002 many State Governments enacted The Right to Information Act which is operative in the respective States only. Then the Union Government in the year 2002, passed the Freedom of Information Act. But this central legislation contained many lacunas. Jurists criticized the Act of 2002 because it did not satisfy the aspiration of the citizens; they wanted it to be more progressive, positive, participatory and meaningful. The National Advisory Council recommended certain important changes to ensure greater access to information. The Union Government examined the suggestions made by the National Advisory Council and others and decided to repeal the Act of 2002. It then enacted the Right to Information Act, 2005, which is since then considered as a landmark step in the field of Fundamental Right of freedom of speech and expression under Article 19(1) (a) of the Constitution of India.

Applicability

The Act applies both to Central and State Governments and all public authorities. A public authority (sec. 2(h)) which is bound to furnish information means any authority or body or institution of self-government established or constituted (a) by or under the Constitution, (b) by any other law made by Parliament, (c) by any other law made by State Legislature, (d) by a notification issued or order made by the appropriate Government and includes any (i) body owned, controlled or substantially financed, (ii) non-government organization substantially financed - which, in clauses (a) to (d) are all, directly or indirectly funded by the appropriate Government.

Definition

Information

The Act defines information in sec. 2(f) as any material in any form, including the records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, log books, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any law for the time being in force. Sec. 2(i) defines the word 'record' as including (a) any document, manuscript and file, (b) any microfilm, microfiche and facsimile copy of a document, (c) any reproduction of image or images embodied in such microfilm and (d) any other material produced by a computer or any other device.

Right to Information

The right to information is defined in sec. 2(j) as a right to information accessible under the Act which is held by or under the control of any public authority and includes a right to (i) inspection of work, documents, records, (ii) taking notes, extracts or certified copies of documents or records, (iii) taking separate samples of material, (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device.

Maintenance and Publication of Records

Sec. 4 makes it a duty of public authorities to maintain records for easy access and to publish within 120 days the name of the particular officers who should give the information and in regard to the framing of the rules, regulations etc. Subsection (3) of sec. 4 states that for the performance of subsection (1), all information shall be disseminated widely and in such form and manner, which is easily accessible to the public.

Sec. 6 permits persons to obtain information in English or Hindi or in the official language of the area from the designated officers. The person need not give any reason for the request or any personal details. Sec. 7 requires the request to be disposed of within 30 days provided that where information sought for concerns the life or liberty of a person, the same shall be provided within 48 hours. Under sec. 7(7) before any decision is taken for furnishing the information, the designated officer shall take into consideration the representation, if any, made by a third party under sec. 11.

A request rejected shall be communicated under sec. 7(8) giving reasons and specifying the procedure for appeal and the designation of the appellate authority. Sec. 7(9) exempts granting information where it would disproportionately divert the resources of the public authority or would be detrimental to the safety and preservation of the record in question.

Restrictions Imposed by the Act

The Act itself is self-restrictive in nature. The Act does not make the Right to Information an absolute right but imposes restriction on this right. Section 8(1) of the Act deals with exemption from disclosure of information. The section says that "Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen, –

a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;
b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court ;
c) information disclosure of which would cause a breach of privilege of Parliament or the State Legislature ;
d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information ;
e) information available to a person is his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information ;
f) information received in confidence from foreign Government ;
g) information, disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes ;

h) information which would impede the process of investigation or apprehension or prosecution of offenders ;

i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers ;Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over; Provided further that those matters which come under the exemptions specified in this section shall not be disclosed ;

j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information; Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person. Though in the proviso clause and under Sub-Section (2), (3) of Section 8 again restrict Section 8 (1) to some extent by saying those information which cannot be denied to the Parliament or a state legislature shall not be denied to any person or by giving overriding effect of the Act over the Official Secrets Act, 1923, by saying if public interest in disclosure outweighs the harm to the protected interest, in such case public authority may allow access to information. But this has to be kept in mind that proviso clause of Section 8 (1) and Sub-Sections (2) and (3) are exceptions and exemption from disclosure of certain information as stated earlier is the rule.

Section 9 of the Act says that a Central Public Information Officer or a State Public Information Officer may reject a request for information where such a request for providing access to information involves an infringement of copyright subsisting in a person other than the state. Section 24 lays down that the Act has no application to certain organizations. These are:

1. Intelligence Bureau
2. Research and Analysis wing of the Cabinet Secretariat
3. Directorate of Revenue Intelligence
4. Central Economic Intelligence Bureau
5. Directorate of Enforcement
6. Narcotics Control Bureau
7. Aviation Research Centre
8. Special Frontier Force
9. Border Security Force
10. Central Reserve Police Force
11. Indo-Tibetan Border Police
12. Central Industrial Security Force
13. National Security Guards
14. Assam Rifles

15. Sasastra Seema Bal
16. CID Special Branch, Andaman and Nicober
17. The Crime Branch – CID – CB, Dadra and Nagar Haveli
18. Special Branch, Lakshadweep Police
19. Special Protection Group
20. Defence Research and Development Organisation
21. Border Road Development Board
22. Financial Intelligence Unit, India

Penal provision

Every PIO/SIO will be liable for fine of Rs. 250 per day, up to a maximum of Rs. 25,000/-, for -

1. Not accepting an application;
2. Delaying information release without reasonable cause;
3. Malafidely denying information;
4. Knowingly giving incomplete, incorrect, misleading information;
5. Destroying information that has been requested and
6. Obstructing furnishing of information in any manner.

Other Laws Relating to the Restriction on Communication of Information

While discussing other laws relating to the restriction on communication of information, first comes the Constitution of India. The Constitution is the supreme law of the land and any law which *ultravires* (goes beyond authority) the Constitution or made in violation of it is void *abinitio*(void from its very beginning). Article 19(1)(a) is the main source of right to information and Article 19(2) puts reasonable restriction on it. It is not wise to make access to information absolute for the security of the state and to maintain tranquillity and harmony within the country some facts / information must be kept unpublished. Under Article 19(2), the state is empowered to make any law which imposes reasonable restrictions on such right on the grounds of sovereignty and integrity of India, security of the state, friendly relation with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. The All India Service (Conduct) Rules, 1968 prohibits unauthorized communication of information by member of All India Services.

Under the Atomic Energy Act, 1962 the Central Government is empowered to declare any information as restricted information which cannot be made public or published. The Central Government may by order restrict the disclosure of information relating to atomic plant, mode of operation, substances, mode of acquisition of materials, transaction, purchase, theory, design, construction, research, technology etc. of an atomic plant. Sections 123 to 126 deals with communications of which evidence cannot be given. Section 123 says that no one is permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the head of the department concerned that shall give or withheld such permission as he thinks fit.

Under this Act official communication is immune from disclosure. Public officer cannot be compelled to disclose official communication made to him in official confidence, when he thinks that public interest would suffer by such disclosure. Information as to the communication of offence and professional communication are also exempted from disclosure. Section 52 of the Competition Act, 2002, says that information relating to any enterprise, being information which has been obtained by or on behalf of the Commission, without the previous permission in writing, shall not be disclosed.

In the Bureau of Indian Standard Act, 1986, it has been laid down that any information obtained by an inspecting officer or the Bureau from any statement made or information supplied or any evidence given or from inspection made under the provision of this Act shall be treated as confidential.

The Central Civil Services (Conduct) Rules, 1964, also prohibits unauthorized communication of information. By virtue of Article 19 (2), the State has made many laws like The Official Secrets Act which prohibits disclosure of official communication and enacted restrictive provisions in other laws on communication of information. In public dealings and state affairs high secrecy was used to be maintained by public officers as part of their duty. Confidentiality remained a condition of public service and violation of it attracts penalty including dismissal.

No Right to Information in the Private Sector

The Right to Information Act, 2005 is applicable in respect of public authorities established, owned or substantially financed by the Central Government, State Government, administration of Union Territories, panchayat, municipality or local bodies. Under Section 2(h) of the Act 'public authority' means anybody or institution or authority constituted or established

(a) By or under the Constitution of India
(b) By any law made by the Parliament
(c) By any law made by the State Legislature
(d) By any notification issued by the appropriate government and includes
(1) Body owned, controlled or substantially financed
(2) NGOs established, financed (directly or indirectly) by the Government

From the above discussion it is clear that the ambit of the Right to Information Act covers only public sector. So far as private sector is concerned like partnership business, private companies and factories, multinational companies which have their head offices outside India, NGOs not financed by the government etc. the Act remains silent. Therefore private bodies or authorities are not under obligation to furnish any sort of information if asked for. The Act is operative in the public sector only. The Act has no application in the private sector.

Constitutional Avenues Remain Open

Under the Act, where a citizen has exhausted the remedy of appeal or second appeal, the finality given to the orders of the commissioners and appellate authorities is only for the purposes of the Act and the citizen has a right to approach the High Court under Art. 226 or where it refers to a fundamental right, he may even approach the Supreme Court under Art. 32.

Impact of the New Law

Now that the statute requires information about the pendency of the applications, reasons as to why they are not disposed of or the reasons behind the rejection of an application, there is bound to be improvement in the efficiency of the departments. As of now, the only supervision of efficiency is supervision that is made by the superior officers at the time of reviewing the employees' work and while recording comments in the annual confidential reports or ACRs. This process has not proved successful and though it may be continued, still the threat of a designated official calling for the relevant information at the instance of a citizen will be a salutary check on the inefficiency of officers. It also checks lethargy or bad faith or corrupt motives.

Another important aspect is that in India we have not given respect and prominence to the rights of the individual Citizen. True democracy is impossible until we recognize the majesty of the individual Citizen. If individual Citizens are empowered to ensure greater accountability and transparency in governance, it can bring about a major change. There has been no vehicle available for individual citizens to impact the governance structure. In a system reeking with corruption and becoming increasingly insensitive to the problems of the disadvantaged Citizenry, the Right to Information has shown promise of empowering Citizens to get accountability and act as an enforcer of good governance.

Right to information act and women empowerment

The first conference on women held at Mexico City adopted the theme of 'Equality Development And Peace'. Democracy, Development, respect for human rights and fundamental freedoms are interdependent and have mutual reinforcement. with this Act in place, women can also access information on issues like domestic violence, harassment at workplaces, whether police is refusing to register an FIR in serious dowry related cases and deaths. It is submitted in the paper that the utility of Right to Information Act is more significant for women because the so called patriarchal society has left the act from its purview of criticism.

Of late, Vinita Kamte wife of IPS Officer Ashok Kamte who died fighting attackers during 26/11 Mumbai attack in her Book To The Last Bullet brought to the light the various lapses on part of the Indian security system that lead to the killing of many including Ashok Kamte. The expose' was based on the information gathered with the provision of Right to Information Act in place. In an interview to the news portal Vinita Kamte clearly stated that the post mortem report of the deceased police officer was also obtained through a request made under Right to Information Act.

RTI not only strengthens women in difficult circumstances but also make things better for school and college girl dropouts, women with disabilities, women entrepreneurs, women SHG leaders, grassroots women leaders and women in general. It is said that when one is equipped with knowledge in various aspects a lot of mishaps can be prevented hence, information is a boon to women's empowerment and Gender Equality. Lack of information leads to hindrance to lot of things such access to health, education, social and economic reforms etc.

M. Lakshmi Devi, a 25-year- old Dalit women from Kondavanipalli village of Kurnool district in Andhra Pradesh used to work as daily wage labourer weeding ploughing or sowing seeds in fields or digging and constructing roads and earned Rs 40. In 2002, due to her father's sickness she took a loan of mere Rs 1000 hoping to repay it. What she did not know was that the upper caste moneylender had made her sign five acres of land away with a thumb impression. She joined APDS-Andhra Pradesh Dalit Samakhya (women Self Help Group) to rescue her land. Last year, using the Right to Information Act, Lakshmi and her fellow activists found 110 acres of vacant land, and lobbied hard for it to be given to Dalit women. In November2013, sixty women got one or two acres of fertile land worth Rs 1, 00,000/ acre. "This is a small but we say that it is a significant example" it is important women organizations come together and map out a strategy on how they can push for the Right to Information process.

Case –laws on Right to Information and women

In ***Radhika Aggrawal vs. State Bank of India***, Hyderabad, it was held that since the information pertaining to bank records relates to the appellant. The respondent was directed to enable to inspect all the records pertaining to the RTI application. In ***Bina Saha vs. S E B I***, it was held that since the appellant has not specified the exact information she wants, therefore it could be denied on such grounds.

The CIC in ***Shobhana Takia vs. Deptt of Personal Training, New Delhi***, held that the casual handling of the RTI request and consequently depriving the information seeker of the information renders CPIO responsible for penalty.

So far as the personal information is concerned a woman could be protected under this act if any one seeks information against her. In ***Amar Lal Arora vs. Deptt. of Posts***, ***New Delhi***, the commission upheld the exemption claimed by the CPIO for non disclosure of personal information relating to the employee Ms. Shashi Bala and advised the appellant to not misuse the RTI ACT. But it seems that commission has shown some privileges to women, means if any information is sought by woman than it was provided but when any information was sought about woman, it was denied. In ***Vandana Mathankar vs. Passport Office Bhopal***, information was sought u/s 8(1) (j) where the commission held that normally the personal details of the passport holder are not to be disclosed being purely personal information. However, since the wife is seeking such details about the husband's

passport, we tend o consider the information is not exactly personal any longer. Again in ***Ritu Raj Jain V. Passport Office, Jalandhar***, the appellant sought the passport details of his wife and son. The commission held that it is about their personal details. However, if son is a minor than information can be given. Besides, the CPIO can also inform the appellant if passport had been issued in favour of the individuals or not.

In ***Jyoti Gutta vs. LIC of India***, A.P, the commission held that the insured has decease over six years ago and the disclosure of information at this stage to the daughter of the insured will not result in any harm to the interest of public authority or the deceased.

In ***Meenakshi Chopra vs. Indian Air Force***, information was sought about Captain Atul Chopra regarding consumption of liquor etc. And it was denied as personal information. In ***Akshima vs. CBSE Delhi***, appellant had sought information on seven points relating to alleged mistakes in the checking of Physics and Biology papers for CBSE class xii. The PIO informed the appellant that there is no such provision for revaluation and both the subject papers were checked by subject experts. The AA observed that answer sheets were shown to subject experts and they have reported that the evaluation has been done according to the marking scheme and marks awarded are correct. The commission referred the case of CBSE V. Aditya Bandopadhyay, in which SC observed that the Act gives a right to a citizen to only access information, but not for any consequential relief based on such information.

In ***Aishwarya Parashar vs. CPIO & Asstt. Director of Archives, National Archives of India, Janpath, New Delhi***, the appellant sought information regarding a copy of the govt. Of India whereby Shri Mohandas Karamchand Gandhi was declared 'Rashtrapati.' The CPIO said that there is no specific document on the information being sought. However, she may search available records and library material and the appellant was assured to be provided with al facilities, as per rules, to facilitate research work. It was also mentioned in the reply that certain published reports indicate that the phrase "Father of the Nation" was first used by Netaji Subhash Chandra Bose in his message to Gandhiji on Azad Hind Radio, from Rangoon on 4th June 1944.

On the basis of above mentioned cases, it becomes clear that though the girls and women are using the provisions of the act for their personal matters, not in general for the overall benefit of the society. But it could be hoped that gradually they will also seek information on the issues of national importance too.

Here it is also submitted that right to information means to get right information which is neither false nor misleading. Even when the information is not sought through RTI ACT, rather it is received through mass media then also it should be true.

Conclusion

The Right to Information Act is a social legislation enacted for the benefit of the society at large. It is submitted in the paper that the act is a means to an end and not an end in itself.

It is a special law having some overriding effect on general laws. Though the Act contains restrictive provisions and above all there are reasonable restrictions under the Constitution, we hope the Act will be exploited for the benefit of the society. The Right to Information Act, 2005 is a complete code. The public has a fundamental right to know what the government has done or is been doing in its name. The Statute is enacted to make the state affairs fairer, transparent and obviously to check corruption. The Act is a strong weapon in the hands of the media and the press. If they sniff any irregularity or incorrectness in any public dealing they can ask for correct information. The restrictions imposed on such right under the Constitution, the Act itself, any other law and by judicial interpretation seem to be reasonable and strike a good balance between people's right to know and secrecy maintained by the State.

By enacting the Right to Information Act India has moved from an opaque and arbitrary system of government to the beginning of an era where there will be greater transparency and to a system where the citizen will be empowered and the true centre of power. Only by empowering the ordinary citizen can any nation progress towards greatness and by enacting the Right to Information Act, 2005 India has taken a small but significant step towards that goal. The real Swaraj will come not by the acquisition of authority by a few but by the acquisition of capacity by all to resist authority when abused. Thus with the enactment of this Act India has taken a small step towards achieving real Swaraj.

Suggestions

Despite all, it is also suggested that the RTI Act should be amended for protection of the RTI activists. Because since 2010, at least 12 RTI activists have been murdered for seeking information to "promote transparency and accountability in the working of every public authority" of India. Ms. Shehla Masood, a prominent woman RTI activist of Bhopal, Madhya Pradesh was murdered on 16 August 2011. She joined the growing list of RTI activists who have been murdered. Even policeman seeking information could not escape death. On 25 July 2010, Uttar Pradesh Police Home Guard, Mr. Babbu Singhwas killed allegedly for seeking information about government funds and work done by his village Pradhan (Head) at Katghar village in Bahraich district of Uttar Pradesh.Many face serious physical assaults on regular basis. Those who seek information from their village panchayat and other local administration also face social ostracisation. Asian Centre for Human Rights recommends that a separate chapter, "Protection of those seeking information under the (RTI) Act", be inserted into the Act.

Further, it is also submitted in the paper that unity, concerted movement and will power of the women activists will be able to eradicate the menaces of corruption and nepotism from the system. A periodical, awareness campaign should be launched. Capacity building programme and sustained training is also some of the important quintessential.
There is no doubt that the act is a boon to women empowerment and gender equality.

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Pros and Cons of bringing Political Parties Under the ambit of Right to Information Regime

Dr. Rajneesh Kumar Yadav*

Introduction

After almost 55 years since the coming into force of the Constitution of India a national law providing for the right to information was passed by both Houses of Parliament on 12 May and 13 May 2005. The Bill with 146 amendments was adopted by voice vote.[1] This law satisfies a long standing demand of the people raised through various peoples' movements, and gives content and meaning to the right to information recognized since 1973 by the Supreme Court as a concomitant of the fundamental right to freedom of speech and expression guaranteed under Art 19(1) (a) of the Constitution of India.[2]

Political Parties should be covered or not in the ambit of RTI that is the main question for the consideration before us because after the CIC judgment in June-2013 this debate is intensified and needed to be interpreted by the competent authorities with due consideration of all the essential elements and characteristic features of Political Parties of our country.

In the background of this discussion there is a landmark judgment delivered by full bench of the CIC to bring Political Parties under the ambit of RTI.[3]In June, the CIC had, under Section 2(h) of the RTI Act, ruled that all non-governmental organizations substantially financed, directly or indirectly by funds provided by the appropriate government, came under the act's purview. A full bench of the CIC held that six parties- the Congress, BJP, CPM, CPI, NCP and the BSP- to which petitioners had addressed TRI queries, fulfilled the criteria for "public authorities" as defined in the Act.

Following the CIC ruling, the government had decided to amend the act and introduced a bill to keep parties out of the RTI law's ambit. But consensus eluded the bill as parties like the Biju Janata Dal, Trinamul Congress and the CPI raised objections. The government then referred the Right to Information (Amendment) Bill, 2013 to the committee. In order to nullify the ruling of CIC The Right to Information (Amendment) Bill, 2013 introduced in Lok Sabha in August, 2013 to insert an explanation in Section 2 of the RTI Act, 2005 which states that any association or body of Individuals registered or recognized as political party under the Representation of the People Act, 1951, will not be considered a public authority. Incidentally, it was at Rahul Gandhi's insistence that the amendment bill

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had been referred to the Standing Committee on Law and Personnel. On 17th December, 2013 Parliamentary Standing Committee supported the move to keep political parties outside the ambit of the Right to Information Act, 2005.

Are political parties public authorities?

The entire debate whether the political parties are amenable to the RTI regime in India rests on the answer to the question if political parties are public authorities. Therefore it would be pertinent to discuss an analyse the definition, nature and scope of term "Public Authority" under the RTI Act, 2005. As per the preamble of Right to Information Act the *public authorities* are the main information providers to the citizens whenever they seek any information under the control of them. Therefore it is very essential to analyze the definition of **Public Authority** under the Right to Information Act, 2005 which reads as under-

Section 2(h) "public authority" means any authority or body or institution of self - government established or constituted,-

(a) by or under the Constitution;
(b) by any other law made by Parliament;
(c) by any other law made by State Legislature;
(d) by notification issued or order made by the appropriate Government, and includes any-

1) Body owned , controlled or substantially financed;
2) Non-Government Organisation substantially financed, directly or indirectly by funds provided by the appropriate Government.

After consideration of definition of public authority according to the Right to Information Act, 2005 and the nature of political parties in our country we can say that the political parties are public authorities and must be kept in the purview of RTI.

Provisions under the Representation of People Act, 1951 regarding receiving of contributions by Political Parties:

The proposition that political parties are public authority and under an obligation to disclose information to the general public is further strengthened by statutory provisions contained in the Representation of People Act, 1951 and the Companies Act, 2013.

The relevant provisions in the Representation of People Act, 1951 are as under *29 B. Political parties entitled to accept contribution*- Subject to the provisions of the Companies Act, 1956 (1 of 1956), every political party may accept any amount of contribution voluntarily offered to it by any person or company other than a Government company.
Provided that no political party shall be eligible to accept any contribution from any foreign source defined under clause (e) of the section 2 of the foreign Contribution (Regulation) Act, 1976 (49 of 1976).

Explanation—for the purposes of this section and section 29C

(a) "company" means a company as defined in section 3;
(b) "Government company" means a company within the meaning of section 617; and
(c) "contribution" has the meaning assigned to it under section 293 A, of the Company Act , 1956(1 of 1956) and includes any donation or subscription offered by any person to a political; and
(d) "person" has the meaning assigned to it under clause(31) of the section 2of the Income-tax Act, 1961(43 of 1961) but does not include Government company , local authority and every artificial juridical person wholly or partially funded by the Government.

Section 29 C. Declaration of donation received by the Political Parties

(1) The treasurer of a political party or any other person authorized by the political party in this behalf shall, each financial year, prepare a report in respect of the following, namely:

a) The contribution in excess of twenty thousand rupees received by such political party from any person in that financial year;
b) The contribution in excess of twenty thousand rupees received by such political party from companies other than Government companies in that financial Year.

(2) The report under sub-sections (1) shall be in such forms as may be prescribed.

(3) The report for a financial year under sub-section (1) shall be submitted by the treasurer of a political party or any other person authorized by the political party in this behalf before the due date for furnishing a return of its income of that financial year under section 139 of the Income tax Act , 1961(43 of 1961), to the Election Commission.

(4) Where the treasurer of any political party or any other person authorized by the political party in this behalf fails to submit a report under sub-section (3) then, notwithstanding anything contained in the Income-tax Act , 1961 (43 of 1961) , such political party shall not be entitled to any tax relief under that Act.

The above provisions of Representation of People Act, 1951 make a reference to the old Companies Act of 1956 which now stands replaced by the Companies Act, 2013. Therefore any reference to the old Companies Act, 1956 ought to be construed as a reference to new Companies Act, 2013. Section 182 of the Companies Act, 2013 which allows companies to make contributions to political parties is reproduced hereunder-

Section 182. (1) Notwithstanding anything contained in any other provision of this Act, a company, other than a Government company and a company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party:

Provided that the amount referred to in sub-section (1) or, as the case may be, the aggregate of the amount which may be so contributed by the company in any financial year shall not exceed seven and a half per cent of its average net profits during the three immediately preceding financial years:

Provided further that no such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making and the acceptance of the contribution authorised by it.

(2) Without prejudice to the generality of the provisions of sub-section (1),—

(a) a donation or subscription or payment caused to be given by a company on its behalf or on its account to a person who, to its knowledge, is carrying on any activity which, at the time at which such donation or subscription or payment was given or made, can reasonably be regarded as likely to affect public support for a political party shall also be deemed to be contribution of the amount of such donation, subscription or payment to such person for a political purpose;

(b) the amount of expenditure incurred, directly or indirectly, by a company on an advertisement in any publication, being a publication in the nature of a souvenir, brochure, tract, pamphlet or the like, shall also be deemed,—

(i) where such publication is by or on behalf of a political party, to be a contribution of such amount to such political party, and

(ii) where such publication is not by or on behalf of, but for the advantage of a political party, to be a contribution for a political purpose.

(3) Every company shall disclose in its profit and loss account any amount or amounts contributed by it to any political party during the financial year to which that account relates, giving particulars of the total amount contributed and the name of the party to which such amount has been contributed.

(4) If a company makes any contribution in contravention of the provisions of this section, the company shall be punishable with fine which may extend to five times the amount so contributed and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months and with fine which may extend to five times the amount so contributed.

Explanation.—for the purposes of this section, "political party" means a political party registered under section 29A of the Representation of the People Act, 1951".

In view of the above it is evident that every company making contribution to political parties must disclose the same in its profit and loss account failing which it may incur heavy penalties. Therefore political parties receiving contributions from companies can not claim to withhold such information as the same is already in public domain.

Performance of Public Duty by the Political Parties

In the course of its judgment the CIC noted the following characteristics of Political Parties whereby they perform the public duty.

1) The political parties are the life blood of our polity. As observed by Laski "The life of the democratic state is built upon the party system". Elections are contested on party basis. The political parties select some problems as more urgent than others and present solutions to them which may be acceptable to the citizens. The ruling

party draws its development programs on the basis of its political agenda. It is responsible for the growth and development of the society and the nation. Political Parties affect the lives of citizen, directly or indirectly, in every conceivable way and are continuously engaged in performing public duty. It is, therefore, important that they become accountable to the public.

2) Political parties are the main unique institution of the modern constitutional State. These are essentially political institutions and are non-governmental. Their uniqueness lies in the fact that in spite of being non-governmental, they come to wield or directly or indirectly influence exercise of Governmental power. It would be odd to argue the transparency is good for all state organs but not so good for political parties, which in reality control all the vital organs of the state.[4]

The CIC further noted that there are many reasons why the political parties should be brought under the RTI Act, to name few-

1) The National Commission to review the working of the Constitution in its report submitted in March 2002 has recommended that Political Parties as well as individual candidates be made subject to a proper statutory audit of the amounts they spend. In Common Cause (A Registered Society) vs Union of India, AIR 1996 SC 3081, the Supreme Court has dealt with the income and expenditure incurred by the political parties and has laid emphasis on transparency on election funding.
2) The people of India must know the source of Expenditure incurred by Political Parties and by the Candidates in the process of Election. These Judicial Pronouncements unmistakably commend progressively higher level of transparency in the functioning of Political parties in general and their funding in particular.
3) We may also add that the preamble to the Constitution of India aims at securing to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; and EQUALITY of status and of opportunity. Coincidentally, the preamble of RTI Act also aims to promote these principles in the form of transparency and accountability in the working of the every public authority. It also aims to create an 'informed citizenry' and to contain corruption and to hold government and their instrumentalities accountable to the governed. Needless to say, Political parties are important political institutions and can play a critical role in heralding transparency in public life. Political Parties continuously perform public functions which define parameters of governance and socio-economic developments in the country.[5]

Government's move to nullify the impact of the CIC ruling:

The government brought an amendment to negate the CIC order but it has been referred to a parliamentary standing committee for wider consultations after social activists protested. Even former Law Minister Kapil Sibal while defending the amendments said that political parties follow transparency norms by submitting information about their funds to the poll panels and income tax authorities. He said that parties were association of people and

hence not liable under to disclose information under the transparency law. Law Minister had on December, 2013 given the green signal to the Right to Information (Amendment) Bill, also said it would be difficult for parties to function if they were brought under RTI as people would then ask details on the process of giving tickets and seek confidential decisions. Even a parliamentary standing committee on 17th of December 2013, seeks to exempt political parties from being subjected to RTI queries. The department related standing committee on personnel, public grievances, law and justice, in its report tabled on 17.12.2013, disagreed with a June 2013 order of the CIC ruling political parties as "public authorities" that ought to be brought within ambit of the RTI Act. It recommended passage of the RTI (Amendment) Act, 2013 to nullify the CIC order.[6]

Conclusion

It is believed that One of the main reasons why the six national Political Parties are opposed to being brought under the RTI Act transparency law is that around 75 percent of their funds come from "unknown: and "undesirable". According to an estimate, in the Income Tax returns and statements filed by parties with the Election Commission, most of the sources of funding of the six national political parties remain largely unknown. Out of the total income of the parties from 2004-05 to 2011-12 Rs. 4895 crore- a staggering Rs. 3674 crore came from sources that were unknown, the Association of Democratic Reforms has said. Undoubtedly Political Parties perform functions which closely resembles with other public authorities that are under the ambit of RTI Act, 2005.

Political Parties which are life blood of Democracy are expected to come forward welcoming the landmark ruling delivered by the Central Information Commission bringing them within the RTI regime in this Country. The Government should refrain from nullifying this landmark ruling heralding openness in Indian Democratic system.

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State Creation as a Tool for National Integration and Conflict Management: The Nigerian Experience

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Abstract

State creation under the 1999 Constitution of the Federal Republic of Nigeria is a complex and deeply political enterprise involving multiple actors with different and often conflicting goals and interests. It is a known fact that State creation under the military and in fact all State creation that took place under the military era is less volatile and was properly managed. As seemingly ingenious as the idea of the State creation is to the management of ethno-communal conflict and promotion of National Integration in Nigeria, the hurdle created by the provisions of the Constitution to achieve this may defeat the purpose of achieving National Integration and management of ethno-communal conflict. This paper will examine the Constitutional mechanism for State creation and submit that the process while favorable to local majorities is likely to be disadvantageous for local minorities as they are not in a dominant position locally. This process, rather than forge National Integration, may likely provoke ethnic violence as local minorities will always agitate and challenge for administrative positions with local majorities. Similarly, creation of States through this process is a recipe for disintegration and communal conflict as this will set the politically marginalized minorities in a clash against the powerful local majorities. This paper will look at the relevant Sections of the Constitution in line with the challenges and suggest ways of overcoming them.

Introduction

It is the constant policy of the Nigerian government to maintain and support the local tribal institutions and the indigenous forms of government…assuming…that the impossible were feasible-- that this collection of self – contained and mutually independent Native states, separated from one another, as many of them are, by great distance, by difference of history and traditions and by ethnological, racial, tribal, political, social and religious barriers, were indeed capable of being welded into a single homogenous nation--a deadly blow would be struck at the very root of national self-government in Nigeria which secures to each separate people the right to maintain its identity, its individuality and its nationality…and the peculiar political and social institutions which have evolved for it by the wisdom and by the accumulated experiences of greatness of its forbearers. The above epigraph seem to aptly describe the nature of the Nigerian state which has hitherto, to a

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large extent, defied all policies and strategies so far deployed to douse the ethnic tension that have dotted the Nigerian political space[1].

The problem of integrating the diverse cultural diversity of Nigeria is very practical, and maintaining the existing level of integration is also a cumbersome task. The government over the years from colonial period tried to ward off fragmentation of Nigerian society and ensure unity of its component parts. One of the major strategies adopted by the government for National Integration is creation of states. National Integration stemmed from the concept of Nation, which means a social group which shares a common ideology, common institutions, customs and sense of homogeneity[2]. The task of this paper is to determine whether state creation in Nigeria will foster National Integration and conflict management.

Historical Issues in Ethnic Conflict Management through State Creation in Nigeria

Since being imaginatively christened Nigeria by Flora Shaw, a lady, who later married the first Governor-General of Nigeria named Fredrick Lord Lugard, the existence of the name has been a major source of challenges for the amalgamated northern and southern protectorate of the Niger. The name Nigeria was first mentioned in the British House of Commons debate on the Royal Niger Company in 1899. Prior to the amalgamation in 1914, there existed three territories covering the various communities the colony of Lagos, the Protectorate of Southern Nigeria, and the Protectorate of Northern Nigeria. Each territory has its own government under an administrator who was responsible to the British government. The amalgamation was not done until 1914 which was primarily for administrative convenience by the British. It has since been bedeviled with plethora of conflicts in its effort to contain the involuntary collection of disparate ethnic groups into one nation. Acclaimed and removed for being home to the largest number of black people in the whole world, the heterogeneous composition of Nigeria made it to be very challenging to foist a nation state on the diverse socio-cultural and ethno-regional groups to drive concerted march towards nation building[3].

It started with Clifford Constitution of 1922 and ends with Lyttelton Constitution of 1954. At independence, the amalgamated Northern and Southern Protectorate had given way to four regions of West, Mid-West, North and East. This saw the Southern Protectorate being devolved into three regions namely the Eastern Nigeria, the mid-Western Nigeria and the Western Nigeria, while the Northern Protectorate remained intact by assuming the status of a region. The plural composition of the Nigerian society also brought with it the attendant consequence of putting up a Constitutional compact that could guarantee the togetherness of the nation by managing its plural composition. Conflicts along ethnic and regional lines that manifested pre-colonial period led the British administrators to try various constitutional arrangements to mitigate the conflict. However, continuous and consistent redesigning of the Constitution to achieve this end by the Nigerian political class under the watchful eyes of the British administrators did not particularly achieve the desired end of obliterating the divisiveness that have permeated the Nigeria polity, in a manner that may be described as osmotic.

The military interregnum in Nigeria's political life lasted till 1979 and within this period, the nation was further devolved into states and local government council from the three regions inherited in 1963 Constitution. The military sees this as a way of reducing tension within the polity and among the ethnic groups. It was also the argument that it is a means to bring government services closer to the beneficiaries, the people in the grass root. It can also be seen as a response to the long-standing grievances existing in the regions against the centralized government administration which the people were not, by their socio-political inclinations used to. The structural and institutional changes have, on the one hand, achieved the initial aims of the legislation and to some extent addressed existing grievances in the regions. On the other hand, however, such change has opened up spaces for new forms of local-level elite competition and grass root mobilization around a variety of local identities and interest. It has also led to a proliferation of state splitting and shifts in local-leveldemographics. The military leadership in this country, by 1979, left the country with 19 states from the initial three regions, and by the time they returned to government in 1983, and left again in May 1999, the states had increased to 36 and have remained till date. However the 1999 Constitution handed over by the military, made provisions for creation of states with the view of addressing the same need of mitigating ethno-communal conflicts and National Integration by moving the government closer to the people[4].

Rationale for State Creation[5]

State creation is a response by the Nigerian State to use Federal structure of government to solve the country's problem associated with conflict management, ethnic pluralism and distribution of national wealth to component states. State creation in Nigeria was expected to assuage ethnic minority grievances and to correct the politico-structural imbalance arising from the disproportionate size of some sections of the country which accounted for over half of the federation's population and three-quarters of the national territory. In summary, state creation attempted to ameliorate minorities' fear and integrate minorities as unique components of a federating society. It is also to ensure unity of the State. It was also expected that state creation would foster national integration with the elimination of minorities' fear and majority dominance, which the regionalization promoted. However, if state creation was to foster national integration, its uneven distribution among the six geo-political regions had caused more agitation. This uneven distribution of states has promoted mutual mistrust, ill-feeling and disintegration among the component states.

State creation in this sense can be seen as a vicious circle. Once there is majority and minority, and an attempt is made to appease the minority by creating a state for them, a new minority will emerge from the former minority. Taking a cue from the Calabar/Ogoja Rivers state movement, the minority groups in Eastern Nigeria which were dominated by the Igbo majority requested for a state and south-eastern state was created for the Efiks, Ibibio, Ejagams and Ikois. And Rivers state for the Ijaw, Ikwere and Ogoni people in 1967. In south-eastern states, Ibibios were the new majority and agitation for new states resurfaced again from the emerging minorities of Efiks and Ejagams. Long after the

creation of AkwaIbom from the old Cross River state, the Ibibios still became majority in the new state living Oron to agitate for "Atlantic State" and the Annangs to demand for Itai State. This situation is replicated in all the other states of the federation.

However, it must be noted that state creation at the inception had always provided the minority groups the opportunity for self-determination and revealed their uniqueness as a component of the federation.It must also be emphasized that successive governments in Nigeria has politicized the process of state creation. Politicians use state creation to create political domain for themselves thereby causing divisions in the society. State creation in Nigeria today rather than uniting Nigerians to foster national integration, has resulted in violence and conflicts of various dimensions causing "national disintegration rather than integration".

Constitutional Provision for State Creation in Nigeria

Section 8& 9 of the Constitution of the Federal Republic of Nigeria 1999 Cap C23, Laws of the Federation 2004 provides as follows:

An Act of the National Assembly for the purpose of creating a new state shall only be passed if –

a) a request, supported by at least two-third majority of members representing he area demanding the creation of the new state in each of the following namely
   1) the Senate and House of representatives,
   2) the House of Assembly in respect of the area, and
   3) the Local Government Councils in respect of the area, is received by the National Assembly;

b) a proposal for the creation of the state is thereafter approved in a referendum by at least two-thirds majority of the people of the area wherethe demand for the creation of the state originated;

c) the result of the referendum is then approved by a simple majority of the state of the federation supported by a simple majority of members of the Houses of Assembly; and

d) the proposal is approved by a resolution passed by two-third majority of members of each House of Assembly[6]

Substantially, contentious issues in Nigeria's Constitution and politics can be categorized into three:

(a) Issues of Sovereignty which questions the desire and practicality of Nigeria continuing as a unified legal and political entity consistent with international norms and standard.

(b) Secularism, which questions whether or not the Nigerian state permits its citizens through a federal structure to practice different religious beliefs without local or national state sanctions.

(c) Procedural governance issues such as revenue allocation; census figures; Federal Government appointments; access to National Institutions for example higher

education, the Army, Police, and other civil service employments; property rights and boundary adjustments[7].

As observed earlier, Section 8 and 9 of the 1999 Constitution provide for Constitutional procedure for creation of states in Nigeria and it seems very cumbersome, onerous and appeared to have been designed not to allow for state creation at all. The fact that the Constitution fails to lay out socio-economic criteria that must be met by the groups calling for state creation before approaching the National Assembly for the commencement of the process is fraught with difficulties and conflict. One issue that has been central to agitation for state creation is reduction of ethno-communal tension and promotion of national integration. However, these laudable goals for which states were designed to be created has given way to political elites' opportunity to enrich themselves and become reckless with national resources which accrue to them through the states.

Crave for self-governance and economic independence by various ethnic groups in the Nigerian project had been largely responsible for the inclusion of certain Constitutional provisions to take care of the anticipated problems peculiar to some heterogeneous nations. This has given rise to many requests for state creation to the National Assembly by the various ethnic groups in the country. This thus makes the Nigerian Constitution a living document that serves as a guide in ethnic conflict management, through the elected representatives of the people with the legislative power to amend the Constitution, to serve the purpose when the need arises through state creation, is in itself healthy for the polity. Accepting a Constitutionas a nation's supreme legal document however becomes a contentious issue when its procedure for resource allocation are disputed or seen as unfair by any segment of the population. This is the structural issue at the base of state creation in Nigeria.

The afore-mentioned is however possible if government consults the people in the process of drafting and ratifying the Constitution. However, as evidenced by the 1999 Constitution, in the absence of such process-ledand transparent Constitution-making efforts, the tendency will exist for multiple interpretations that the Constitution advances the lot of some citizens at the expense of others. It therefore follows that the safety of an average Nigerian citizen seems not to be guaranteed outside his ethnic community. Clearly, while procedural governance issues may be contentious, there are fundamental issues in the Constitution that must never be in doubt. Hence, there is always a need to categorize and/or prioritize issues in terms of their relevance to the overall national goal. Careful categorization enables objective appraisal of issues and averts the onset of national political crises and disaster. Non-categorization and/or non-prioritization have always been a recipe for disaster.Thus the Constitution must provide a clear definition of citizenship, rights, responsibilities and processes for holding public officials accountable for their actions while in office. In the light of the above, the imposed 1999 Constitution reflects at best a liberal political transition that will result in illiberal politics which is different from illiberal

democracy that promotes popular sovereignty, economic opportunities, political liberty and equality.

Conclusion

The continuous demands for states creation reflect the dissatisfaction of ethnic nationalities in Nigeria with the present number of states. The number of states that will be adequate to sustain peace, promote national integration and harmonious relationship is not known to anybody. The vicious circle of creating more states will continue to build new frontiers of majority/minority conflict. Furthermore, state creation posts both manifest and latent consequences as well as a dysfunction on the social progress of the nation. Agitation for more states will lead to building new frontiers of ethnic conflict, inter-tribal war, boundary disputes, as well as disproportional formula of revenue allocation and problem of fiscal federalism. All these are disintegrative elements as opposed to integrative elements.

In Nigeria today, we are no more pursuing national integration as a strategy of nation building but fighting ethno-cultural nationalism which is a consequence of state creation. We can achieve national integration if we play down faulty strategies of national integration as federal character, state of origin syndrome, quota system, and instead put in place appropriate domicile laws which allow Nigerians to gain residential rights of attaining their highest limits wherever they find themselves in Nigeria without ethnic discrimination.

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Right to Information as a tool for Good Governance

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Abstract

Good Governance is a dynamic concept means democratization of governance. Basically it is characterized by transparency and accountability and the best way for this is prerequisite for democracy. Such governance includes some factors such as transparency, accountability, rule of law and people's participation. Good Governance includes wide range of issues like economic, political, administrative and judicial as well. The need of good governance is universally accepted. It has recognized that the state and its machinery should work for the welfare of the peoples India is a democratic country and in every democratic country, there is a need of good governance and transparency. In every development administration experiences indicated that there has always an urgent need for improving government. Today in India there is unprecedented corruption at all levels. All feel its pinch but corruption is roaring high. The corruption has virtually spread in almost all aspects of public life. The main factor behind the corruption is secrecy, which was taken as a tool of faithfulness towards government in past era. If we want transparency in governance, there is a need to crack the corruption by cracking the walls of secrecy. The prevalence of corruption, lack of accountability, efficiency and effectiveness demands the requisite changes and transformations to ensure good governance. Information is power and at International level it is recognized that information is essential for development as a result many countries have enacted Right to Information Act. In that direction government of India too introduces a new era of good governance through the enactment of Right to Information Act in 2005.The Right to Information has been given the status of a fundamental right under Article 19(1) of the Constitution. This act was given the status of fundamental right and it is evident from the fact that how crucial it is for the proper functioning of the government. It provides an opportunity to interact with the officials and institutions. Right to Information is a potent weapon to fight against corruption, arbitrariness and misuse of power.RTI has significant bearing on good governance and development. The Main thrust of RTI law is to promote openness, transparency and accountability in administration by making the government more open to public scrutiny. Present paper is an endeavor to discuss the major indicators of good governance, role of RTI in good governance and eradication of corruption in India through RTI. Along with that, this paper also discusses the importance of RTI among the peoples for effective functioning of good governance.

Introduction

In a democratic country every person has the right to freedom of opinion and expression. This right includes right of holding public opinion and to seek, receive and impart information and ideas from the public authorities. Information is an inalienable and natural right of every human being which helps citizen to live with free dignity in a civilized

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society. Moreover there is a close link between right to information and good governance. Good governance is characterized by transparency, accountability and responsiveness. Consequently, the citizen‘s right to information is increasingly being recognized as an important mechanism to promote openness, transparency and accountability in government administration. People are the sole part in a representative form of government. So it is necessary that they must have to know all the functioning of government activities to frame a practical regime of good governance in administrative process. The right to information is implicitly guaranteed by the Constitution human security, shelter, food; environment and employment opportunity are all bound up with right to information. In the absence of information on this issue, people cannot live a dignified life and will remain ever marginalized group in the society. Corruption and criminalization is the nerve of Indian bureaucracy today.

The secrecy they have maintained is a source of corruption and harassment. Though India is the world largest democracy, it now fails to attain confidence from common people. As a taxpayer, each person should have the right to know the functioning of government machinery. In addition to this, in a democratic country, citizen can be regarded asset only when citizen develop the skill to gain access to information of all kinds and to put such information to effective use. Without intellectual freedom the success of democratic governance cannot be imagined. Information is now the sole of every government. The need for transparency and efficiency in the governance become more important to achieve the goal of good governance. The first of these is assuring individual self-fulfillment, the second set of values focuses on means of attaining the truth, the third addresses a method of securing the participation of members in the society in social and political decision making, the fourth set of value seeks to maintain the balance between stability and change in the society. The Indian parliament had enacted the ―Freedom of Information act, 2002 in order to promote transparency and accountability in the administration. The report envisaged by the National common Minimum Programme, the ―Freedom of Information Act, 2002 has repelled and ―Right to Information Bill, 2004 (RTI) was passed by both the houses of parliament on May 2005. The ―Right to Information Act‖ was notified in the Gazette of India on 21st June, 2005. This new law empowers Indian citizens to seek any accessible information from a public authority and makes the government and its functionaries more accountable and responsible.

Objective of the Act

The main objective of Right to Information Act is to establish “the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commission and for matters connected therewith and incidental thereto.”This Act has some important features which are as follows:

(1) All citizens possess the right to information

(2) The term Information includes any mode of information in any form of record, document, e-mail, circular, press release, contract sample or electronic data etc.
(3) Such information covers inspection of work, document, and record and its certified copy and information in form of diskettes, floppies, tapes, video cassettes in any electronic mode or stored information's in computer etc.
(4) The Applicant can obtain Information within 30 days from the date of request in a normal case. However, Information can be obtained within 48 hours from time of request, if it is a matter of life or liberty of a person.
(5) Certain information's are prohibited.
(6) Restrictions made for third party information Appeal against the decision of the Central Information Commission or State Information Commission can be made to an officer who is senior in rank.

Good Governance

The concept of good governance is not new, rather it is an old as human civilization. It consists from two word, good and governance, the word good is derived from the word 'god' which means the sense of judgment which is right, air, just and moral. The word 'governance' means an act or manner of governing and the process of decision making. In this sense good governance means right or moral or just fair judgment made by those, exercising authority in the public interest.

Basic Elements of good governance

There are some essential elements of good governance which is reflected in the governance and process of government. These are as follows:

(1) Transparency- Transparency means operating in a manner that is honest, open and amenable to questions and provided for ready access to information. It relies on a presumption of access to information about how the government works. To facilitate the access to information, a citizen has, u/s 2 (j) of the Act, the right to:
1) Inspection of work, documents, records;
2) Taking notes extracts or certified copies of the documents or records;
3) Taking certified sample of material; and
4) Obtaining information in electronic form, if available.

In effect, thus, there is greater transparency than ever before in the working of the public bodies. The media and civil society have raised development issues, based on facts about the use of funds as well as the best practices in formulation and implementation of pro-poor schemes. The citizens are thus better informed about the performance and contributions of the elected representatives, which augurs well for a healthy democracy and democratic governance of projects.

(2) Accountability

Accountability means decision makers accept responsibility for their decision. Not only the government, the private sector institutions should also accountable to the people. Information is power and Right to Information act brings accountability and transparency in the administration. The Right to Information act provides people with mechanism to access information, which they can use to hold the government accountable or to seek explanation as to why decisions have been taken, by whom and with what consequences or outcomes. However, accountability cannot be achieved without transparency and rule of law.

(3) Participation

Participation is another requirement for good governance, which means people are the key to good governance. They are not only beneficiaries of good governance but also are the agents of it. The Right to information Acts gives people a chance to participate not just one in five years, but every day and question any decisions. The right to Information Act gives an opportunity to the common men to participate in governance and reduce the imbalance in power relationship, provides a tool to oppose injustice and allows collective spirit to make democracy work for everyone. Right to information Act also strengthen grassroots democracy and ensures peoples participation in local governance and development activities.

(4) Predictability

Predictability means the existence of Laws, regulations and policies to regulate society and their consistent application.

(5) Rule of Law

Good governance requires fair legal frameworks that are enforced impartially. A fair, predictable and stable legal framework is essential so that businesses and individuals may assess economic opportunities and act on them without fear of arbitrary interference or expropriation. This requires that the rules be known in advance, that they be actually in force and applied consistently and fairly, that conflicts be resolvable by an independent judicial system, and that procedures for amending and repealing the rules exist and are publicly known.

Recommendations for effective implementation of RTI Act

a) As stated above due to ignorance, most of people have not heard about RTI act. To tackle this issue, government should allocate huge fund for publicity budget of RTI act. However, this fund should be spent through central Information commission.
b) Publicity is very essential for RTI implementation. NGO‘s and civil society groups can take initiative to make massive awareness campaign to educate citizen about RTI act. This awareness programme may be at national, state and block level. Before making awareness programmes, the NGO‘s and CSC groups must identify the target i.e.

vulnerable categories of citizens specifically- women, farmers and families, middle and working class. In this regard media and newspaper can play an effective role.

c) Children are considered resources for the future health of a nation. Therefore, RTI act should be added in the school syllabus to arouse curiosity of children about RTI at the grass-root level.
d) As the nodal administrative authority at the district level, every deputy commissioner and district collectors must be given responsibility of monitoring and implementation of RTI act by various departmental authorities within the respective district.
e) State Administrative Training institute can organize appropriate training intervention for the stakeholders.
f) There should be efficient and scientific record keeping agency so that applicants can get accurate information. Without modernizing and digitizing management of information and record providing information would take several days often exceeding the legal deadlines.
g) Government departments should be entrusted responsibility to make the implementation of RTI easy for applicants seeking information rather than tough procedures.
h) Inculcation of political will is necessary for judicious working of RTI act. The Bureaucrats must come forward to help the aggrieved citizens.
i) It is the moral responsibility of the government to protect RTI activists and users and to take legal action against the attackers.
j) There is also need strong and robust monitoring and evaluation system. It will help periodically review implementation of the law and provide feedback to government agencies to address the shortcomings.
k) There should be proper coordination among state information commissioner and departments for the effective implementation of RTI act.
l) It is a recognized fact that for enabling and effective implementation of RTI act, the central and state information commissions need to strengthen their technical and IT capability.
m) Fast action to be taken to integrate different websites of all information commissions through a common IT gateway or national portal on RTI. This will prove to be grateful to common citizens.
n) Chief information commissioners should have frequent interaction with all information commissioners so that approach of all information commissioners may be similar in dealing with appeals/complaints before them.
o) According to the act it is mandatory to provide the information in the given time frame of 30 days. Since the information system is not integrated, therefore it becomes difficult to provide information in the given time. Moreover, many departments could not prepare themselves to respond according to the act.
p) Exemption provides under section 24 to the security and intelligence agencies are irrational and contrary to national interest. This exemption should be removed not by amendment of the act but by withdrawing the list of notified agencies in the 2nd schedule of the RTI act.

q) Training of officials of all departments and representatives of public authorities is essentially required so that they are made aware of their duties and obligations under the act.
r) Government of India should set up a National RTI council, which has members, people from various states, so that problems in implementation the RTI can be monitored regularly.
s) Last but not the least, political influence may anomalies in the functions of high level officials, so they have to maintain integrity by ignoring the vested interest.

Conclusion

With the advent of the RTI Act, citizens have found a tool to bring in transparency and accountability at all levels of Governance. In particular, the RTI Act has a much higher impact on the quality of life of the poor and weaker section of the society. However, the power of the Act is still to be fully realized. The citizens, Government, Civil Society Organizations and media need to do a lot to attain the intended objective of the Act and to address various issues and constraints in accessing the information under the Act. The RTI Act, as it stands today, is a strong tool to uphold the spirit of democracy. All the development projects, particularly poverty alleviation programmes should incorporate transparency and accountability norms to allow for objective scrutiny of the process of execution of programmes and to assess the extent of adherence of the norms of equity and justice in delivery of essential services to the persons who are entitled for the specified benefits. Thus it may be submitted that it can be rightly mentioned that Right to Information act is an agent of good governance. It makes administration more accountable to the people. It makes people aware of administration and gives them an opportunity to take part in decision making process. It promoted democratic ideology by promoting openness and transparency in the administration. It reduces the chances of corruption and abuse of authority by public servants. Since the Act is prepared for people‘s interest, hence it success also depends on how they exercise the act. Moreover, there is need of active participation from people, NGO‘s, civil society groups, coordination among RTI officials, integrity among government departments and political will from government and elected leaders.

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International Environmental Law Applicable to Environmental Protection

Dr. S. P. Singh*

Introduction

The perception of the most important global concern about environment is of recent origin. During and after the First World War, law was given an "economic nuance" and thus became economic law. Today environmental law has, with the newly created concept of environment policy, been subsumed in giving an "ecological nuance" to legal norms in public law, private law, criminal law and international law. The growth of international environmental law has compelled us to revisit to our existing political, economic and social values and structure both at national and international levels. Global Environmental crisis has questioned the modernity and its values. The very existence and survival of man and other forms of life have become a matter of deep concern. The global concerns for environmental crisis have led the evolution and remarkable growth of international environmental law.

Sources of International Environmental Law

There are two main traditional sources of Environmental Law under International law. One is 'hard law', which establish legally binding obligations, where as other is 'soft law', which are not binding per se but which in the field of International Environmental law have played an important role and have given rise to a large body of International legal obligations which relate to the protection of the environment. The traditional sources of International legal obligations which equally apply in the field of the environment comprise 'the body of rules which are legally binding on states in their intercourse with each other. These rules derive their authority, as per Article 38 (1) of the Statute of the ICJ, from four sources: treaties, International custom, general principle of law recognized by civilized nations, and subsidiary sources. The main "subsidiary sources" are the decisions of courts and tribunals and the writings of jurists. According to Prof. J.G. Starke, "the decisions of state courts may, under the same principle as dictate the formations of customs, lead directly to the growth of customary rules of international law.[1]

General Principles and Rules

General principles of international environmental law reflect in binding acts of international organizations, treaties, state practice, and soft law norms. They are general in the sense that they are applicable to all members of the international community in respect of the protection of the environment. According to Prof. Philippe Sands[2] in environmental

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law context, the main general rules and principles which have broad support and are frequently endorsed in practice are:

1. "The obligation reflected in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration, namely that states have sovereignty over their natural resources and the responsibility not to cause environmental damage;
2. The principle of preventive action;
3. The principle of good neighborliness and international co-operation;
4. The precautionary principle;
5. The principle of sustainable development; and
6. The polluter-pays principle;

General International Environmental Principles: Legal status

The legal consequences of each in relation to a particular activity or incident must be considered on the facts and circumstances of each case and take account of several factors. Some general principles or rules may reflect customary law, other may reflect emerging legal obligations, and yet others might have an even less developed legal status. Of these general principles and rules only aforesaid Principle 21 of Stockholm, Principle 2 of Rio and the good neighborliness are sufficiently substantive to be capable of establishing the basis of an international cause of action i.e. to give rise to an international customary legal obligation the violation of which would give rise to a legal remedy. The status and effect of the others remains inconclusive, although they may bind as treaty obligations or, in limited circumstances, as customary obligations. Whether they give rise to actionable obligations of a general nature is open to question. According to Prof. Sands view the international community has not adopted a binding international instrument of global application which purports to set out the general rights and obligations of the international community on environmental matters.

The environmental decisions of the national / state courts and international environmental law have influenced each other.[3] The decisions of the state courts which are 'subsidiary sources' under Article 38(1) of the statue of the ICJ, may lead directly to the growth of 'customary' rules of international law. Similarly, the state courts have often developed national environmental jurisprudence by taking inspirations and helps from the international environmental laws. In the light of aforesaid development, hereinafter, an attempt has been made to analyze the linkages between certain international environmental law principles and their application in domestic law by the state courts in India.

Indian Constitution and International Environmental Law

The Constitution is known as the 'basic law of the land' from which all other laws derive their sanctity or validity. India is a member of the United Nation Organisation (UNO) since its inception .India facing many problem of like population, pollution and poverty, these problems relates to humanity, world over equally, and therefore, there must be concerted and integrated efforts to deal with them. All the nation, rich or poor, developed, north or south are facing the problems of pollution. All the nations must join hands to combat the

problem of pollution before it assumes threatening dimensions and brings us on the brink of disaster. Article 51 of the Constitution of India provides for 'promotion of international peace and security. 'It provides under clause© that 'the state shall endeavour to foster respect for international law and treaty obligations in the dealings of organized people with one another. Article 253 of the Indian Constitution confers wide and overriding power on the 'parliament to make any law for the whole or any part of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference , association or body. According to Art 245 of the Constitution of India, the territorial Jurisdiction confers the power to the parliament to make laws for the whole or any part of the territory of India. Article 246 deals with the subject matter of laws, empowers the parliament to have 'exclusive' power to make laws with respect to the Union list. The parliament has exclusive power to legislate on all conceivable international matters which have been enumerated under the Union List. Under this list main entries relating to international matters are: foreign affairs (entry 10), United Nations Organization (entry 12), participation in international conferences, associations and other bodies and implanting of decisions made thereat (entry 13), and entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries (entry 14) etc. Under Article 253 the parliament has exclusive power to make any law for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. These provisions suggest that the parliament has sweeping power to legislate on international matters. However, this power of the parliament, according to the Supreme Court, can not override the fundamental rights enumerated under Part III of the constitution.[4]

List III (Concurrent List[5]) of schedule VII also provides power to the Indian parliament on various aspects related to the environment. This list includes various subjects like forests, mines and minerals, protection of wildlife, development, population control and family planning, and minor ports and factories.

International Law and Constitutional Duty

Though Part IV (Article 37 to 51) of the Indian Constitution, known as the Directive Principles of State Policy, is not enforceable by any court but principles contained therein are fundamental in the governance of the country and it "shall" be the duty of the State to apply these principles in making laws (Article 37). Article 51 specifically deals with international law and international relation, inter alia, provides that the 'state shall endeavor to foster respect for international law and treaty obligations.' In *Telephone Tapping Case*[6] the Supreme Court by invoking Article 51 developed right to privacy as a fundamental right under Article 21. Here, the court took inspiration from the privacy provision of the Covenant on Civil and Political Rights. However, in environmental matters, it appears, no such use of Article 51 has been done by the courts. Here, it may be recalled that the courts have invoked Article 48-A (duty of the state to protect environment) to develop a fundamental right to environment as part of the right to life

under Article 21.[7]The ratification or enactment of environmental statues in India, without real commitment to implement the same by the executive, has resulted into judicial interventions and activism in the field of environmental law.

The role of judiciary depends on the very nature of political system adopted by a particular country. This is the reason that role of judiciary varies in liberal democracy, communist system and countries having dictatorship. The role of judiciary has been important in liberal democracies like India. Constitution of India in fact took inspiration from US Constitution and therefore adopted similar concept of judicial review. In independent India, history of judiciary, judicial review and judicial activism has been a fertile area for legal researchers. It is now a well established fact that, in India, in view of legislative and executive indifferences or failures, the role of judiciary has been crucial in shaping the environmental laws and policies. The role of the Indian Supreme Court may be explained quoting the views of Professor S.P. Sathe and Professor Upendra Baxi two leading academics who have extensively written on the role of judiciary in India. Professor Sathe has analyzed the transformation of the Indian Supreme Court "from a positivist court into an activist court". Professor Upendra Baxi, who has often supported the judicial activism in India, has also said that the "Supreme Court of India" has often become "Supreme Court for Indians".[8]

Stockholm Conference on Human Environment, 1972, has generated a strong global international awareness and in India it facilitated the enactment of the 42nd Constitutional Amendment, 1976. This amendment has introduced certain environmental duties both on the part of the citizens [Article 51A (g)] and on the state (Article 48-A). According to Article 48A,of the Indian Constitution, ‘the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the community’. Under the constitutional scheme the legal status of Article 51(A)-(g) and 48-A is enabling in nature and not legally binding per se, however, such provisions have often been interpreted by the Indian courts as legally binding. Moreover, these provisions have been used by the courts to justify and develop a legally binding fundamental right to environment as part of right to life under Article 21.[9] Hereinafter, an effort has been made to demonstrate that how both the 'soft' and 'hard' international environmental laws have been used by the Indian courts to develop a strong environmental jurisprudence in domestic law. The judicial adoption of international environmental law into domestic law in India has not been done overnight rather it has been gradual. In order to understand the judicial process of such adoption the present discussion can be divided into the following three periods.[10]

International Environmental Law: Domestic Law application

According to Indian Constitution, the parliament has passed many environmental laws which have been enacted to implement the international environmental treaties, covenants and protocols, etc. Following are some of the instances where such laws have been passed by parliament-

(1)The wild life protection Act, 1972, give effects to various provisions of the convention on International trade in Endangered species of Wild Fauna and Flora (CITES) 1973. This Act was amended to fall in line with the global concept to protect and preserve the endangered species like African elephant and to ban the import of ivory. Similarly, the Wild life (protection) amendment Act, 2002 has been passed by Parliament to completely ban the possession of ivory whether by a trader or by a person.

(2) National Environment Tribunal Act , 1995 provides that the Act has been passed as 'decisions were taken at the UN conference on environmental and development held at Rio-deJaneiro in June 1992, in which India participated, calling upon states to develop national laws regarding liability and compensation for the victims of pollution and other environmental damages.

(3) The Environment (Protection) Act, 1986 and the Air (Prevention and Control of Pollution) Act, 1981, have been passed to implement the decision taken at Stockholm 1972 which is known as Stockholm Declaration, 1972. This declaration was the first holistic approach to deal with the problems of environment. It also declares that there is a need for the international law relating to liability and compensation for the victims of pollution and other environmental damage.

(4) The Public Liability Insurance Act, commitment made by India 'to develop national law regarding liability and compensation for the victims of pollution and other environmental damages' called upon as per decision at the United Nation Conference on Environment and Development held at Rio-de-Janeiro in June 1992.

(5) The Chemical Weapons Convention Act,2000 has been passed to give effect to the convention on the prohibition of the development, production, stockpiling and use of the chemical weapons signed by India at Paris on the Jan 14, 1993.Schedule of the Act has reproduced the provisions of the above-mentioned convention from Article 1 to 24.

Conclusion

Man must live in harmony with nature which nourishes him and provides all basics of human life. The environmental decision of the national/state courts and international environmental law has influenced each other. The decision of the state courts which is 'subsidiary sources' under Article 38(1) of the Statute of the ICJ, may lead directly to the growth of 'customary rules of international law.' Similarly, the state courts have often developed national environmental laws by taking inspirations and help from the international environmental laws. It may be stated that the influence of international law in general and international environmental law in particular is growing and there has been a close interaction between international environmental law and municipal law in India. It appears that growth of Indian environmental law has often been co-extensive to the growth of the environmental law under international law. India, in its constitutional scheme, has adopted a dualist approach to treaty obligation. In this connection Indian courts adopted a

traditional position during 1950-1984 periods and endorsed the doctrine of incorporation. Since 1996 the Indian Supreme Court has used the international environmental law in such a manner which not only blurred the distinction between monism and dualism but also redefined the role of international law in Indian courts. The judicial activism of the higher judiciary and particularly the Supreme Court has led to incorporation of certain international environmental principles under domestic law whose legal status is still open to question under international law. The international environmental law principles namely sustainable development, precautionary principle and polluter pays principle have not only been made 'part' of the Indian domestic law but have also been given 'new' meaning which is now a unique feature of the Indian environmental law.

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[3] See, Anderson, Michacl and Galizzi, P., *International Environmental Law in National Courts* (London : The British Institute of International and Comparative Law, 2002].
[4] *Magambhai Ishwarbhai Patel* v. *Union of India* (1970) 3 SCC 400.
[5] Concurrent list consists of 47 items on which parliament and state legislatures both can make law.
[6] *People's Union for Civil Liberties*, v. *U.O.I.* (1997) 1 SCC 301.
[7] In several leading cases the Indian courts have been guided and inspired by Article 48-A and developed a general fundamental right to environment under Article 21. See, *M.C. Mehta* v. *Union of India* (Kanpur Tanneries Matter) AIR 1988 SC 1037 at 1038; *Rural Litigation and Entitlement Kendra* v. *State of U.P.* AIR 1988 SC 2187 at 2199: *Kinkari Devi* v. *State of H.P.* AIR 1988 4 at 8; *Bichhri Village Case* AIR 1996 SC 1446 at 1459.
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Marital & Resembling Relationship: Legal Protection to the Parties

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अन्योंयेस्स्याव्यिभचारो भ्वेदामणान्तिक:

एष धर्मः समासेन ज्ञये स्त्रीपुंसयो:पर:[1]

Is relationship in nature of marriage (under sec 2(f) of the Protection of women from Domestic Violence Act 2005) and marriage is the same thing and parties of this relationship and marriage can be treated alike? The question arises when same remedy is provided to the parties of the relationship in nature of marriage and parties to the marriage. It can be justified in those cases where both parties either parties of relationship in nature of marriage or parties to the marriage are maintaining fidelity in their relations or both parties are unmarried or single.

But the situation becomes different in cases where relationship in nature of marriage is established between married man and unmarried women or single women. In such cases the interests of legally wedded wife and other women cannot be at the same footing especially in those cases where the other women have knowledge about the marital status of the man. A welcome judgement of Supreme Court in ***Indira Sarma vs. V.K.V Sarma*** SLP (CRL.) No.4895 of 2012 came on 26 Nov 2013 in which the Apex Court held that, "Live-in relationship would not amount to a "relationship in the nature of marriage" not falling within the definition of "domestic relationship" under Section 2(f) of the Protection of Women from Domestic Violence Act, 2005 and the disruption of such a relationship by failure to maintain a women involved in such a relationship not amounts to "domestic violence" within the meaning of Section 3 of the DV Act where woman is aware that the man is a married person even before the commencement of their relationship."

Though it is also mentioned by the court that Live-in or marriage like relationship is neither a crime nor a sin though socially unacceptable in this country. The decision to marry or not to marry or to have a heterosexual relationship is intensely personal. This is welcome judgement in the sense that live in relationship is legalised in India in some other decisions of the same Court[2] but this time it protected the interest of wife and gave warning to those women who are intended to enter in to the relation of married couple by establishing live in relationship with male partner.

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Aggrieved Person and Domestic Relationship

A wide meaning has been given to the expression 'aggrieved person' and 'domestic relationship' under protection of Women from Domestic Violence Act 2005 for the purpose of the Act it include every women residing in domestic sphere. The expression "aggrieved person" as defined under sec 2(a) of the Protection of Women from Domestic Violence Act 2005[3] means and includes every women living in domestic relationship. It is not restricted to those women only against whom violence perpetrated by her husband or his relatives. Similarly expression "Domestic Relationship" as defined under sec 2(f) of Protection of Women from Domestic Violence Act 2005[4] includes not only those women living together under the same roof on account of marital relations (e.g. wife living with her husband and his relatives)but also persons related with consanguinity(sister living with her brother), a women living in her family with other male relations of husband including his father brother etc. and relationship between two persons who are living together as a family in shared household even though they are not related to each other by blood or marital relations i.e. 'relationship in nature of marriage'. Such wide connotation includes every women involved in Live-in Relationship, adulterous and bigamous relationships and they all are also beneficiaries under Protection of Women from Domestic Violence Act 2005.

In ***Aruna Parmod Shah vs. UOI***[5] the petitioner contended that "near or like "marriages status in sec 2(f) of the Protection of Women from Domestic Violence Act 2005 leads to derogation of rights of the legally wedded wife. The Delhi High Court rejected the contention by saying that there is no reason why equal treatment should not be accorded to wife as well as woman who is living with a man as his second wife or as a mistress. The Court opined that like treatment to both not in any manner derogate from the sanctity of marriage since an assumption can fairly be drawn invariably initiated and perpetuated by male. Similarly it was held that Domestic Relationship can be inferred if men and women have shared household, temporarily lived together, had consensual sex, woman can claim protection\ maintenance under Protection of Women from Domestic Violence Act 2005[6]. Here in these references Protection of Women from Domestic Violence Act 2005 applied to all women living in domestic sphere and court give wide interpretation to include every sort of relationship without examining legality and morality of the relations. Though in number of cases the Supreme Court legalised such relations and providing them status of husband and wife. In ***Madam Mohan Singh vs. Rajni Kant*** [7]the Supreme Court stated that if man and woman are living under the same roof and cohabiting for a number of years, there will be a presumption under section 114 of the Evidence Act, 1872 that they live as husband and wife and the children born to them will not be illegitimate.

In ***Payal Katara vs. Superintendent of Nari Niketan*** [8] it has been established that anyone, man or woman, could live together even without getting married if they wished. Further, the Apex court has reiterated that the children born out of such relations are legitimate and have property rights of their parents under Section 16 of Hindu Marriage Act, 1955. In ***Lata Singh vs. State of U.P. & Anr.***[9] wherein it was observed that a live-in relationship

between two consenting adults of heterogenic sex does not amount to any offence (with the obvious exception of `adultery'), even though it may be perceived as immoral. A major girl is free to marry anyone she likes or & quot; live with anyone she likes. In that case, the petitioner was a woman who had married a man belonging to another caste and had begun cohabitation with him.

In ***S. Khushboo vs. Kanniammal and another***[10]on live-in relationships, a special three-Judge Bench constituting then Chief Justice of India, K.G. Balakrishnan and Justices Deepak Verma and B.S. Chauhan observed that a man and a woman living together without marriage cannot be construed as an offence. "When two people want to live together, what is the offence? Does it amount to an offence?" The Supreme Court said that there was no law prohibiting live-in relationships or pre-marital sex. "Living together is a right to live" apparently referring to Article 21 of the Constitution of India which guarantees right to life and personal liberty as a fundamental right. In a recent Judgment of ***D Patchaiammal v. D Velusamy*** [11] the Supreme Court held that not all live in relationships will amount to a relationship in the nature of marriage to get the benefit of the Protection of Women from Domestic Violence Act 2005.

In Indra Sarma[12]the fact of the case is that a women lived in live in relationship with a man for fourteen years knowing the fact that he is married and with continuous objection of his wife and children and her own parents and brother. They worked together in the same company and she left her job to live with him in shared household. They started business and use to take money with each other. The male partner never showed her as his wife or that she lives as his partner publically. He sometimes paid her medical expenses etc. but later he shifted his business to his house and started practising it with the help of his son. Due to family pressure later he left that woman without providing maintenance to her. Under such circumstances the female partner brought suit for maintenance under Protection of Women from Domestic Violence Act 2005.

The Supreme Court held that male partner is not liable for the fraudulent or bigamous marriage. It was further held that such kind of relationship was established for mutual benefit. The Apex Court in this case also examines the difference between 'relationship in nature of marriage' and marriage and expressly provides certain conditions for the live in female partner to get the benefit of Protection of Women from Domestic Violence Act 2005 under the head of Relationship in nature of Marriage.

Marriage: An Institution

Article 23 of the **International Covenant on Civil and Political Rights, 1966 (ICCPR)** provides that:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be
3. Recognized.

4. No marriage shall be entered into without the free and full consent of the intending spouses.
5. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 16 of the **Universal Declaration of Human Rights, 1948** provides that:

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage,
2. During marriage and at it dissolution.
3. Marriage shall be entered into only with the free and full consent of the intending spouses.
4. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

Under Hindu Marriage Act 1955 section 5 and 7 deals with the conditions and ceremonies of the marriage.[13] Marriage is often described as one of the basic civil rights of man/woman which is voluntarily undertaken by the parties in public in a formal way, and once concluded, recognizes the parties as husband and wife. Three elements of common law marriage are

(1) Agreement to be married
(2) Living together as husband and wife,
(3) Holding out to the public that they are married. Sharing a common household and duty to live together form part of the 'Consortium Omnis Vitae" which obliges spouses to live together, afford each other reasonable marital privileges and rights and be honest and faithful to each other.

One of the most important invariable consequences of marriage is the reciprocal support and the responsibility of maintenance of the common household, jointly and severally. Marriage as an institution has great legal significance and various obligations and duties flow out of marital relationship, as per law, in the matter of inheritance of property, succession ship, etc. Marriage, therefore, involves legal requirements of formality, publicity, exclusivity and all

The legal consequences flow out of that relationship[14]

The Concept of Marriage was extended in South African case in following manner[15]**,** "Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of

profound significance to the individuals concerned. But such relationships have more than personal significance at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well. The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends."

Thus this concept of marriage makes clear that marriage being a social institution, many rights and liabilities flow out of that legal relationship. Married couples who choose to marry are fully cognizant of the legal obligation which arises by the operation of law on solemnization of the marriage and the rights and duties they owe to their children and the family as a whole, unlike the case of persons entering into live-in relationship. In ***Pinakin Mahipatray Rawal vs. State of Gujarat***[16] Supreme Court held that marital relationship means the legally protected marital interest of one spouse to another which include marital obligation to another like companionship, living under the same roof, sexual relation and the exclusive enjoyment of them, to have children, their up-bringing, services in the home, support, affection, love, liking and so on.

Relationship in Nature of Marriage

In ***D Patchaiammal vs. D Velusamy***[17] it was held that Relationship in nature of Marriage is similar to the common law marriage**.** In common law marriages those who are otherwise qualified for the marriage though married and of age of marriage if voluntarily cohabited and hold themselves out of the world as being similar to spouses for a significant period of time are taken as common law marriage couple.

It was further held by the Apex Court that a 'relationship in the nature of marriage' under the 2005 Act must also full fill the above requirements, and in addition to this the parties must have lived together in a 'shared household' as defined in Section 2(s) of the Act[18]. Merely spending weekends together or a one night stand would not make it a 'domestic relationship. All live in relationships will not amount to a relationship in the nature of marriage to get the benefit of the PWDVA. To get such benefit the conditions mentioned above must be satisfied, and this has to be proved by evidence. If a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage'[19]. The Supreme Court further extended the above conditions in ***Indira Sarma vs. V.K.V Sarma***[20] and held that a relationship is under the head of relationship in nature of marriage under PWDV Act when it conforms following conditions:

(1) Duration of period of relationship: Section 2(f) of the DV Act has used the expression "at any point of time", which means a reasonable period of time to maintain and continue a relationship which may vary from case to case, depending upon the fact situation.
(2) Shared household: as provided under sec 2(f)of the Protection of Women from Domestic Violence Act 2005.[21]
(3) Pooling of Resources and Financial Arrangements: Supporting each other, or any one of them, financially, sharing bank accounts, acquiring immovable properties in joint names or in the name of the woman, long term investments in business, shares in separate and joint names, so as to have a long standing relationship, may be a guiding factor.
(4) Domestic Arrangements: Entrusting the responsibility, especially on the woman to run the home, do the household activities like cleaning, cooking, maintaining or up keeping the
House, etc. is an indication of a relationship in the nature of marriage.
(5) Sexual Relationship: Marriage like relationship refers to sexual relationship, not just for pleasure, but for emotional and intimate relationship, for procreation of children, so as to give emotional support, companionship and also material affection, caring etc.
(6) Children: Having children is a strong indication of a relationship in the nature of marriage. Parties, therefore, intend to have a long standing relationship. Sharing the responsibility for bringing up and supporting them is also a strong indication.
(7) Socialization in Public: Holding out to the public and socializing with friends, relations and others, as if they are husband and wife is a strong circumstance to hold the relationship is in the nature of marriage.
(8) Intention and conduct of the parties: Common intention of parties as to what their relationship is to be and to involve, and as to their respective roles and responsibilities, primarily determines the nature of that relationship.[22]

Thus where a women entered into a live-in relationship with the man knowing that he was married person, with wife and two children, the presumption that where a man and a woman are proved to have lived together as husband and wife, the law presumes that they are living together in consequence of a valid marriage will not apply and, hence, the relationship between the such woman and the man is not a relationship in the nature of a marriage, and the status of such woman is of a concubine. A concubine cannot maintain a relationship in the nature of marriage because such a relationship will not have exclusively and is not monogamous in character.[23]Polygamy, that is a relationship or practice of having more than one wife or husband at the same time, or a relationship by way of a bigamous marriage that is marrying someone while already married to another and or maintaining an adulterous relationship that is having voluntary sexual intercourse between a married person who is not one's husband or wife, cannot be said to be a relationship in the nature of marriage.[24]

Thus mutual fidelity is also required for the relationship in nature of marriage for the legal protection of women in those cases where they are living with each other as husband and wife without marriage. Where intention of the women is not clear or she entered in to the relation just for monetary benefit or any other type of considerations or sympathetic in nature, though stayed for longer period, legal protection not justified to those women from the justified legal interests of the legally wedded wife.

Conclusion

The decisions of the cases which provide legal sanctity to live-in relationships may be justified up to the extent that these attempts were made to liberalize women and children from the clutches of their abusers. But what kind of protections is available for those women who are lawfully married, and who are supported both by formal and non-formal support systems of the society. The women who are in legal wedlock known as wife, now are under threat from these fellow women who first don't believe in the institution of marriage and secondly they are eager and ready to engage with married and established man as live in partner with consent and with knowing fact about his marital status. Consequently such relations are disturbing to the household of the family of that married couple.

The legally wedded wife and her children suffered mental and economic trauma in such situations. On the other hand that other woman enjoys life both economically and sexually without any sense of sharing liabilities or responsibilities of the family life. At any point of time in any inconvenience to their services by the male partner they without any hesitation immediately complaint for the domestic violence and claim maintenance from the legitimate share of the legally wedded wife and her children. In India still an overwhelming majority of the country has faith in the permanent and lifelong marriage between husband and wife as propounded in the Dharmashastras. Live in relations can be justified on different ground but it should not be against to those people who are still believe in institution of marriage, who are practicing it, maintaining it and valuing it.

References:

[1] Let mutual fidelity continue until death. This is the summary of the highest law for the husband and wife. MANU IX 101.

[2] *Tulsa vs. Durghatiya* 2008 (4) SCC 520.

[3] Sec 2(a) of the PWDVA "aggrieved person" means any women who is , or has been, in domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.

[4] Sec 2(f) of the PWDVA "Domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family".

[5] WP (crl) 425\2008Delhi,decided on 7.04. 2008.

[6] *M.Palani vs. Minashi* AIR 2008 Mad.

[7] AIR 2010 SC 2933.

[8] AIR 2002, All 452.
[9] AIR 2006 SC 2522.
[10] (2010)5 SCC 600.
[11] AIR 2011 SC 479.
[12] *ibid.*
[13] Sec 5 of Hindu Marriage Act1955 Conditions for a Hindu marriage – A marriage may be solemnized between any two hindus, if the following conditions are fulfilled, namely:- (i) neither party has a spouse living at the time of the marriage (ii) at the time of the marriage, neither party- (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or (c) has been subject to recurrent attacks of insanity; (iii) the bridegroom has completed the age of twenty- one years and the bride the age of eighteen years at the time of the marriage; (iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two; (v) the parties are not *sapindas* of each other, unless the custom or usage governing each of them permits of a marriage between the two." Sec 7 of the Hindu Marriage Act 1955 Ceremonies for a Hindu marriage. - (1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto. (2) Where such rites and ceremonies include the *saptapadi* (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken."
[14] Para 24, page 25 of the *Indira Sarma vs. V.K.V Sarma* SLP (CRL.) NO. 4895 of 2012.
[15] *Dawood and Another vs. Minister of Home Affairs and Others* 2000 (3) SA 936 (CC).
[16] (2013) 2 SCALE 198.
[17] AIR 2011 SC 479.
[18] Sec2(s) of the PWDVA provides "shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household."
[19] *D Patchaiammal vs. D Velusamy* AIR 2011 SC 479, Para 34.
[20] Special Leave Petition (CRL.) NO.4895 OF 2012 decided on 26 Nov 2013.
[21] Supra note 17.
[22] *Indira Sarma vs. V.K.V Sarma* SLP (CRL.) No.4895 of 2012 Para 54 page 52-53.
[23] *Andrahennedige Dinohamy vs. Wiketunge Liyanapatabendage Balshamy*, AIR 1927 PC 185.
[24] *Gokal Chand vs. Parvin Kumari* AIR 1952 SC 231.

Live in Relationship Neither a Crime nor a Sin: A Study with Reference to Right to Marriage

Dr. Pradeep Kumar*

Introduction

Marriage is an imperative action born out of custom to define a legal relation & to have acceptance of general society. The law provides certain right to the spouses. Marriage is often described as one of the basic civil rights of man/woman, which is voluntarily undertaken by the parties in public in a formal way, and once concluded, recognizes the parties as husband and wife.

In common law the three elements of marriage are:

(1) Agreement to be married,
(2) Living together as husband and wife,
(3) Holding out to the public that they are married.

One of the most important invariable consequences of marriage is the reciprocal support and the responsibility of maintenance of the common household, jointly and severally. Marriage as an institution has great legal significance and various obligations and duties flow out of marital relationship, as per law, in the matter of inheritance of property, succession-ship, maintenance and divorce etc. Marriage, therefore, involves legal requirements of formality, publicity, exclusivity and all the legal consequences flow out of that relationship.

With the change of time, need & culture also made a shift. Marriage custom found its new & easy substitute as live in relationship. Although the new incursion seems to be denounce by our orthodox but even then. Live in relationship can neither be considered as a crime nor a sin.

Statement of Problem

There are a lot of questions to be answered in order to make a person liable for live in relationship, like what is meant by live in relationship? What amounts to agreement to be married? What is nature of marriage living together as husband and wife? Is there a difference between how civil law and family law define live in relationship? What the available remedies for victims are of live in relationship? What are the various remedies available under the Indian law in case of live in relationship? What amount to holding out

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to the public that they are married? What is the period of live in relationship? What is effect on matrimonial right during live in relationship? etc.

Object of study

Live in relationships in India have still not received the acceptance of the majority of people. They are still considered a taboo to the Indian society. The majority of the people consider it as an immoral and an improper relationship. At present there is no specific legislation that deals with concept of live in relationship and the rights of the parties and the children of the live in partners. Infect it was a ambiguous concept until the Supreme Court of India took the initiative and declared that live in relationship though considered immoral but it is not illegal. In view of all above facts, the followings are the major objectives:

1. to define the conceptual framework and emerging dimensions live in Live in relationships neither a crime nor an offence a study with reference to right to marriage and privacy;
2. to identify various aspects of Live in relationships;
3. to review various law with special reference to Live in relationships neither a crime nor an offence;
4. to study the various aspects of Live in relationships with reference to right to marriage and privacy;
5. to review the socio legal study with reference to Live in relationships;
6. to analyze observation and guidelines of the foreign courts, Apex/ Supreme Court and High Courts Judgments;
7. to analyze the available remedies of Live in relationships and their effectiveness in present day;

Hypothesis

I have framed following hypothesis that:

1. Live in relationship should be given constitutional status as a device to provide social Justice in India.
2. Judicial activism plays vital role in the development and liberal interpretation of relationship.
3. To analyze the concept of matrimonial justice through live in relationship.
4. To highlight the problem of live in relationship and status of women in India.

Research Methodology

The article shall be carried out in a very objective, systematic and unbiased manner. All the primary as well as secondary documentary sources will be utilized to make the study advanced, orderly and methodical. The Hypothesis will be evaluated on the basis of foreign courts, Apex/ Supreme Court, High Courts, judgments with reference to Domestic Violence Act, 2005.

The concept of Live in relationship

The legal definition of live in relationship is "an arrangement of living under which the couples which are unmarried live together to conduct a long-going relationship similarly as in marriage."

Live-in relationship is one such connection in which a boy and girl have some relation before their marriage and if they are satisfied with their partner they get married or be like that for years. This kind of act though seems different; it is one, which is being implemented today. Live-in relationship handles matter of premarital sex, but those couples who are maintaining relations don't mind such things. Overall, this relation builds up harmony between the couples, but spoils their social influence.

Malimath Committee and Law commission of India on the concept of live in relationships gave the proposal which suggested that if a woman has been in a live in relationship for considerably long time, she ought to enjoy the legal status as given to wife. However, recently it was observed that it is divorced wife who is treated as a wife in context of Section 125 of Cr.P.C. and if a person has not even been married i.e. the case of live in partners, they cannot be divorced, and hence cannot claim maintenance under Section 125 of Cr.P.C.[1]

The Supreme Court[2] held that in a judgment a woman in an adulterous relationship cannot claim maintenance from her partner under the domestic violence act as the law protects only a live-in relationship that is "in the nature of marriage", the Supreme Court has ruled. A bench headed by justice *K.S. Radhakrishnan* said the ambit of the Protection of Women from Domestic Violence Act, 2005 (DV Act) which for the first time recognized a man-woman relationship outside wedlock - did not cover live-in relationships in general. It offers protection against domestic violence to a woman in a live-in relationship that is in the nature of marriage. She is also entitled to maintenance and other benefits

Live in relationship is generally perceived as brought inclusive, a cultural emulated from Western world. In ***Dawood and Another v. Minister of Home Affairs and Others***[3] laying down the importance of marriage as follows:

"Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge, obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well.

The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends."

The court said extending the benefit of the act to a woman who is not in a relationship in the nature of marriage would be an injustice to the man's wife and children. However, it added Live in or marriage-like relationship is neither a crime nor a sin though socially unacceptable in this country. "Polygamy or a bigamous marriage and/or maintaining an adulterous relationship cannot be said to be a relationship in the nature of marriage," it said.

Elaborating on what should be taken into consideration to decide if a live in relationship fell within the expression "in the nature of marriage" so as to be covered under the law, the bench listed eight parameters - duration of relationship, shared household, pooling of resources and financial arrangements, domestic arrangements, sexual relationship, children, socialization in public and intention and conduct of the parties about their relationship.

It recommended that Parliament consider a proper law to address the problems faced by a large number of women in live-in relationships that are not in the nature of marriage and, hence, not covered under the act. The ruling came on a petition filed by a woman from Bangalore. The court rejected her claim for maintenance and independent residence from the man on the grounds that she was only a "mistress" and the relationship in question did not fall within the definition of "domestic relationship" under section 2(f) of the act. "If any direction is given to the respondent (man) to pay maintenance or monetary consideration to the appellant (woman), that would be at the cost of the legally-wedded wife and children of the respondent, especially when they had opposed that relationship and have a cause of action against the appellant for alienating the companionship and affection of the husband/paren."

Live in relationship is neither a crime nor a sin, the Supreme Court has held while asking the Parliament to frame laws for protection of women in such relationship and children born out of it. The apex court said unfortunately, there is no express statutory provision to regulate live-in relationships upon termination as these relationships are not in the nature of marriage and not recognised in law. In the landmark judgement, a bench headed by Justice *K. S. Radhakrishnan* framed guidelines for bringing live-in relationship within the expression 'relationship in the nature of marriage' for protection of women from Domestic Violence Act.

Parliament has to ponder over these issues, bring in legislation or make a proper amendment of the Act, so that women and the children, born out of such relationships are protected, though those types of relationship might not be a relationship in the nature of a marriage.

The SC said a law is needed as it is the woman who invariably suffers because of breakdown of such relationship. "We cannot, however, lose sight of the fact that inequalities do exist in such relationships and on breaking down such relationship, the woman invariably is the sufferer," it said, noting "Live in relationship has not been socially accepted in India, unlike many other countries". The SC, however, said that legislature cannot promote pre-marital sex and people may express their opinion, for and against.[4]

There are some legal questions that arise in context to the live in relationship. It may, on the basis of above discussion some guidelines have been given for testing under what circumstances; a live in relationship will fall within the expression "relationship in the nature of marriage" under Section 2(f) of the DV Act. The guidelines, of course, are not exhaustive, but will definitely give some insight to such relationships.

What is "marriage", "marital relationship" and "marital obligations". Let us now examine the meaning and scope of the expression "relationship in the nature of marriage" which falls within the definition of Section 2(f) of the DV Act. Our concern in this case is of the third enumerated category that is "relationship in the nature of marriage" which means a relationship which has some inherent or essential characteristics of a marriage though not a marriage legally recognized, and, hence, a comparison of both will have to be resorted, to determine whether the relationship in a given case constitutes the characteristics of a regular marriage.

Distinction between the relationship in the nature of marriage and marital relationship has to be noted first. Relationship of marriage continues, notwithstanding the fact that there are differences of opinions, marital unrest etc., even if they are not sharing a shared household, being based on law. But live in relationship is purely an arrangement between the parties unlike, a legal marriage. Once a party to a live in relationship determines that he/she does not wish to live in such a relationship, that relationship comes to an end. Further, in a relationship in the nature of marriage, the party asserting the existence of the relationship, at any stage or at any point of time, must positively prove the existence of the identifying characteristics of that relationship, since the legislature has used the expression "in the nature of".

1) Duration of period of relationship

Section 2(f) of the DV Act has used the expression "at any point of time", which means a reasonable period of time to maintain and continue a relationship which may vary from case to case, depending upon the fact situation. Duration of relation, shared household and pooling of resources are some of the guidelines the Supreme Court has framed for bringing

live in relationship within the expression 'relationship in the nature of marriage' for protection of women under DV Act. A bench of justices *K. S. Radhakrishnan* and *Pinaki Chandra Ghose* said though the eight guidelines are not exhaustive, these will definitely give some insight to such relationships. Framing guidelines for determining live in relations, the bench said that pooling of financial and domestic arrangements, entrusting the responsibility, sexual relationship, bearing children, socialization in public and intention and conduct of the parties are some of the other criteria to be considered for determining the nature of relations between parties.[5]

The bench said domestic arrangements where there is entrustment of responsibility, especially on the woman to run the home, do the household activities like cleaning, cooking, maintaining or up-keeping the house are indication of a relationship in the nature of marriage. The guidelines include presence of sexual relationship and children which mean, Marriage like relationship refers to sexual relationship, not just for pleasure, but for emotional and intimate relationship, for procreation of children, so as to give emotional support, companionship and also material affection, caring etc.

Having children is a strong indication of a relationship in the nature of marriage. Parties, therefore, intend to have a long standing relationship. Sharing the responsibility for bringing up and supporting them is also a strong indication." The apex court passed the verdict while adjudicating dispute between live in couples where the woman had sought maintenance from the man after the relationship came to an end.[6]

(2) Sharing household

The expression has been defined under Section 2(s) of the DV Act and, hence, need no further elaboration. Pooling of Resources and Financial Arrangements Supporting each other, or any one of them, financially, sharing bank accounts, acquiring immovable properties in joint names or in the name of the woman, long term investments in business, shares in separate and joint names, so as to have a long standing relationship, may be a guiding factor.

(4) Domestic Arrangements

Entrusting the responsibility, especially on the woman to run the home, do the household activities like cleaning, cooking, maintaining or up keeping the house, etc. is an indication of a relationship in the nature of marriage.

(5) Maintenance

Section 125 Cr.P.C., of course, provides for maintenance of a destitute wife and Section 498A IPC is related to mental cruelty inflicted on women by her husband and in-laws. Section 304-B IPC deals with the cases relating to dowry death. The Dowry Prohibition Act, 1961 was enacted to deal with the cases of dowry demands by the husband and family members. The Hindu Adoptions and Maintenance Act, 1956 provides for grant of maintenance to a legally wedded Hindu wife, and also deals with rules for adoption. The

Hindu Marriage Act, 1955 refers to the provisions dealing with solemnization of marriage also deals with the provisions for divorce.

(6) Sexual Relationship

Marriage like relationship refers to sexual relationship, not just for pleasure, but for emotional and intimate relationship, for procreation of children, so as to give emotional support, companionship and also material affection, caring etc. Children having children is a strong indication of a relationship in the nature of marriage. Parties, therefore, intend to have a long standing relationship. Sharing the responsibility for bringing up and supporting them is also a strong indication. In ***State of U.P. vs. Naushad***, Criminal Appeal No. 1949 of 2013 decided on 19th November, 2013 the two-Judge Bench Hon'ble *S.J. Mokhopadhya* and *V. Gopal Gowda*, JJ, held that a women's body is not a man's playthings and he cannot take advantage of it in order to satisfy his lust and desires by fooling a women into consenting to sexual intercourse simply because he want to include in it. The court also held that it is apparent from the evidence that the accused only wanted to indulge in sexual intercourse/relationship with her and was under no intention of actually marrying the prosecutrix. Hence the accused was held guilty of committing rape.

(7) Status of Children during leave in relationship

In ***Jinia Keotin vs. Kumar Sitaram Manjhi***[7] Case the children, though illegitimate, to be treated as legitimate, notwithstanding that the marriage was void or voidable. In ***Bharatha Matha and Anr. vs. R. Vijaya Ranganathan and Ors***.[8] the Court dealt with the legitimacy of the children born out of such relationship observing thus, it is evident that Section 16 of the (Hindu Marriage) Act intends to bring about social reforms, conferment of social status of legitimacy on such group of children, otherwise treated as illegitimate, as its prime object.

(8) Socialization in Public

Holding out to the public and socializing with friends, relations and others, as if they are husband and wife is a strong circumstance to hold the relationship is in the nature of marriage. Intention and conduct of the parties' Common intention of parties as to what their relationship is to be and to involve, and as to their respective roles and responsibilities, primarily determines the nature of that relationship.

(9) The Hindu Marriage Act, 1955

According to Hindu Marriage Act parties in the present case are Hindus by religion and are governed by the Hindu Marriage Act, 1955. The expression "marriage", as stated, is not defined under the Hindu Marriage Act, but the "conditions for a Hindu marriage" are dealt with in Section 5 of the Hindu Marriage Act. Conditions for a Hindu marriage[9] - A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:-

1) Neither party has a spouse living at the time of the marriage

2) at the time of the marriage, neither party- (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or (c) has been subject to recurrent attacks of insanity;
3) The bridegroom has completed the age of twenty- one years and the bride the age of eighteen years at the time of the marriage;
4) The parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;
5) The parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two."

According to Section 7 of the Hindu Marriage Act deals with the "Ceremonies for a Hindu marriage" and reads as follows:

"Section 7 Ceremonies for a Hindu marriage.

1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.
2) Where such rites and ceremonies include the saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken."

Entering into a marriage, therefore, either through the Hindu Marriage Act or the Special Marriage Act or any other Personal Law, applicable to the parties, is entering into a relationship of "public significance", since marriage being a social institution, many rights and liabilities flow out of that legal relationship. The concept of marriage as a "civil right" has been recognised by various courts all over the world, for example, ***Skinner vs. Oklahoma***[10]***, Perez vs. Lippold***[11] ***Loving v. Virginia.***[12]

Married couples who choose to marry are fully cognizant of the legal obligation which arises by the operation of law, on solemnization of the marriage. The rights and duties they owe to their children and the family as a whole, unlike the case of persons entering into live-in relationship. This Court in ***Pinakin Mahipatray Rawal vs. State of Gujarat***[13] held that marital relationship means the legally protected marital interest of one spouse to another includes marital obligation to another like companionship, living under the same roof, sexual relation and the exclusive enjoyment of them, to have children, their up-bringing, services in the home, support, affection, love, liking and so on.

Position of Live in Relationship in Other Countries

Different countries have different approach on Live in relationships. For example Bangladesh cohabitation after divorce is frequently punished by the *salishi system* of informal courts, especially in rural areas. In Indonesia, an Islamic penal code proposed in 2005 would have made cohabitation punishable by up to two years in prison. Also Cohabitation is illegal according to *sharia law* in countries where it has been practiced. On

the other side in many developed countries like USA (23% in 2003), Denmark, Norway, Sweden (above 50 %) and Australia (22%) etc Live-in relationship are very commonly practiced, accepted and are not considered to be illegal.[14]

Australia

In Australia Section 4AA of Family Law Act 1957 defines the meaning of de facto relationship it says that a person is in de fact relationship with another person if,

(a) The persons are not legally married to each other; and
(b) The person are not related by family and
(c) Having regard to all the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.[15]

Canada

In Canada live in relationship is legally recognized. Section 54 (1) of Family law Act, R.S.O. 1990 says that, two persons who are cohabiting or who intend to cohabit and who are not married to each other may enter into an agreement in which they agree on their respective rights and obligations during cohabitation, or on ceasing to cohabit or on death, including,

(a) Ownership in or division of property;
(b) Support obligations;
(c) The right to direct the education and moral training of their children, but not the right to custody of or access to their children And further sub section 2 of section 53 says that if the parties to a cohabitation agreement marry each other, the agreement shall be deemed to be a marriage contract.

France

In France the National Assembly passed the Civil Solidarity Pact on Oct. 13, 1999. Live in relationship is governed by civil solidarity pact in France. The civil solidarity pact is a contract binding on two adults of different sexes or of the same sex, in order to organize their common life.

Scotland

In Scotland the Family Law Act 2006, for the first time known, and in the process by default legalized, lives in relationship of over 150,000 cohabiting couples in the country. Section 25 (2) of the Act said that in determining for the purpose of any of section 26 to 29 whether a person (A) is cohabitant of another a court of law can consider a person as a co-habitant of another person (B) the court shall have regard:

- The length of the period during which they lived together,
- The nature of the relationship during that period and
- The nature and extent of any financial arrangements.[16]

United States

The American legal history was then witness to several consensual sex legislations, which paved the way for living together contracts and their cousins, the "prenuptial agreements". The country later institutionalized cohabitation by giving cohabiters essentially the same rights and obligations as married couples, a situation similar to Sweden and Denmark. Those living together are not recognized as legal parents.[17]

United Kingdom

In United Kingdom live in relationships are largely covered by the Civil Partnership Act 2004. Though a man and woman living together in a stable sexual relationship are often referred to as "common law spouses", the expression is not wholly correct in law in England and Wales. As per note from Home Affairs Section to the House of Commons, unmarried couples have no guaranteed rights to ownership of each other's property on breakdown of relationship.[18]

Live in relationship and Human Rights Concern

According to *Article 16 of the Universal Declaration of Human Rights, 1948* provides that:

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at it dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

According to *Article 23 of the International Covenant on Civil and Political Rights, 1966* (ICCPR) provides that:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."

Judicial Approach

The United States Supreme Court has stated that marriage is a fundamental right of all individuals. In these cases, the Court has reaffirmed that freedom of personal choice in matters of marriage is one of the liberties protected by the Due Process Clause, essential to the orderly pursuit of happiness by free men, and sheltered by the Fourteenth Amendment

against the State's unwarranted usurpation, disregard, or disrespect.[19] The number of cases United States Supreme Court has held right to marry is fundamental rights. ***Maynard vs. Hill***[20], ***Meyer vs. Nebraska***[21], ***Skinner vs. Oklahoma ex rel. Williamson***[22], ***Griswold v. Connecticut***[23], ***Loving vs. Virginia***[24], ***Boddie vs. Connecticut***[25], ***Cleveland Board of Education vs. LaFleur***[26], ***Moore vs. City of East Cleveland***[27], ***Carey vs. Population Services International***[28], ***Zablocki vs. Redhail***[29], ***Turner v. Safley***[30], ***Planned Parenthood of Southeastern Pennsylvania vs. Casey***[31], ***M.L.B. vs. S.L.J.***[32] and ***Lawrence vs. Texas***[33].

In ***D. Velusamy vs. D. Patchaiammal***[34] Court held that the relationship between the parties would not fall within the ambit of "relationship in the nature of marriage" and the tests laid down in Velusamy case have not been satisfied. Consequently, the High Court allowed the appeal and set aside the order passed by the Courts below. Aggrieved by the same, this appeal has been preferred.

In the Malimath Committee report and submitted that a man who marries a second wife, during the existence of the first wife, should not escape his liability to maintain his second wife, even under Section 125 Cr.P.C. Learned amicus curiae also referred to a recent judgment of this Court in ***Deoki Panjhiyara v. Shashi Bhushan Narayan Azad and Another*** [35]in support of her contention.

In ***Re Marriage of Lindsay***[36], ***Litham vs. Hennessey***[37], ***Pennington 93 Wash. App. at 917***, the Courts in United States took the view that the relevant factors establishing a marital relationship include continuous cohabitation, duration of the relationship, purpose of the relationship, and the pooling of resources and services for joint projects. The Courts also ruled that a relationship need not be "long term" to be characterized as meretricious relationship. While a long term relationship is not a threshold requirement, duration is a significant factor. Further, the Court also noticed that a short term relationship may be characterized as a meretricious, but a number of other important factors must be present.

Live in relationship with the respondent knowing that he was married person, with wife and two children, hence, the generic proposition laid down by the Privy Council in ***Andrahennedige Dinohamy vs. Wiketunge Liyanapatabendage Balshamy***[38], that where a man and a woman are proved to have lived together as husband and wife, the law presumes that they are living together in consequence of a valid marriage will not apply and, hence, the relationship between the appellant and the respondent was not a relationship in the nature of a marriage, and the status of the appellant was that of a concubine. A concubine cannot maintain a relationship in the nature of marriage because such a relationship will not have exclusivity and will not be monogamous in character. Reference may also be made to the judgments of this Court in ***Badri Prasad vs. Director of Consolidation***[39] and ***Tulsa v. Durghatiya***[40].

In ***Velusamy case*** stated that instances are many where married person maintain and support such types of women, either for sexual pleasure or sometimes for emotional

support. Woman, a party to that relationship does suffer social disadvantages and prejudices, and historically, such a person has been regarded as less worthy than the married woman. Concubine suffers social ostracism through the denial of status and benefits, which cannot, of course, enter into a relationship in the nature of marriage.

American Jurisprudence[41], speaks of Rights and Remedies of property accumulated by man and woman living together in illicit relations or under void marriage, which reads as under: "Although the courts have recognized the property rights of persons cohabiting without benefit of marriage, these rights are not based on the equitable distribution provisions of the marriage and divorce laws because the judicial recognition of mutual property rights between unmarried cohabitants would violate the policy of the state to strengthen and preserve the integrity of marriage, as demonstrated by its abolition of common-law marriage."

In ***Lynam vs. The Director-General of Social Security[42]***, the Court considered whether a man and a woman living together can be called 'as husband and wife on a bona fide domestic basis' Fitzgerald, J. said: "Each element of a relationship draws its colour and its significance from the other elements, some of which may point in one direction and some in the other. What must be looked at is the composite picture. Any attempt to isolate individual factors and to attribute to them relative degrees of materiality or importance involves a denial of common experience and will almost inevitably be productive of error. The endless scope for differences in human attitudes and activities means that there will be an almost infinite variety of combinations of circumstances which may fall for consideration. In any particular case, it will be a question of fact and degree, a jury question, whether a relationship between two unrelated persons of the opposite sex meets the statutory test."

In ***Tipping, J. in Thompson vs. Department of Social Welfare[43]***, listed few characteristics which are relevant to determine relationship in the nature of marriage as follows:

1. Whether and how frequently the parties live in the same house.
2. Whether the parties have a sexual relationship.
3. Whether the parties give each other emotional support and companionship.
4. Whether the parties socialize together or attend activities together as a couple.
5. Whether and to what extent the parties share the responsibility for bringing up and supporting any relevant children.
6. Whether the parties share household and other domestic tasks.
7. Whether the parties share costs and other financial responsibilities by the pooling of resources or otherwise.
8. Whether the parties run a common household, even if one or other partner is absent for periods of time.
9. Whether the parties go on holiday together.

10. Whether the parties conduct themselves towards, and are treated by friends, relations and others as if they were a married couple.

In ***Payal Katara vs. Supritendent Nari Niketan Kandri Vihar Agra and Others***[44] Case Allahabad High Court ruled out that a lady of about 21 years of age being a major, has right to go anywhere and that anyone, man and women even without getting married can live together if they wish. In ***Patel and others***, case the Supreme Court observed the live in relationship between two adults without formal marriage could not be construed as an offence.

In ***Satchwell vs. President of the Republic of South Africa and Another***[45], ***Du Toit and Another vs. Minister of Welfare and Population Development and Others***[46] ***case*** the Constitutional Court of South Africa recognized the right "free to marry and to raise family". Section 15(3) (a) (i) of the Constitution of South Africa, in substance makes provision for the recognition of "marriages concluded under the tradition, or a system of religious, personal or family law." Section 9(3) of the Constitution of South Africa reads as follows: "The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

In ***Chellamma vs. Tillamma***[47] case Supreme Court gave the status of wife to the partner of live in relationship Justice M. Katju and Justice Mishra stated that, in their opinion, a man and a woman, even without getting married, could live together if they wish to. This may be regarded as immoral by society, but is not illegal. There is different between law and morality. The bench also went one set ahead and observed that the children born to such a parent would be called legitimate. They have the right in their parent's property.

In ***Lata Singh vs. State of U.P.***[48] it was observed that a live in relationship between two consenting adults of heterosexual sex does not amount to any offence even though it may be perceived as immoral. However, in order to provide a remedy in Civil Law for protection of women, from being victims of such relationship, and to prevent the occurrence of domestic violence in the society, first time in India, the Domestic Violence Act has been enacted to cover the couple having relationship in the nature of marriage, persons related by consanguinity, marriages etc. We have little other legislation also where reliefs have been provided to woman placed in certain vulnerable situations.

In ***Stack vs. Dowden***[49] Baroness Hale of Richmond said: "Cohabitation comes in many different shapes and sizes. People embarking on their first serious relationship more commonly cohabit than marry. Many of these relationships may be quite short-lived and childless. But most people these days cohabit before marriage. So many couples are cohabiting with a view to marriage at some later date – as long ago as 1998 the British

Household Panel Survey found that 75% of current cohabitants expected to marry, although only a third had firm plans.

In ***MW vs. The Department of Community Services***[50], CJ, observation made "Finn J was correct to stress the difference between living together and living together 'as a couple in a relationship in the nature of marriage or civil union'. The relationship between two people who live together, even though it is a sexual relationship, may, or may not, be a relationship in the nature of marriage or civil union. One consequence of relationships of the former kind becoming commonplace is that it may now be more difficult, rather than easier, to infer that they have the nature of marriage or civil union, at least where the care and upbringing of children are not involved."

Such relationship, it may be noted, may endure for a long time and can result pattern of dependency and vulnerability, and increasing number of such relationships, calls for adequate and effective protection, especially to the woman and children born out of that live-in-relationship. Legislature, of course, cannot promote pre-marital sex, though, at times, such relationships are intensively personal and people may express their opinion, for and against. ***S. Khushboo vs. Kanniammal and another***[51] Parliament has to ponder over these issues, bring in proper legislation or make a proper amendment of the Act, so that women and the children, born out of such kinds of relationships are protected, though those types of relationship might not be a relationship in the nature of a marriage.

In ***Madan Mohan Singh & Ors. vs. Rajni Kant & other***[52] case the court held that the live in relationship if continued for long time, it cannot be termed in as 'walk in and walk out' relationship and there is a presumption of marriage between the parties. The court clearly inferred that it is in favor of treating the long term living relationship as marriage rather than branding it as new concept likes live in relationship.

In ***Indra Sarma vs. V.K.V. Sarma*** is the latest judgment given on 26th November, 2013 where it is said that Live in or marriage like relationship is neither a crime nor a sin though socially unacceptable in this country. The decision to marry or not to marry or to have a heterosexual relationship is intensely personal.

In ***Madan Mohan Singh and Ors. vs. Rajni Kant and Anr***.[53] the courts held that the law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously for a number of years. However, such presumption can be rebutted by proper evidence.

In a recent case decided on 21st April, 2014 ***Uday Gupta vs. Aysha and Anr.***[54] Supreme Court held that to have a live in relationship is not a crime or offence and during this duration of live in relationship if a child is born it would be considered as their legal heir.

Conclusion

Marriage is the most important relation in life and is the foundation of the family and society, without which there would be neither civilization nor progress but at the same time one cannot ignore the transition of society form marriage to live in culture. This fact has also been accepted by Apex Court. In ***Uday Gupta vs. Aysha and Anr.*** Case Supreme Court has held that to have a live in relationship is not a crime or offence.

In another case (*Khushboo case*), Supreme Court expressed it opinion that entering into live in relationship cannot be called as an offence. A three judge bench said that when two adult people want to live together. Living together is a fundamental right under Article 21 of Constitution of India. Today there is no express statutory provision to regulate such types of relationships upon termination or disruption. Therefore need of the hour is formulation of laws and by-laws to cater the current needs of the society.

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Muslim Divorcee's Right to Maintenance in India: Judicial and Legislative Initiatives

Manju Jamwal*

Introduction

Maintenance of a person is the matter of social importance, particularly for women who in the existing social and economic set up continues to be a weaker section of the society. The personal laws of Hindus and Muslims do contain rules for maintenance of women. But when comes to the claim of divorced wife, law is different on this issue. Under uncodified Muslim law husband's obligation to maintain wife ceases on the expiration of period of *iddat*, whereas, under other personal laws a divorced wife is entitled to maintenance until she remarriages or indulges in post-divorce adultery. This interpretation led to the neglect of the Muslim wives who were left to destitution by her husband. To remedy this evil, the Cr.P.C replaced the old Section 488 by a new Section 125.

The Explanation to Section 125 states that 'wife' includes a woman who has been divorced by or has obtained a divorce from her husband and has not remarried. Under Section 125 Cr.P.C. the claim of the wife could not be defeated by divorcing her. This was purposely done to prevent unscrupulous husbands from frustrating the legitimate maintenance claims of the wife by just divorcing her under the personal law. After all no civilised society would tolerate moral abandonment or starvation of women However, under Section 127(3)(b) the Magistrae was ordained to cancel his order passed under Section 125 on proof that the divorcee has received from her husband the whole of the sum which under customary or personal law was payable on such divorce.

In the interest of social justice Section 125 and 127 of the Code provides for speedy and inexpensive remedy to dependent wives, children and parents for obtaining maintenance.

Muslim Divorcee's right to maintenance can be discussed under the following headings:

- Maintenance Rights of the Muslim Divorcee's under Criminal Procedure Code.
- Maintenance Rights of Muslim Divorcees under Muslim Women (Protection of Rights on Divorce) Act 1986.

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Maintenance rights of the Muslim Divorcee's under the Criminal Procedure Code can be conveniently discussed as under:

Judicial Exposition of the Law before Shah Bano's Case

With the enactment of Section 125 of Cr. P.C. 1973, there was a spate of cases in the courts on the question whether Section 125 was retrospective in its operation. Probably, the first case decided on the point was that of ***Mohd. Hanef vs. Anisa Kahtoon***, wherein the Allahabad High Court held that the even if wife was divorced before coming into force of the said Code, she was entitled to maintenance under Section 125. The same point came up for consideration before the Andhra Pradesh High Court in ***Raza Khan vs. Mumtaz Khatoon***. Citing G.P. Singh it was held that where a statute is remedial in nature and beneficial in character, it is the duty of the court to construe the stature in such a manner as to suppress the mischief and advance the remedy Hence, in all the cases where divorce had been effected prior to coming into force of the Code, the benefit could be claimed under Section 125.

Similarly, Section 127(3) (b) also came up for interpretation in ***Bai Tahira v. Ali Hussain***, wherein, the Supreme Court was to determine whether 127(3) (b) barred a Muslim divorcee to claim maintenance under Section 125. Court observed that "No husband can claim under Section 127(3) (b) absolution from his obligation under Section 125 towards divorced wife except on proof of payment of sum under customary law quantum of which in more or less sufficient to do the duty of maintenance allowance"

The Supreme Court pointed out that the amount paid as *mahr* has to be considered, but it is necessary that there be some co- relation between the sum payable under a maintenance order before the husband could claim immunity from Section 125 of the Code. During the course of judgment Justice V. R . Krishna Iyer observed:

Payment of *mahr* money as a customary discharge is within the cognizance of Section 127(3) (b). But what was the amount of *mahr*? Rs.5000, interest for which could not keep the woman's body and soul together for a day… unless she was ready to sell her body and give up her soul… The Complex of provisions in Chapter X has a social purpose. All used wives and desperate divorcees shall not be driven to material and moral dereliction to seek sanctuary in the streets…. where the husband, by customary payment at the time of divorce, has adequately provided for. The key note thought is adequacy of payment which will take reasonable care of her maintenance.

The Court further held that payment of illusionary amounts by the way of customary or personal requirement will be considered in reducing the rate of maintenance but cannot be considered as wiping it out together. Therefore Section 127(3) (b) for the Code operated to protect the husband from double liability and not to deprive a divorcee of her statuary right under Section 125 in circumstances where payment under customary or personal law left her inadequately provided for.

In *BAi Tahir's* case generated a mixed reaction. Although the notable feature of the judgment was that it sought to interpret the language of the legislation in the light of goals enunciated in the constitution yet the orthodox Muslims opposed the decision of the Supreme Court on the score that it was an interference with the Muslim Personal Law. The orthodox and dominant male members of the community were blind to the plight of Muslim divorcees. The Supreme Court by the fiat of interrogation accomplished what the community and Government had failed to provide.

The Supreme Court confirmed the ***Bai Tahira's case in Fuzlunbi vs. K. Khader Vali***. Justice Krishna Iyer again declared that: "The quintessence of mehr, whether it is prompt ordeferred, is clearly not a contemplated quantification of a sum of money in lieu of maintenance upon divorce."

The Apex Court got an occasion in 1981 to pronounce on the rights of a Muslim woman who had availed of the judicial procedure established under the Dissolution of Muslim Marriages Act, 1939 to receive maintenance from her husband under Section 125 of the Code of Criminal Procedure 1973.

In ***Zohra Khatoon vs. Mohd. Ibrahim***, the point at the issue was whether a Muslim wife who filed a petition under the "Indian Dissolution of Muslim Marriages Act, 1939" would be entitled to seek maintenance from him under the provisions of the Code of 1973. The court unanimously upheld the right of a Muslim Woman who had obtained a decree of divorce against her husband by forensic procedure under the Dissolution of Muslim Marriages Act, 1939 to claim maintenance after such divorce, by the virtue of Section 125 of the Code.

The decision of the Supreme Court in Zohra Khatoon is straight forward, logical and flows from the working of "Explanations" to Section 125 of the Code which reads, "wife includes a woman who has been divorced by or has obtained divorce form her husband and has not remarried". The court has rightly held that the expression "has obtained a divorce from her husband" includes the case of a woman who has obtained a decree of dissolution of her marriage (*Fasakh*) from a court of law under the Dissolution of Muslim Marriages Act, 1939 and also includes other cases enumerated in the judgment.

Judicial Exposition of Law in Shah Bano's case

The question regarding maintenance of Muslim divorcees under Section 125 of Cr.P.C remained uncertain till the judgment in ***Mohammad Ahmed Khan vs. Shah Bano Begum*** wherein a five judge bench of Supreme Court gave its judgment on the issue whether Muslim divorcee is entitled to be maintained by her former husband. The issue arose because it was contended before the court that a divorced woman who could maintained herself was entitled to a payment for her maintenance from her former husband only till the period of *iddat* prescribed under Muslim Personal Law. The court held that *mehr* is not a

customary payment due on divorce. Indeed, *mehr* is a consideration for a marriage or a mark of respect towards the wife.

Therefore, no amount which is payable in consideration of marriage can possible be described as an amount payable on divorce. Interestingly, the court in concluding the judgment claimed that there was no conflict between Section 125 of the Court and Islamic Personal Law.

As to the statement that on expiration of the period *iddat*, the husband's obligation to maintain the wife ceases as is quoted in some text books. The learned judge said that these statements in the text books are inadequate to establish the preposition that Muslim husband is not under an obligation to provide maintenance to his divorced wife who is unable to maintain herself. The learned judge said that the application of those statements of law must be restricted to that class of cases, in which there is no possibility of vagrancy or destitution arising out of the indigent of the divorced wife. It is submitted, the question of maintenance of a divorced wife arises only when she is indigent and this is so under practically all personal laws as well as under Section 125 Cr.P.C. Otherwise, the question hardly arises particularly after divorce.

The Supreme Court in *Shah Bano* case unequivocally reiterated the supremacy of maintenance provisions of the Code of 1973 over the traditional Islamic law on the basis of general principals of the secular welfare state and other principals enshrined in the India Constitution. It, therefore, again impressed upon the fact that a Muslim wife was entitled to maintenance from her husband under Section 125 of the Code. Thus, the seal of certainty was put up by the Supreme Court in the issue which is of common interest not only to Muslin woman and woman generally but to all those aspiring to create an equal society of men and women. The verdict of the court represents a radical step forward in the secular application of Indian Laws.

Judicial exposition of law after *Shah Bano's* case

Shah Bano's judgement is a landmark in the history of Indian judiciary which became a cause of calibre and stir in the country. This decision was welcomed wholeheartedly by the progressive and secular minded intellectuals while orthodox and protagonists got infuriated. The controversy assumes political overtones and ultimately the government, despite it assurances that the law would not be tampered with succumbed to the pulls and pressures and eventually Muslim orthodox section obtained Muslim Women (Protection of Rights on Divorce) Act 1986.

Maintenance Rights of Muslim Divorcees under Muslim Women (Protection of Rights on Divorce) Act 1986

The Muslim Women (Protection of Rights on Divorce) Act 1986 is a precise Act consisting of seven sections. The Act put Muslim divorcees outside the purview of Section 125 of the Code as the 'divorced woman' has been defined as Muslim women who has been married according to Muslim law and has been divorced by or has obtained divorce from her husband in accordance with the Muslim law. But the Act excludes from its purview a Muslim woman whose marriage is solemnized either under the Special Marriage Act, 1954 or a Muslim woman whose marriage was dissolved either under Indian Divorce Act, 1969 or the Special Marriage Act, 1954. The Act does not apply to the deserted and separated Muslim wives.

Under the statutory provisions of the Act, the responsibility of the husband for the maintenance of his divorced wife does not extend beyond the *iddat* period. By virtue of this Act the liability to maintain a divorced wife has been cast upon her former husband, children, parents, relations and *wakf* Boards.

Maintenance by Ex-husband

Section 3(1)(a) of the Act provides that a divorced woman shall be entitled to have from her former husband a reasonable and fair provision and maintenance which is to be made and paid to her within the *iddat* period. Under Section 3(2), the divorcee can file an application before a Magistrate if the former husband has not paid to her a reasonable and fair provision and maintenance mehr, or dower due to her or has not delivered the properties given to her before or at the time of marriage by her relative, or friends or the husband or any of his relatives or friends

The purpose of enactment of this Act, as generally understood, was to allow the Muslim husband to retain his freedom of avoiding payment of maintenance to his erstwhile wife after the period of *iddat*. However, many judicial pronouncements run counter to it. For instance in *Arab Bin Abdullah's* case**,** the crucial question that arose before the court was whether under Section 3(1) (a), a divorced Muslim woman was entitled to get reasonable and fair provision and maintenance only during the *iddat* period or beyond it ? The court held that a divorced Muslim woman was entitled to maintenance after contemplating her future needs and was not limited only upto the *iddat* period.

With regard to the contention that word "within" the Section 3(1) (a), should be read as "during" or "for". Shah J. observed the word "within" which is used by Parliament under the Act would mean that on or before the expiration of the *iddat* period, the husband is bound to make and pay a reasonable and fair provision and maintenance to the wife. If he fails to do so, then the wife is entitled to recover it by filing an application before the magistrate as provided in Section 3(2) but no where the Parliament has provided that reasonable and fair provision and maintenance is limited only for the *iddat* period and not beyond it While dealing with the ex-husband liability under Section 3(1) (a) of the Act the Kerla High Court in Chelangadan Ali's case speaking through Shreedharan, J. held:

But this Act now states that the husband must pay maintenance for the period of *iddat* and also should make a reasonable and fair provision for her. This provision should be for the future of the lady. Even after the provision having been made by the former husband, lady becomes unable to maintain herself then a situation envisaged by Section 4 of the Act will come into operation. According to me, Section 4 of the Act does not absolve the former husband from making a reasonable and fair provision for the lady's life.

The court rejected the contention that the only liability of the former husband is to pay maintenance to the divorced woman during the period of *iddat* only. In sequel to its innovative judgments, the Kerla High Court again in *Ali v. Sufaira* laid down that under section 3(1)(a), a divorced woman was not only entitled to maintenance for the period of *iddat* but also a reasonable and fair provision for her future. This interpretation was followed in *K.K Haji* v. *K. Amina, K. Zunaideen v. Ameena Begum* And *K.A.R Shaikh v. Shehnaz Karim Shaikh* The other interpretation that the liability of the former husband to provide maintenance is limited for the period of *iddat* and therefore she has to make an application under Section 4 of the Act was given in *Usman K. Bahamani v. Fathimunnisa Begum Mohd. Marahim v. Raiza Begum* and *Abdhul Haq v. Yasmin Talat* Finally, in *Danial Latifi v. Union of India*,the constitutional validity of the Act under which Section 125, Cr.P.C providing for maintenance for wives including divorced woman, by their former husbands was made inapplicable to divorced Muslim woman was challenged. It was contended that Section 125 of the Cr.P.C. is a provision made in respect of women belonging to all religions to avoid vagrancy after marriage and exclusion of Muslim Women from the same results in discrimination between women and women and so violating Article 15 of the Constitution. There is a violation of not only equality before law but also equal protection of laws and thus violating Article 14 which in turn inherently infringes Article 21 as well as basic human values.

Supreme Court upheld the Constitutional validity of the Act and held that reasonable and fair provisions include provision for the future of the divorced wife (including maintenance) and it does not confine itself to the *iddat* period only. The *Danial Latifi* judgment remains the final case law in this regard. Similarly commenting on different contours of the Act, Supreme Court in *Iqbal Bano* v *State of U.P*. held that claim of maintenance of the divorced wife cannot be preceded under Section 125 of Cr. P.C after the enactment of the 1986 Act. It is humbly submitted that court fails to take recognition of the fact that the Act is inherently discriminatory. Section 4 of the Act makes the relatives of the Divorced woman or the State *wakf* Board responsible for the maintenance of the Divorced woman. But reality is that it is quite improbable that she will get sustenance from the parties who were not only strangers to the marital relationship which led to divorce. Also, Wakf Boards would usually not have the means to support such destitute women since they are themselves perennially starved of funds and the potential legatees of a destitute woman would either be too young or too old so as to be able to extend requisite support.

Furthermore, the Court fails to answer the necessity of an Act, segregating Muslim women completely when a secular remedy is already available under the Section 125 of the Code of Criminal Procedure. Hindu women have their right to maintenance recognized under the Hindu Adoptions and Maintenance Act, 1956 but that no way bars her from claiming maintenance under Section 125 of the Code of Criminal Procedure. The Court fails to give reasons for such discrimination. The justification of the law being non-discriminatory based on a reasonable classification and so not violative of Article 14 of the Constitution of India (as given in *Danial Latifi* judgment) does not hold good because a law for maintenance to divorced women was already in force and available to every women of India, irrespective of their caste, creed, religion. The proposition put forward that the Act in spirit tries to respect the provisions in the Personal Law does not hold good as it being a codified Law, has to pass the acid test of the Constitution, which it miserably fails. Another, fact to be noted is that Section 5 of the Act gave option to the parties to the divorce, the husband and the wife, to decide mutually to be governed either by Sections 125-128 of the Cr. P.C or the provisions of the Act.

But the main criticism against this provision was that which Muslim husband would like to go through the rigours of the Cr.P.C provisions when he can be governed by a much easier law? However, the middle path approach undertaken by the Supreme Court becomes evident as it reiterates the stand of the Gujarat, Kerala and Bombay High Courts earlier in this regard. The poorly drafted provisions of the Act, especially Section 3, provided the Court with ample scope of interpretation. The Bench laid special emphasis on the two words- 'maintenance' and 'provision' and distinguished between the precision of use of the two words as provision to be 'made' and maintenance to be 'paid'. The time frame or the *iddat* period mentioned was held to be the time limit within which both maintenance for the *iddat* period and a 'reasonable and fair provision' for the future in the form of a lump sum were to be paid to the divorced wife to avoid future vagrancy. The interpretation given to the Act by the Courts thus codified the *Shah Bano* ratio, while it tried to nullify it.

Conclusion

A Muslim divorcee's right to maintenance by the husband beyond the period of *iddat* has been the subject of judicial consideration and debate during the last more than two decades. Some high courts construed the provisions of the Code of Cr.P.C to technically and held that once *mehr* is paid to the wife, she is not entitled to be maintained by the husband beyond *iddat* under the Code. Some courts, on the other hand, held that the payment of *mehr* or some other allowance would not absolve the husband of his libality to further maintain the divorced wife.

The Supreme Court in *Bai Tahira, Fuzlunbi, Zohra Khatoon* and *Shah Bano Begum* has done a yeoman's service to the cause of Muslim divorcees. Article 15(3) of the Constitution of India categorically lays down that a special legislation could be enacted for amelioration the lot of females and the Supreme Court judgements are in tune with the letter and spirit of the constitution. The Apex court in *Shah Bano's* case reiterated very

correctly that a Muslim divorcee is entitled to maintenance irrespective of the fact whether she has or has not been paid dowry money.

The landmark decision of the Apex Court tackled the problem of modernisation and reform of Muslim divorcee's right to maintenance which the politicians had shied away for a very long period from the woman as well as the parliament had been unable to deal with. The kind of social and political response the judgment had evoked surely and certainly proves how much needed the judgment was. This attempt of the Supreme Court to ameliorate the position of Muslim divorcees was negated by the Muslim Women (Protection of Rights on Divorce) Act 1986 by excluding Muslim divorcees from the ambit of Section 125 of Cr.P.C. According to the provision of the Act husband is to make a reasonable and fair provision and maintenance to be made and paid within the period of *iddat* . Before the *Danial Latifi* judgement, the expression "provision and maintenance" created confusion as the High Court of Kerala,Bombay and Gujrat in ***Ali vs. Sufaira, Abdul Rahman Shaikh vs. Shehnaz Karim Shaikh*** **and** ***Arab Ahemadhia Abdulla vs. Arab Bail Mohmuna Saiyadbhai*** respectively held that the expression reasonable and fair provision meant arrangement for a lump sum amount for the future provision of the wife within the *iddat* period other than the *iddat* period maintenance. But contrary opinions were given by the Andhra Pradesh High Court in the case of ***Usman Bahmani vs. Fathimunnisa,*** where it was held that both expressions "provision and maintenance' meant the same, and it covered only maintenance for the *iddat* period only. Judiciary in the *Danial Latifi* case adopted middle path as on one hand where it upholds the Constitutional validity of the Act, it also interprets the provisions of the Act in favour of the divorced Muslim women. The Court could envisage that the country at such a juncture of Economic and Social growth could not bear the burden of aftermath of another *Shah Bano*.

But keeping in mind the changing times and the constantly evolving meaning of Article 21of the Constitution, which has been held to include the 'right to live with dignity.' it is a duty of the society to make sure that the divorced Muslim wife have the provision to maintain herself with dignity and is not led to destitution and vagrancy. The Personal law may connote a different thing but keeping the changing society in mind, it should be open to interpretation only for positive changes. That only can help us achieve the objectives of Social Justice laid down both expressly and implicitly in our Constitution.

References:

1. Lalita Parihar, Muslim Divorcee's Right to Maintenance in India : "Recent Judicial Trends in India," in D.N.Saraf (ed.) *Social Policy,Law and Protectionof Weaker sections of Society*, 405(1986).
2. *Iddat* is the period that a Muslim woman must observe after the death of her spouse or after a divorce, during which she may not marry another man
3. Section 125: Cr.P.C. reads :**(**1) If any person having sufficient means neglects or refuses to maintain,(a) his wife, unable to maintain herself or,(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or(c) his legitimate or illegitimate child (not

being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormally or injury unable to maintain itself, or(d) his father or mother, unable to maintain himself of herself,a Magistrate of the first class may, upon proof of such neglect or refusal order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit.

4. Section 127Cr.P.C. lays down procedure for alteration in allowance:
5. Section127(3)(b**)** Cr.P.C. reads: Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Court shall, if it is satisfied that: the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order:
6. 1965 C.L.J. 520 (All.)
7. 1976 Cr. L. J. 905 (A.P)
8. *Id*. at 907.
9. A.I.R. 1979 S.C. 362
10. *Id*. at 36
11. *Id*. at 368.
12. Lucy carrol: "Mehr and Muslim Divorcees Right to maintenance," XXVII, *Journal of Indian Law Institute*,488 at 490 (1985)
13. (1980)4 SCC 125
14. *Id*. at 127
15. Section 2 of the Act lays down :
16. A Muslim wife may after the passing of the Dissolution of Muslim Marriage Act,1939 obtain a decree for a dissolution of marriage on one of the following grounds:
17. ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years
18. A.I.R.1981 S.C. 1243.
19. *Id*., at 1251.
20. Lalita Parihar *op. cit*. at 424 and425.
21. A.I.R. 1985 S.C.945.
22. Paras Diwan, *Muslim Law in Modren India*, 146 (1982).
23. D.F.Mulla,*Principles of Mohamedan Law* 279 (1968); Muhsin Tyabji,*Muslim Law* 304 (1968 and Paras Diwan,*Muslim Law in Modren India*, 130 (1982)
24. *Supra* note 15 at 950.
25. *Id*., at 946.
26. Act than Section 125 of Cr.P.C.and that the Act should be welcomed as the first step towards the codification.
27. Paras Diwan, *Muslim Law in Modren India*; 155 (1986). Infact the first step was taken up by the Wakf Validating Act which was passed to abrogate the Privy Council decision in *Abdul fata mohammad* v. *Russmony Dhur*, 22 IA 76 (1984).
28. The Criminal Procedure Code of 1973 will still remain anti vagrancy law foe the Muslim wives in India. See also; *Gulam Sabir* v. *Rayeesa Begum*,1988 All.L.J.873, wherein, the court clarified that the Act of 1986 applied to divorcee's only and has no effect on the Muslim wives' right under Cr. P.C.
29. *Arab Ahmed Bin Abdullah* v. *Arab Bail Mohum Saidbhai*, A.I.R. 1988 Guj. 141.
30. *Ibid* at 150.

31. *Chelangadan Ali* v. *Suraira*, (1988) 24 Reports, 488.
32. *Ibid.*
33. (1988)3Cimes 147.
34. 1995 Cr.L.J. 3371 (Ker).
35. (1998) 2 DMC 468(Mad.).
36. 2000 Cr.L.J.356 (Bom.)(F.B.).
37. 1990 Cr LJ 1364.
38. (1993) 1 DMC 60.
39. 1998 Cr LJ 3433(MP).
40. **(**2001) 7 SCC 740.
41. AIR 2007 SC 245.
42. *Supra* note 25.
43. *Supra* note 29.
44. *Supra* note 32.
45. *Ruksana Parveen v. Sheikh Mohd. Hussain*,A.I.R. 1976 Bom. 124.
46. *Supra* note 8.
47. *Supra* note 12.
48. *Supra* note 15.
49. *Supra* note 18.
50. *Supra* note 29.
51. *Supra* note 32.
52. *Supra* note25.
53. AIR 1990 AP225(FB).

Anti-dumping and Determination of Injury: A Conceptual Study

Jyotsna Sharma*

Concept of dumping

Free trade, which is unfair could undermine and distort competitive and well-functioning markets, leading to inefficiencies. Putting in place a system by which countries can punish such activity with duties to counteract these unfair trade practices, (similar to allowing countervailing duties on export subsidies) seems reasonable. Enhancing the benefits of the elimination of trade barriers and promoting conditions of fair competition are two central thrusts of international trade agreements. Had price discrimination taken place by a monopoly firm within one economy, the government would have intervened to stop consumer exploitation by enforcing an act similar to the Monopolies and Restrictive Trade Practices Act, in India.[1]

Hence, in the international context, it is the anti-dumping duty that protects the domestic producers initially and consumers in the long run. The duty is justified because in case of many industries the start up period is long and start-up costs are also high. Once these firms are forced out of the market as a result of dumping by exporters, it is very difficult for them to restart when the same exporters raise prices.

Dumping gives temporary gains to the consumer but effects the domestic industries in long run by reducing their sales volume, market share and revenue, which ultimately affect the turnover of domestic industries and thereby reducing the employment opportunities in such industries. Dumping can only occur at places where imperfect competition and where the markets are segmented in a way such that domestic residents cannot easily purchase goods intended for export.

A standard technical definition of dumping is the act of charging a lower price for goods in a foreign market than one charge for the same goods in a domestic market. This is often referred to as selling at less than "fair value". Dumping in the literature is defined in two ways: price dumping and cost dumping. The formal refers to the international price discrimination, while the later refers to the practice of selling at prices below per unit cost.

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The anti dumping laws in the WTO agreement refer to price discrimination. The sales below costs are not considered as 'in the ordinary course of trade'. Thus, in the context of International trade law, dumping can be defined as the act of a manufacturer in one country exporting a product to another country at a price which is either below the price it charges in its home market or is below its cost of production[2]. It is said to be the most common form of price discrimination in international trade.

Usually the different trade policies prevailing in the national economic systems of various countries provide scope for dumping. For instances, in some countries, the policies that do not allow layoff labour even during the downturn. In that situation, labour costs are fixed and do not vary. In such a setting, producers may prefer to sell below full costs instead of laying off surplus workers. This would result in exporting unemployment to other country's industry.[3] Yet another example is that the producers may heavily rely on debt rather than equities, particularly where equity market is not developed. They may find it necessary to sell below cost to service their debt obligations. The state trading regimes with specific export quantitative targets may also indulge in dumping.[4] The anti-dumping rules are meant to offset the effects of distortions caused by the anti- market policies of foreign governments and not intended as remedy for the predatory practices of firms or any other private anti-competitive practices. The purpose of the anti-dumping law is to offset that artificial advantage and restore 'level playing field'.

Anti-dumping duties have been gaining more importance in recent times simply because, it has been observed to be the best form of protection. Unlike quotas or safeguard measures, anti-dumping duties are not retaliatory. They are industry, time and product specific and hence are said to create lesser distorting effects as compared to other forms of protection.[5] National anti-dumping legislations date back to the beginning of the 20th century. The General Agreement on Trade and Tariff (GATT) 1947 contained a special article on dumping and anti-dumping action. Article VI of the GATT condemns dumping that causes injury, but it does not prohibit it.[6]

Rather, Article VI of GATT authorizes the importing member to take measures to offset injurious dumping. This approach follows logically from the definition of dumping as price discrimination practiced by private companies. The GATT addresses governmental behavior and therefore cannot possibly prohibit dumping by private enterprises. Moreover, importing countries may not find it in their interest to act against dumping, for example because their user industries benefit from the low prices. Thus, GATT (and now the World Trade Organization, WTO) approaches the problem from the other side, *i.e.* from the position of the importing member.[7]

GATT 1947 applied only to goods which implied that dumping of services was not covered. Indeed, the General Agreement on Trade in Services, negotiated during the

Uruguay Round 1986, does not contain provisions with respect to dumping or anti-dumping measures of services.[8]

It has furthermore long been accepted that neither Article VI (nor the agreement on anti-dumping) covers exchange rate dumping, social dumping, and environmental dumping or freight dumping[9]. Dumping may therefore, equally cover predatory dumping,[10] cyclical dumping,[11] market expansion dumping,[12] state-trading dumping[13] and strategic dumping.[14]

Article VI was carried forward into GATT 1994. A new agreement, the Agreement on Implementation of Article VI [agreement on anti-dumping], was concluded in 1994 as a result of the Uruguay Round. Article VI and the agreement on anti-dumping apply together.

II. Agreement on anti-dumping

The agreement on anti-dumping is divided into three parts and two important annexes. Part I, covering Articles 1 to 15, is the heart of the Agreement and contains the definitions of dumping (Article 2) and injury (Article 3) as well as all procedural provisions that must be complied with by importing member authorities wishing to take anti-dumping measures. Articles 16 and 17 in Part II establish respectively the WTO Committee on Anti-Dumping Practices [ADP] and special rules for WTO dispute settlement relating to anti-dumping matters. Article 18 in Part III contains the final provisions. Annex I provides procedures for conducting on-the-spot investigations while Annex II imposes constraints on the use of best information available in cases where interested parties insufficiently cooperate in the investigation.[15]

A. Principles of agreement on anti-dumping (ADA) [16]

Anti-dumping measures can only be applied in the circumstances provided for in Article VI of the GATT 1994. Article VI of the GATT 1994 defines dumping as when the export price is less than the normal value (comparable domestic price, export price to a third country, or cost of production plus a reasonable addition for selling cost and profit). Dumping is condemned if it is causes or threatens material injury to an established industry.

B. Determination of Dumping[17]

Dumping occurs when a like product (‘*produit similaire*’) is sold at less than its normal value. The normal value will usually be the comparable price of the product in the domestic market of the exporting country. Actual domestic prices do not have to be used when (a) sales are not made in the ordinary course of trade e.g. below cost, (b) there is a particular market situation that does not permit a proper comparison, (c) there is a low volume of domestic sales.[18]

When actual domestic prices are not available, or cannot be used, normal value can be based on the export price to a third country or cost of production in the country of origin (plus reasonable amount for selling costs and profit). Export prices may be ‘constructed’

from the first independent price where the importer is related to the exporter. A fair comparison must be made between export price and normal value. Allowances should be made for all differences that affect price comparability.[19]

Like product: The term like product is defined as a product, which is identical, *i.e.* alike in all respects, to the product under consideration, or in the absence of such a product, another product, which has characteristics closely resembling those of the product under consideration.[20]

This definition is strict and may be contrasted, for example, with the broader term 'like or directly competitive products' in the Safeguards Agreement. In the context of the agreement on anti-dumping, the term is relevant for both the dumping and injury determination. While many variations are possible, the underlying principle is that the comparison must be as precise as possible. Consequently, a variation that has an appreciable impact on the price or the cost of a product would normally be treated as a different model or type. For calculation purposes, authorities will then normally compare identical or very similar models or types.

The Export Price: It is the price at which the product is exported from one country to another. It is this price that is allegedly dumped and for which an appropriate normal value must be found in order to determine whether dumping in fact is taking place. [21] In some cases, the export price may not be reliable. Thus, where the exporter and the importer are related, the price between them may be unreliable because of transfer pricing reasons.[22] Article 2.3 of agreement on anti-dumping provides that the export price then may be constructed on the basis of the price at which the imported products are first resold to an independent buyer. In such cases, allowances for costs, duties and taxes, incurred between importation and resale, and for profits accruing, should be made in accordance with article 2.4 of agreement on anti-dumping. Such allowances decrease the export price, increasing the likelihood of a dumping finding. [23]

In the case of ***Oxo Alcohols Industries' Association vs. Designated Authority***[24], the Customs, Excise & Gold (Control) Appellate Tribunal (CEGAT), New Delhi held that when exports take place on a particular date, its price should be compared with the normal value at as nearly as possible the same time and that the margin of dumping established on the basis of comparison of a weighted average normal value to weighted average export price can alone be the basis for imposing the anti-dumping duty.

Normal Value: The normal value is the comparable price at which the goods under complaint are sold, in the ordinary course of trade, in the domestic market of the exporting country or territory.[25] If the normal value cannot be determined by means of domestic sales, the Act provides for the following two alternative methods:

- Comparable representative export price to an appropriate third country.

- Cost of production in the country of origin with reasonable addition for administrative, selling and general costs and for profits.
- Agreement on anti-dumping distinguishes three elements of constructed normal value:[26]
- Cost of production;
- Reasonable amount for administrative, selling and general costs (often called SGA);
- Reasonable amount for profits.

The anti-dumping provisions and practice of nations indicate that the margins of dumping including the variables thereof, that is, normal value and export price are determined qua an exporter (if exporter co-operates in the investigation) and qua a country (if exporter chooses not to co-operate and for the residual category). However, the Honorable Supreme Court in *Reliance Industries Ltd v. Designated Authority*[27] has observed that: "In our opinion, both normal value and Non-Injurious Price (NIP) are not exporter or domestic industry specific but exporting country specific and importing country specific (India). Once dumping of specific goods from a country is established, dumping duty can be imposed on all exports of those goods from that country to India under Sec. 9A of Customs Tariff Act 1975 (as amended in 1995), irrespective of the exporter. The rate of duty may vary from exporter to exporter depending upon the export price."

Fair Comparison and Allowances: Article 2.4 of agreement on anti-dumping lays down as key principle that a fair comparison shall be made between export price and the normal value. This comparison shall be made at the same level of trade, normally the ex-factory level, and in respect of sales made at as nearly as possible the same time. The ex-factory price is the price of a product at the moment that it leaves the factory.[28]

Article 2.4 of agreement on anti-dumping goes on to require that due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. It must be emphasized that the wording of article 2.4 is open-ended and requires allowance for any difference demonstrated to affect price comparability.

Dumping Margin[29]**:** The margin of dumping is the difference between the Normal value and the export price of the goods under complaint. It is generally expressed as a percentage of the export price. Most authorities in countries *viz.* India, EC and US establish the 'Dumping margin' on the basis of comparison of a weighted average normal value to weighted of prices of all comparable export transactions. The authorities of New Zealand and Egypt, however, prefer to establish the 'Dumping margin' by a comparison of normal value and export prices on a transaction-to-transaction basis.[30]

C. Determination of Injury[31]

In order to impose anti-dumping measures, an authority must determine not only that dumping is occurring, but also that such dumping is causing material injury to the domestic industry producing the like product.

The agreement on anti-dumping does not specifically define "injury" but it does specify what it could be in an anti-dumping investigation[32]. Paragraph1 of article VI of the GATT 1947 read along with the footnote 9 to article 3 of the agreement on anti-dumping states that the term "injury" encompasses three concepts:

- material injury to domestic industry
- threat of material injury to domestic industry; or
- material retardation of the establishment of a domestic industry

Injury determinations are complex and require an assessment to be made on a case-by-case basis of all the factors affecting the domestic industry. Article 3.1 of agreement on anti-dumping provides that the injury determination shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such products. It must be demonstrated that dumped imports are causing injury and that injury caused by other factors is not attributed to the dumped imports. Threat of injury must be clearly foreseen and imminent.[33]

It has to be recognized that there may be reasons why the factors, which are found to cause injury in one investigation, need not cause injury to another domestic industry in circumstances, which are apparently similar. There is wide scope for discretion; therefore the authorities should take care to apply a reasonable standard of injury.[34]

The three concepts of injury are discussed in detail as follows:

Material injury

The degree of injury required in the GATT and the agreement on anti-dumping is described in English as being 'material' and in the French as being 'important'. Whatever language is used, this qualification gives little guidance while drawing a clear and precise dividing line between the injury, which is considered sufficient to permit the application of protective measures and that, which does not justify such action.[35] Though the agreement does not define 'material injury', but it mandates that a determination of material injury must be based on positive evidence and involves an objective examination of the specific factors listed in the agreement, including the volume of the dumped imports; the effects of these imports on prices in the domestic industry for like products; and the consequent impact of the dumped imports on domestic producers of like products.[36]

Article 3.2 provides more details on the analysis of the volume factor and the price factor. It emphasizes the relevance of a significant increase in dumped imports, either absolute or

relative to production or consumption in the importing member. With regard to the effect of the dumped imports on prices, the investigating authority must consider whether there has been a significant price undercutting by the dumped imports, or whether the effect of the imports has been to significantly depress prices or prevent price increases, which otherwise would have occurred.[37]

Article 3.4 requires that the examination of the impact of the dumped imports on the domestic industry shall include an evaluation of all relevant economic factors and indices like product in the importing country and then mentions 15 specific factors. It concludes that this list is not exhaustive and that no single or several of these factors can necessarily give decisive guidance.[38]

Indian anti-dumping rules and regulations follow the rules laid down in the WTO agreement on anti-dumping. Annexure II to the anti-dumping rules read along with rule 11 of the rules provides the framework for determination of injury caused on account of dumped imports. The rules mandate the designated authority objectively examine both volume and price impact of the dumped imports and consequences of this impact on the domestic industry. For this purpose, the volume impact may be examined, either in the absolute terms, or relative to production or consumption in India and the price effect is examined in terms of the significant price undercutting, significant price depression or significant price suppression with respect to domestic industry. Para 4 of Annexure II, lists 15 factors that are to be examined for an objective determination of injury, which is in line with the WTO obligation in this respect. The Authority analyses most of the factors listed based on the questionnaire responses from the domestic industries, its own verifications, and facts available.[39]

In the *Hot Rolled Coils case*[40], the honorable Tribunal observed that Designated Authority should take into account all the relevant factors including volume of dumped imports and their effect on the prices in the domestic market.

Threat of material injury

'Threat of material injury' and 'material injury' to the domestic industry is normally considered by the authorities as alternatives, for the threat of injury implies material injury in the imminent future whereas material injury implies injury in the present. Though the threat of injury analysis may necessary be prospective in nature but the agreement on anti-dumping requires that a determination of threat of material injury shall be based on the facts and not merely on allegation, conjecture or remote possibility. The provisions clearly lay down that "the change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent" [41]

The authorities find it useful to collect the additional information necessary for a threat of injury analysis at the outset so that the possibility of considering threat of injury is not

precluded if a negative finding regarding present material injury is made out. The agreement on anti-dumping specifies a non-exhaustive list of factors required to be considered while determining whether the domestic industry faces a 'threat to material injury'.[42]

Articles 3.7 and 3.8 of agreement on anti dumping provide special rules for a determination of threat of material injury. A determination of threat must be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury, must be clearly foreseen and imminent.[43] In making a threat determination, the importing member authorities should consider, *inter alia*, four special factors:[44]

1. a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
2. sufficiently freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing member's market, taking into account the availability of other export markets to absorb any additional exports;
3. whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports;
4. Inventories of the product being investigated.

No single factor will necessarily be decisive, but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

In India, injury determinations based only on 'threat to material injury' are extremely rare.
In the ***Graphite Electrodes case***[45], the Designated Authority simultaneously examined material injury and threat to material injury in terms of Annexure II read along with rule 11 of the anti-dumping rules and concluded that there are enough indications that imports of graphite electrodes from the petitioners would cause a 'threat to material injury' to the domestic industry cited the reasons such as:

1) Increase in imports of the subject good from the subject countries and history of imports from such countries.
2) Availability of sufficient capacity with the exporters to continue dumping and there was a significant margin of dumping in this case, and
3) The prices of imports had a significant depressing and/or suppressing effect on the domestic producer's prices.

Material retardation

The 'material retardation of the establishment of a domestic industry' has sparingly, been applied by investigating authorities.[46]This concept is markedly different from 'material injury' and 'threat to material injury'. It applies in cases where there does not exist a

domestic industry producing a 'like product', and dumped imports have materially retarded efforts to establish such an industry. It could also arise in cases where there has been some production of the 'like product' but such production has not been reached a sufficient level to allow consideration of 'material injury' or 'threat to material injury' to an existing domestic industry, or it may apply in cases where production of the 'like product' has not even begun in the importing country/territory.[47] As far as India is concerned, in the case of *Import of Bisphenol A from Japan*, the Designated Authority found that establishment of the new industry set up by the complainant was being retarded by low price imports from the defendents.[48]

D. Cumulation

The principle of cumulation means that where imports from several countries are simultaneously subject to anti-dumping investigations, their effects may be assessed cumulatively for injury purposes as long as they do not qualify for the *de minimis* or negligibility thresholds and a cumulative assessment is appropriate in light of the conditions of competition among the imports and between imports and the like domestic product.[49]

The authorities take care to ensure that cumulation is not used as a means of justifying the application of defensive measures when the exports from a particular country are insignificant or negligible. However, the exclusion of certain sources on the grounds that their exports are marginal also has its limits, as there is always the possibility that, if excluded these marginal suppliers could replace competitors who are subject to duties or other defensive measures.[50]The concept of cumulation is not expressly dealt within the GATT Codes. The agreement on anti-dumping has put certain pre-conditions that need to be satisfied for cumulatively assessing the effects of imports from multiple countries. The authorities have to ensure that the following four conditions are satisfied before they decide to cumulatively assess the effects of imports from more than one country, *viz.*[51]:

a) that imports are from countries which are "simultaneously subject to anti-dumping investigations".
b) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in article 5.8, the agreement on anti-dumping.
c) the volume of imports from each country is not negligible and
d) a cumulative assessment of the effects, of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

The Authorities in the past routinely assessed cumulatively the effect of imports irrespective of the fact whether imports from different sources were from different producers within one country (intra-country or producer cumulation) or from different countries (inter-country or country cumulation). Normally, the Authorities adopt the following criteria for cumulating purposes: Whether these goods (1) are interchangeable

(2) are sold or offered, for sale in the same geographical markets (3) have common or similar channels of distribution (4) their volume is not negligible.[52]

Indian anti-dumping rules on cumulation are similar to agreement on anti-dumping except that it does not mention *inter se* competition between the dumped imports. However, it is learnt that necessary steps are being taken to rectify the errors in the Indian anti-dumping rules to bring it in conformity with the WTO agreement on anti-dumping. Like the agreement, it does not provide any other guidelines as regards the assessment of the competition. Cumulation, however, is a normal practice in India wherever it is warranted.[53] The issue of cumulation was considered by the CEGAT in the *Acrylonitrile Butadiene Rubber* Case.[54] In this case, the appellant contended that the designated authority should not have cumulated the imports from Germany and Korean together for the purpose of assessment in determining the injury analysis. The Honorable tribunal stated that EC provision was differently worded and was not *pari materia* with that of clause (m) of Annexure-II of Indian Anti-dumping Rules.

Causation

Article 3.5 of agreement on anti-dumping lays down the framework for the causation analysis, including a listing of possible 'other known factors.' the demonstration of the causal link must be based on an examination of all relevant evidence before the authorities, which must also examine any known factors other than the dumped imports which are also injuring the domestic industry, and the injury as a result of such other known factors must not be attributed to the dumped imports. It then provides a non-exhaustive list of other factors which may be relevant depending on the facts of the case.[55]

It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs of article 3.2 and 3.4 of the agreement, causing injury within the meaning of this agreement. This demonstration of a causal relationship between the dumped imports and the injury to the domestic industry has to be based on an examination of all relevant evidence before the authorities. The agreement further stipulates that the authorities shall also examine any known factors other than the dumped imports, which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.[56]

Factors that may be relevant in this respect, *inter alia*, include[57]:

- the volume and prices *of* imports not sold at dumping prices,
- contraction in demand or changes in the patterns of consumption,
- trade restrictive practices of and competition between the foreign and domestic producers,
- developments in technology and
- the export performance and productivity of the domestic industry.

The authorities elicit this information from the questionnaires sent to domestic producers, foreign producers/exporters, importers, and purchasers, which also include questions relating to other potential causes of injury. The interested parties to whom questionnaires have been sent are expected to furnish factual report detailing the relevant information regarding 'such other causes'.[58]
Besides, the potential causes mentioned in the agreement on anti-dumping, the following 'other causes' could be added such as[59]:

- Outdated technology used by the domestic industry and the lack of efforts by it to modernize facilities, engage in R & D etc. to otherwise remain competitive.
- Imports of the product by the domestic industry;
- Consumer perception of the domestic product including level of services being provided to customers by the domestic industry (e.g. warranty issues, follow-up, customer service).

The authorities find some or all of these factors as relevant depending upon the merits of each case and address these while establishing the cause of the decline in the domestic industry's position. A finding that one or any of the indicators have adversely impacted the domestic industry may not necessarily preclude a finding of material injury caused by dumped goods. While considering the "other" causes of, injury the authorities take into cognizance the extent of the injury caused by these "other" factors, if any, and the extent to which it dilutes the causal link between the dumped imports and the injury caused by it.[60]
The Indian anti-dumping provisions follow the agreement on anti-dumping for establishing and demonstrating a causal link between the dumping and injury. The rules under annexure II of the anti-dumping rules require it to be demonstrated that the dumped imports are, through the volume and price effects on the domestic industry, causing injury to the domestic industry. The demonstration of the causal relationship has to be based on examination of relevant evidence before the designated authority, who is obligated to examine and segregate other factors injuring the domestic industry at the same time. The rule lists several factors, which may be taken into account for segregation of injury not caused by the dumped imports.[61] These are based on article 3.5 of the agreement on anti-dumping

In ***Videocon Narmada Glass vs. Designated Authority***,[62] the Tribunal in its order held that the import of Strontium Carbonate in granular form from China PR does not cause any material injury to the domestic industry and there is no causal link between the import and the injury, if any, suffered by the domestic industry. Thus, anti-dumping duty on import of Strontium Carbonate from China PR under Notification No. 70/2001-Cus.was not justified.

F. Product line exception[63]
The definition of the like product plays a role in both the dumping and the injury determination because it is with respect to this product that dumping and injury must be

established. As an exception to the principle that it must be established that the domestic industry producing the like product must suffer injury by reason of the dumped imports, the article provides that when available data do not permit the separate identification of the domestic production of the like product on the basis of such criteria as the production process, producers' sales and profits, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided. This is sometimes called the product line exception.[64]

G. Definition of domestic industry[65]

The domestic industry is all domestic producers of the product concerned, or those whose collective output constitutes a major proportion of total domestic production of those products. Companies can be excluded from domestic industry if they are related to exporters or are themselves importing the product concerned. Therefore, domestic industry is defined as the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products. It does not define the term 'a major proportion.'

There are two exceptions to this principle[66]:

1) Where domestic producers are related to exporters or importers or themselves import the dumped products, they may be excluded from the definition of the domestic industry under Article 4.1(i). Such producers may benefit from the dumping and therefore may distort the injury analysis. Exclusion is a discretionary decision of the importing Member authorities for which the Anti-dumping Agreement does not provide further guidance.
2) A regional industry comprising only producers in a certain market of a Member's territory may be found to exist under Article 4.1(ii) if these producers sell all or almost all of their production in that market and the demand within that market is not to any substantial degree supplied by producers of the product located elsewhere in the territory. Injury may then be found even where a major portion of the total domestic industry is not injured, provided that there is a concentration of dumped imports into the isolated market and the dumped imports are causing injury to the producers of all or almost all of the production in that market. If the regional industry exception is used, anti-dumping duties shall be levied only on imports consigned for final consumption to that area. Where this is not allowed under the constitutional law of the importing member, exporters should be given the opportunity to cease exporting to the area concerned or to give undertakings.

Findings of the existence of a regional industry are relatively rare and tend to be confined to industries where transportation is a major cost item, such as, for example, cement. Last, it is noted that the definition of the domestic industry is closely linked to the standing determination which importing Member authorities must make prior to initiation. In the

anti-dumping investigation concerning imports of Purified Terephthalic Acid (PTA), M/s Bombay Dyeing & Manufacturing Company Ltd. (BDMC) and the RIL filed two separate petitions. Although the RIL alone was the manufacturers of the PTA, they were excluded from the investigation on the ground that they had imported the PTA during the period under investigation. The Designated Authority considered the BDMC, manufacturers of the DMT alone as constituting 'domestic industry' as their production accounted for a major proportion of the total domestic production of the PTA and the DMT.[67]

III. Relief/ remedy to the domestic industry

The relief to the domestic industry against dumping of goods from a particular country is in the form of anti-dumping duty imposed against that country/countries, which could go up to the dumping margin. Such duties are exporter specific and country specific.[68] However, the remedy against dumping is not always in the form of anti-dumping duty. The Authority may terminate or suspend investigation after the preliminary findings if the exporter concerned furnished an undertaking to revise his price to remove the dumping or the injurious effect of dumping as the case may be. No anti-dumping duty is recommended on such exporters from whom price undertaking has been accepted.

Remedial Measures against Unfair Trade Practices

Apart from dumping, some of the countries also resort to subsidization of their exports to other countries. Export subsidies, under the WTO agreement, are treated as unfair trade practice and such subsidies are actionable by way of levy of anti-subsidy countervailing duty. There is one more trade remedial measure called “safeguards “which are applied as an emergency measure in response to surge in imports of a particular item.[69] Anti-subsidy countervailing measure is in the form of countervailing duty which is to be imposed only after the determination that[70]:

- the subsidy is a specific subsidy
- the subsidy relates to export performance;
- the subsidy relates to the use of domestic goods over imported goods in the export article; or
- the subsidy has been conferred on a limited number of persons engaged in manufacturing, producing or exporting the article.

Safeguards

- Safeguards, on the other hand, are applied when[71]:
- there is a surge in imports of a particular product irrespective of a particular country/ies
- it causes serious injury to the domestic industry.
- Safeguard measures are applied to all imports of the product in question irrespective of the countries in which it originates or from which it is exported. This aspect distinguishes

Safeguards from anti-dumping and anti subsidy measures which are always country specific and exporter specific[72]. Safeguards are applied in the form of either safeguard duty or in the form of safeguard QRs (import licenses). These measures are administered in India by an Authority called Director General (Safeguards) who functions in the jurisdiction of the Department of Revenue, Ministry of Finance.[7]

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On Human Trafficking as a Deadly Organised Crime: A Socio- Legal Study with special reference to India and Bangladesh

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Introduction

Being one of the billion dollar businesses in modern times, where millions of human beings are commercially exploited by their fellow beings for their selfish interests, 'human trafficking' as an organised crime has indeed become one of the most gruesome realities of the 21st century. Especially in South Asian countries like India and Bangladesh with a huge population influx coupled with abject poverty and characterised with underdevelopment, human trafficking has become uncontrollably perilous; for these countries are used as a source, destination and transit route for the displacement, exploitation and commercialisation of passive victims, who are usually helpless and voiceless, and under the full command and control of the exploiter, having no control over the deplorable situation, having no scope to justice. The situation is distressing indeed where a large portion of the vulnerable population both young and old, ranging from the infants, adolescents, labouring class, women and even dying persons are pitiably trapped in the vicious cycle of trafficking every year. The reasons are varied: forced labour, commercial sexual exploitation, forced marriages, organ transplantation, camel jockeying and many more; however the plight of the victims is more or less similar – they are denied of a minimum decent human existence.

Understanding Human Trafficking

A Multifaceted, Multidimensional Organised Crime

It is although difficult to arrive at any definite definition on human trafficking; however the **United Nations Protocol on Trafficking** in Persons, also referred to as the **Palermo Protocol on Trafficking** adopted in November 2000, has been successful in giving a comprehensive and vivid picture as regards to the meaning of trafficking.
It defines trafficking as:

"the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the

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exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs"

From an analysis of the above definition it can thus be assumed that the trafficked victim in various circumstances is either:

- *displaced from his/her community;*
- *procured illegally;*
- *sold by somebody;*
- *bought by somebody;*
- *imported fro a foreign community;*
- *wrongfully restrained;*
- *wrongfully confined;*
- *physically tortured/injured;*
- *subjected to criminal force;*
- *mentally tortured/harassed;*
- *criminally intimidated;*
- *outraged of modesty;*
- *raped/gang raped;*
- *subjected to unnatural offences;*
- *defamed;*
- *subjected to sexual slavery;*
- *victim of criminal conspiracy*.

From this illustrative but not exhaustive list it can also be naturally inferred how horrific the face human trafficking has assumed and how pitiable the fate of the victims becomes who fall prey to this menace. A trafficked person's basic human rights are blatantly violated and he/she is unreasonable deprived of his/her:

- *right to life;*
- *right to equality;*
- *right to liberty*
- *right to education;*
- *right to employment;*
- *right to access to justice and redressal of grievances;*
- *right of access to health services*
- *right to self determination;*
- *right to representation;*
- *right against discrimination;*
- *right against exploitation;*
- right *to uphold self dignity.*

Human Trafficking in India and Bangladesh: Magnitude of the Problem.

Human trafficking although has a history coterminous with that of society since a long time, its growth at an alarming rate in India and Bangladesh has recently caught the attention of all. Being the countries of both origin and destination for human trafficking, trafficking occurs extensively in the porous borders of these countries owing to numerous factors such as abject poverty, female illiteracy, male unemployment, natural calamities and poor rehabilitation of disaster victims, desertion by parents or husband, traditional practices like 'devdasi' and 'jogin' which gives social legitimacy to trafficking and the like. The consequence is obvious: every year thousands of men, women and children are trafficked from India and Bangladesh for multiple purposes like prostitution and commercial sexual exploitation; forced and bonded labour in domestic and industrial sites; forced employment in entertainment industry including bars, massage parlours and other similar establishments; fraudulent or forced marriages; organ trade such as sale of kidneys and many more. Children are also trafficked for begging and camel jockeying and even infants are believed to be trafficked for the purpose of purchase and sale for adoption.

Such multi-causal nature of trafficking has indeed assumed a horrific face in India and Bangladesh and has unsecured the existence of one and all from the babe in the cradle to the corpse in the coffin. This organised crime which operates clandestinely is shockingly stated to generate a turnover of US$ 7 billion annually, thus revealing the chilling reality which these nations are encountering. On the whole the correct statistics depicting the exact number of trafficked victims may be difficult to obtain, however it can be reasonably assumed that the erosion of border barriers by globalisation, technology and improved communication has inadvertently facilitated trafficking networks and has made trafficking indeed a gruesome problem for both the nations.

Legal Machinery in India and Bangladesh to Curb Human Trafficking:

Th**e** growing incidence of human trafficking as a heinous crime demanded a stern statutory process at the primary level so that the guilty are apprehended and punished, and the victims' rights are duly protected. Accordingly India and Bangladesh have adopted a composite legal code which stands as a bulwark against trafficking and aims at the punishment of traffickers and protection of victims. A short glimpse of the existing legal framework in both the countries is given below-

Anti- trafficking Laws in India

1. The Constitution of India

Article 23 of the Constitution guarantees right against exploitation; prohibits traffic in human beings and forced labour and makes their practice punishable under law.

2. The Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA) amended in 1986 and renamed as the Immoral Traffic (Prevention) Act, (ITPA) 1956.

This is the only legislation which deals exclusively addressing trafficking with the objective to inhibit abolish traffic in women and girls for the purpose of prostitution as an

organized means of living. This Act with the object of preventing trafficking inflicts harsh punishment for offences like-
Keeping a brothel or allowing premises to be used as a brothel (Sec 3)
Living on the earnings of prostitution (Sec 4);
Procuring, including or taking persons for prostitution (Sec 5);
Detaining a person in premises where prostitution is carried on (Sec 6);
Seduction of a person in custody (Sec 9) etc.

3. The Indian Penal Code, 1860
In IPC too there are significant provisions relating to combating trafficking. It includes punishment for offences like: Kidnapping, abducting or inducing a woman to compel marriage (Sec 366); Procuring a minor girl (Sec 366A); Importation of a girl below 21 for sexual exploitation (Sec 366B); Kidnapping/ abducting to subject person to grievous hurt, slavery (Sec 367); Buying or disposing of person as slave (Sec370); Habitual dealing in slaves (Sec 371); Selling minor for prostitution (Sec372); Buying minor for prostitution (Sec373); Compelling a person to labour (Sec 374).

4. Prohibition of Child Marriage Act 2006
Section 12 of this Act makes child marriage void, if after that the minor is sold or trafficked or used for immoral purposes.

5. Children (Pledging of Labour) Act, 1933
Section 4-6 of this Act provides penalties for pledging labour of children (under 15 years).

6. Bonded Labour System (Abolition) Act, 1976
Section 16 of this Act provides punishment for compelling a person to render bonded labour or forced labour.

7. Child Labour (Prohibition and Regulation) Act, 1986
This Act prohibits employment of children in certain specified occupations and also lays down conditions of work of children.

8. The Juvenile Justice Act 2000
This Act also contains relevant provisions relating to combating trafficking. Significant provisions are laid down in- Section 2(vii) which deals with a child in need of care and protection which includes one who is vulnerable and likely to be trafficked; Section 24 dealing with employment of child for begging; Section 26 which make procuring juveniles for hazardous employment or bonded labour punishable.

9. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989
In this Act, Section 3(vi) contains provisions relating to compelling or enticing a member of a Scheduled Caste or Scheduled Tribe.

Section 3(xii) deals with the instance of using a position of dominance to sexually exploit a Scheduled Caste or Scheduled Tribe woman.

10. Information Technology Act, 2000
This Act has relevance to addressing the problem of pornography, one of the causes of trafficking.

Besides these Central legislations there are also State Laws enacted to combat trafficking in India such as the **Karnataka Devadasi (Prohibition of Dedication) Act, 1982; Andhra Pradesh Devadasi (Prohibiting Dedication) Act, 1989; Goa Children's Act, 2003** etc.

It is also to be noted that India has signed and ratified the international conventions such as Convention on the Suppression of Immoral Traffic and of the Prostitution of Others; UN Convention on the Rights of the Child; and Optional Protocol to CRC on Sale of Children, Child Prostitution, Child Pornography so as to strengthen the cause of fighting with the deadly menace of global human trafficking.

Anti- Trafficking Laws in Bangladesh

1. The Constitution of Bangladesh: Article 18(2) and 34(1)
The Constitution of Bangladesh deals specifically with two forms of trafficking – forced labour and commercial sexual exploitation. In Article 34(1), all forms of forced labour are prohibited, and Article 18(2) places a duty upon the State to prevent prostitution.

2. Women and Children Repression Prevention Act, 2000
This is a comprehensive piece of legislation aimed at combating trafficking. The relevant sections are:
Section 5: It criminalizes the trafficking of women for prostitution or other unlawful or immoral purposes and makes it a capital offence punishable by a death sentence or life imprisonment or a prison term not less than ten and not more than twenty years. Also makes the offender liable to pay a fine.
Section 6: Child trafficking for prostitution or immoral or unlawful purposes is prohibited. A child is defined as a person below 16 years of age. This is a capital offence punishable by a death sentence or life imprisonment along with a fine.
Section 7: Punishes Kidnapping.
Section10: Penalizes sexual oppression of women or children.
Section12: Penalizes damaging of organs of a child for beggary or sale.

3. The Penal Code, 1980
The relevant sections relating to trafficking offences making it punishable are-
Section 366 -Kidnapping or abducting or inducing a woman to compel marriage.
366A- Procuring a minor girl.

366B- Importing a girl from a foreign country.
367- Kidnapping or abducting in order to subject person to grievous hurt, slavery.
370- Buying or disposing of any person as a slave.
371- Habitual dealing in slaves.
372- Selling minor for purposes of prostitution, etc.
373- Buying minor for purposes of prostitution, etc.
374- Unlawful compulsory labour.

4. **The Cruelty to Women Ordinance in 1983**
This provision provides punishment for kidnapping and trafficking of women. It provides death penalty or life imprisonment with fine for the kidnappers or traffickers.

5. The Women and Children Repression Act of 1995
This is a modification of the 1983 Cruelty to Women (Deterrent Punishment) Ordinance. In the new act, crime related to children is tied to those related to women. This act specifies that trafficking a woman for prostitution or unlawful or immoral purposes or import or export or buying or selling or renting or engaging in any other form of transportation of women is a subject to life imprisonment and fine.

6. The Suppression of Immoral Trafficking Act of 1993 provides stringent penalties for forcing a girl into prostitution.

7. The Anti-Terrorism Ordinance of 1992 makes all the types of terrorism including the abduction of women and children a punishable offence.

Besides there are other important laws in Bangladesh such as **Children Act 1974, Extradition Act 1974, Bangladesh Labour Code 2006, Employment of Women, Young Persons and Children Act 1956, Prevention of Money Laundering Act 2009** etc.

The Government of Bangladesh has also signed and ratified the UN Convention on the Rights of the Child (UNCRC); Optional Protocol to UNCRC on Sale of Children, Child Prostitution, Child Pornography; Convention on the Suppression of Immoral Traffic and of the Prostitution of Others; ILO Convention 182 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour etc in order to co-operate towards eliminating human trafficking of the vulnerable groups.

Judicial Response to the Evil of Human Trafficking
The sensitivity of the Judiciary to the problem has been of crucial importance as Judiciary is the most crucial and the powerful ally of the government to translate its dreams into reality. Fortunately the judicial systems of both the countries have been dynamic in its approach to deal with the problem and have initiated bold steps to turn away this menace from the society.

The Indian judiciary in the case of ***PUCL v Union of India***[1], ordered compensation to be paid where children were trafficked/ bonded for labour.

Vishal Jeet v Union of India and Others[2] was a landmark decision where the Supreme Court took it upon itself to give directions for the protection and rehabilitation of those who had been dedicated as *devdasis* by their families or communities for cultural reasons and were currently in prostitution.

In ***Prerana v State of Maharashtra***[3] the Apex Court clearly held that children who have been trafficked themselves should also be considered as children in need of care and protection, and not as children in conflict with the law.

Another case was ***Lakshmikant Pandey vs. Union of India***[4] which examined the vulnerability of children being trafficked in adoption rackets due to the lack of an effective protection mechanism. The court went on to create an appropriate mechanism to fill the gap, especially in the context of inter country adoptions.

Similarly the Judiciary of Bangladesh has been extremely judicious while dealing with the cases of trafficking and in addition to inflicting stringent punishment to the guilty; it has taken utmost case to work for the cause of the welfare of the sufferers.

In the case of ***Bangladesh Society for the Enforcement of Human Rights Rights (BSEHR) vs. Government of Bangladesh and Others***[5], the Apex Court gave due recognition to certain specific rights of sex workers.

In ***Abdul Gafur vs. Secretary, Ministry of Foreign Affairs, Govt of Bangladesh***[6], the Supreme Court of Bangladesh duly recognised repatriation as a fundamental right and laid emphasis on the State's responsibility in ensuring repatriation of trafficked victims.

Hence from the above, it can be inferred that the judiciary of India and Bangladesh has endeavoured its best to deal effectively with cases both on protection as well as prosecution. Their role have been significant in the context of checking cross border trafficking and in mitigating the plight of the victims.

Existing Loopholes in the Systems

Despite a plethora of Acts and judicial initiatives there are certain inherent defects in both the systems which is hindering the path of achieving a trafficking free world for dignified human existence. Certain points of criticism which have been levelled in this context are highlighted below:

- Lack of a comprehensive definition of trafficking either as a common minimum platform for the States to work on with each other or even for punishing all forms of trafficking within the countries is a major backdrop.-
- Non existence of Cooperation mechanisms like legal assistance, joint investigations etc in this context are another drawback.
- Non ratification of UNTOC and Protocols is another stumbling block as many enabling provisions of these instruments cannot be availed of.
- There is no positive duty cast upon States to provide sufficient shelters or for rehabilitation or rescue victims of trafficking.-
- The focus is on women and children, with inadequate protection for men.
- The focus is also on trafficking for sexual exploitation and punishments for trafficking for labour do not carry the same weight.
- There are insufficient awareness campaigns and community initiatives, leading to trafficking or unsafe migration which increases vulnerability to trafficking.-
- Licensing of recruitment agencies and their monitoring is not satisfactory. Illegal immigration is often resorted to.
- Systems like referrals and identification of support staff and service providers or authorities at different levels is absent.
- Absence of skilled police officers having motivation and adequate training in both pro-active and reactive investigation to combat organized crime like trafficking is another setback.

Suggestions to Combat Trafficking in India and Bangladesh[7]

Certain recommendations are suggested so as to help both the countries to check trafficking and root it out from the society:

- Ratification of the UNTOC and the Protocols is essential so that there will be a common blueprint and a common as well as comprehensive legal framework.
- In order to have a common understanding of trafficking and also to ensure that all forms of trafficking are penalized, the definition under the Protocol must be adhered to. Even if this is not done under one comprehensive law on trafficking, it must be woven into existing legislations.
- There must be a greater sensitivity to the violations of rights of women who have been trafficked.
- Trafficking must be seen as an organized crime in criminal procedure and substantive criminal law. Existing principles of criminal law, such as common intention, conspiracy, etc., must be used in cases of trafficking.
- Cooperation mechanisms must be set up with mutual contacts at different levels to cut through the red tape and make rapid action possible.
- Corruption among police and border officials must be investigated in order to ensure that cases of trafficking don't figure as illegal migration.

- Cases of trafficking should be taken up by designated courts dealing with violence against women, and judges in such courts should be both trained in the law and sensitized towards issues of gender.
- There is a need for overall systematic and focused trainings of all the wings of the criminal justice system; namely, the police, the public prosecutors and the judicial officers. There must be more stringent punishments for violations of labour standards.
- There must be greater awareness at all stages of source, demand and transit and whistleblowers must be protected
- Awareness building and community initiatives should be strengthened to prevent trafficking and to ensure that unsafe migration will not take place.

Conclusion

It can thus be concluded that human trafficking is an abhorrent phenomenon and its existence in India and Bangladesh is one of the gravest challenges for both the nations which must be given utmost attention. Along with the need of strong legal machinery and an upright judiciary, the cooperation of common people is the immediate necessity without which this problem cannot be tackled. A national plan of action supported by keen cooperation of the public is the need of the hour to eliminate this menace from the society. Trafficking is at the root of human right violations. Every human being has a legitimate right to a dignified life and it is the duty of one and one to see that this basic human right is not violated. This cherished dream can only be achieved only when this world will get rid of the plague of trafficking. The means is difficult but the end is not impossible.

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Crimes Against Women: A Rising Concern in Indian Legal Arena

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"Violence against women and girls continues unabated in every continent, country and culture. It takes a devastating toll on women's lives, on their families, and on society as a whole. Most societies prohibit such violence — yet the reality is that too often, it is covered up or tacitly condoned".

Ban Ki-Moon, (UN Secretary-General, 8th March 2007)

Abstract

The purpose of this research paper is to highlight the crimes committed against women in our society and the consequent need to amend the laws relating to the same. In a male dominated society she is subjected to harassment, ill- treatment, cruelty due to her illiteracy, economic dependence etc. In almost all the present and contemporary societies, the status of women is discriminatory and prejudicial.

Introduction

Crimes against women are showing upward trends. According to National Crime Report a total of 2,13,585 incidence of crime against women were reported in the century during 2010 as compared to 2,03,804 during 2009 recording an increase of 4.8% during 2010. These crimes have continuously increased during 2006-2010 with 1,64,765 cases in 2006, 1,85,312 cases in 2007, 1,95,856 cases in 2008, 2,03.804 cases in 2009 and 2,13,585 cases in 2010.

With the passage of time and the dominance of the materialist and patriarchal values the respected status of women showed a steady decline and in the last six- seven hundred years, it reached a point where a woman was earlier worshipped became the object of enjoyment and trade in all its forms. Crimes against women have existed invariably with time and place. Even periods of transformation have been comfortable for them.[1] Women in India, even after more than six decades of our political emancipation and self-

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governance remain discriminated, oppressed and ignored. There are various and varied factors which are responsible for pitiable condition of the fair sex.

One of the most serious impediments to women's development is the phenomenon of continuing and increasing violence against them. Gender violence manifests itself in various forms: female foeticide, infanticide, sexual abuse, immoral trafficking, molestation, dowry death, bride-burning, honour killing, which killing, and domestic violence.

There are many crimes committed against women in Indian society.

a) ***Female foeticide***

Female foeticide is the act of aborting a foetus because it is female. This is a major social problem in India and has cultural connections with the dowry system that is ingrained in Indian culture, despite the fact that it has been prohibited by law since 1961. In India a strong preference for sons over daughters exists, unlike in Western cultures. People realize smaller family sizes with relatively greater number of sons through the use of medical technologies.

According to the decennial Indian census, the sex ratio in the 0-6 age group in India went from 104.0 males per 100 females in 1981, to 105.8 in 1991, to 107.8 in 2001, to 109.4 in 2011. The ratio is significantly higher in certain states such as Punjab and Haryana (126.1 and 122.0, as of 2001). This is only the tip of the demographic and social problems confronting India in the coming years. Skewed sex ratios have moved beyond the states of Punjab, Haryana, Delhi, Gujarat and Himachal Pradesh. With news of increasing number of female foetuses being aborted from Orissa to Bangalore there is ample evidence to suggest that the next census will reveal a further fall in child sex ratios throughout the country.

Despite these horrific numbers, foetal sex determination and sex selective abortion by unethical medical professionals has today grown into a Rs. 1,000 crore industries (US$ 244 million). Social discrimination against women, already entrenched in Indian society, has been spurred on by technological developments that today allow mobile sex selection clinics to drive into almost any village or neighbourhood unchecked.

While the boys from Haryana may have found a temporary solution to the problem of missing brides, experts warn that the demographic crisis will lead to increasing sexual violence and abuse against women and female children, trafficking, increasing number of child marriages, increasing maternal deaths due to abortions and early marriages and increase in practices like polyandry. There have been only two convictions -- a fine of 300 rupees and another fine of 4,000 rupees from over 400 cases lodged under the Pre-conception and Pre-natal Diagnostic Techniques Act. Bringing about changes in the demand for sex determination is a long process and has to be tackled through women's

education and empowerment including the right to property and land rights. States in the North East and in Kerala where women have these rights show a comparatively better sex ratio.[2]

b) ***Female infanticide***

India is a patriarchal society in which a cultural bias against women has contributed to frequent cases of female infanticide, particularly in poor and rural areas. In South India, the state of Tamil Nadu is a particular area of concern due to indirect demographic evidence that suggests that the practice has increased in recent years.

Female infanticide is prevalent throughout the state, particularly in the districts of Salem, Dharmapuri, Dindigul, and Madurai. In 1995, a study indicated that the number of girls who died soon after birth was three times greater than the number of boys. In Dharmapuri, almost 3000 girls reportedly died immediately after birth between 1994 and 1997Female infanticide is leading to an ever-increasing imbalance in the sex ratio. According to census statistics, the number of female children per male children in India had dropped from 972 girls per 1000 males in 1901 to 929 girls per 1000 males in 1991, and has continued to decrease until today.

Because women are accorded such low value in Indian society, the female children who are allowed to live are at great risk of neglect and discrimination. The National Family Health Survey indicates that the risk of dying between the ages of one and five is 43% higher for girls.

c) ***Dowry death***

In a crime that is prevalent only in India, greedy husbands and his relatives harass the newlywed bride for getting more dowry, and often kill her in the process. And, very often, she is burnt alive. This horror is therefore called bride-burning or in official terms, dowry death. In 2010, there were 8391 reported cases of dowry death in the country. That works out to a shocking one death every hour approximately. Bride-burning is on the increase - just a decade ago, in 2000, there were 6995 cases.[3] In 1986, under huge pressure from the women's movement, the Indian penal Code was amended to include section 304B, specifically against murder following harassment for dowry. Section 498A was added to define harassment and cruelty by husbands and his relatives. Strangely this too has not had much effect. Laxity of the government machinery can be one reason for the failure of legal measures. After all, conviction rates in bride burning cases have dipped from an already weak 37% in 2000 to 34% in 2010. In section 498A cases, the conviction rates are even lower: just 19%, although reported cases were 94,000 in 2010.

d) ***Honor killing***

An honor killing or honour killing (also called a customary killing) is the murder of a member of a family or social group by other members, due to the belief of the perpetrators (and potentially the wider community) that the victim has brought dishonour upon the

family or community. Honour killings are directed mostly against women and girls. The perceived dishonor is normally the result of one of the following behaviors, or the suspicion of such behaviors:

a. Dressing in a manner unacceptable to the family or community,
b. Wanting to terminate or prevent an arranged marriage or desiring to marry by own choice,
c. Engaging in heterosexual sexual acts outside marriage, or even due to a non-sexual relationship perceived as inappropriate, and
d. Engaging in homosexual acts. Women and girls are killed at a much higher rate than men.

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

5. Witch Killing

National Crime Bureau statistics, a Dehra Dun-based NGO has said that nearly 150-200 women are killed every year in the country after being tagged as 'witches.'

Jharkhand tops the list with 50-60 witchcraft-related murders every year, followed by Andhra Pradesh, where the number is around 30, Haryana with 25-30 and Orissa with 24-28 deaths According to a study conducted by Rural Litigation and Entitlement Kendra (RLEK), more than 2,500 women were killed in the past 15 years after being accused of practising witchcraft.[4]

6. Domestic violence

Domestic violence in India is endemic and widespread predominantly against women. Around 70% of women in India are victims of domestic violence, act[5]. National Crime Records Bureau reveal that a crime against a woman is committed every three minutes, a woman is raped every 29 minutes, a dowry death occurs every 77 minutes, and one case

of cruelty committed by either the husband or relative of the victim occurs every nine minutes. This all occurs despite the fact that women in India are legally protected from domestic abuse under the Protection of Women from Domestic Violence Act.

7. Sexual Assault

Sexual assault is another common form of domestic violence in India. Sexual violence can include a range of forceful and non-forceful acts including unwanted kissing, touching, or fondling; sexual/reproductive coercion; rape; and marital rape. As in Delhi gang case, it crosses all limits of sexual assault. In a 1995-1996 Pub Med study conducted in Northern India, wife abuse appears to be fairly common throughout the region as a whole. 22% of the 6632 adult men surveyed reported sexually abusing their wife without physical force in at least one instance and 7% reported sexual abuse with physical force. Abuse was most common among men who also had extramarital affairs, and among those who had STD symptoms. Abusive sexual behaviors were also found to be correlated with an elevated rate of unplanned pregnancies. In 2013, a court in Mumbai ruled that *depriving a woman of sex* is a form of cruelty.

International Convention and the Indian Laws Relating to Women

1) ***Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)***
    - The convention under article 1 defines the term 'discrimination against women' as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of marital status on the basis of equality of men and women, of human rights and fundamental freedom in the political, economic, social, cultural, civil or any other field[6].

    Despite the existence of other instruments, women still do not have equal rights with men. Discrimination against women continues to exist in every society.

2) ***SAARC Convention on Preventing and Combating the Trafficking in Women and Children for Prostitution, 2002***
    - Trafficking Protocol offers a framework for tackling the problem of human trafficking.
    - To prevent and combat trafficking in persons, paying particular attention to women and children;
    - To protect and assist victims of such trafficking, with full respect for their human rights; and
    - To promote international co-operation to achieve objectives.

3) ***The Dowry Prohibition Act 1961***

The evil of dowry system has been a matter of serious concern to everyone in view of its ever-increasing and disturbing proportions. The legislation on the subject enacted by Parliament, *i.e*., the Dowry Prohibition Act, 1961 and the far-reaching amendments which have been made to the Act by a number of States during the seventies have not succeeded in containing the evil. As pointed out by the Committee on the Status of Women in India, the educated youth is grossly insensitive to the evil of dowry and unashamedly contributes to its perpetuation. Government has been making various efforts to deal with the problem.

Though the legislation, The Dowry Prohibition Act, 1961, aptly prohibits the giving or taking of dowry, it was felt that the present law has been totally ineffective to curb this social evil. The convention, which was attended by chairpersons of various State Commissions for Women, members of NGOs', Civil Servants as well as retired and working police officers from various states, felt that there was a dire need to make the requisite amendments to the Act so as to make it effective[7]

4) The Medical Termination of Pregnancy Act, 1971

It states that all the abortion conduct requires the consent of the woman. If it conducted without the consent of the concerned woman then it is against her human right. All the abortions conducted after the period of twenty weeks of the pregnancy it would be illegal.

5) The Pre-Conception and prenatal Diagnostic Techniques Act (Prohibition of Sex Selection) Act, 2002

1. This act was passed to meet the need of the modern society. This act The Act provides for the prohibition of sex selection, before or after conception.
2. It regulates the use of pre-natal diagnostic techniques, like ultrasound and amniocentesis by allowing them their use only to detect :
    1. genetic abnormalities
    2. metabolic disorders
    3. chromosomal abnormalities
    4. certain congenital malformations
    5. haemoglobinopathies
    6. Sex linked disorders.
3. No laboratory or centre or clinic will conduct any test including ultrasonography for the purpose of determining the sex of the foetus.
4. No person, including the one who is conducting the procedure as per the law, will communicate the sex of the foetus to the pregnant woman or her relatives by words, signs or any other method.
5. Any person who puts an advertisement for pre-natal and pre-conception sex determination facilities in the form of a notice, circular, label, wrapper or any document, or advertises through interior or other media in electronic or print form or engages in any visible representation made by means of hoarding, wall painting, signal, light, sound, smoke or gas, can be imprisoned for up to three years and fined Rs. 10,000.

The PCPNDT Act 1994 (Preconception and Prenatal Diagnostic Techniques Act) was modified in 2003 to target the medical profession - the 'supply side' of the practice of sex selection. However non implementation of the Act has been the biggest failing of the campaign against sex selection. According to the data, as many as 22 out of 35 states in India had not reported a single case of violation of the act since it came into force. Delhi reported the largest number of violations – 76 out of which 69 were cases of non registration of birth! Punjab had 67 cases and Gujarat 57 cases.

In a recent landmark judgment the Mumbai High Court upheld an amendment to the PCPNDT Act banning sex selection treatment. The Court pronounced that pre natal sex determination would be as good as female foeticide. Pre-conception sex determination violated a woman's right to live and was against the Constitution, it said.

The Act mandates compulsory registration of all diagnostic laboratories, all genetic counseling centers, genetic laboratories, genetic clinics and ultrasound clinics. Amendment in 2003. Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (PNDT), was amended in 2003 to The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition Of Sex Selection) Act (PCPNDT Act) to improve the regulation of the technology used in sex selection.
Implications of the amendment are:-

1. Amendment of the act mainly covered bringing the technique of pre conception sex selection within the ambit of the act
2. Bringing ultrasound within its ambit
3. Empowering the central supervisory board, constitution of state level supervisory board
4. Provision for more stringent punishments
5. Empowering appropriate authorities with the power of civil court for search, seizure and sealing the machines and equipments of the violators
6. Regulating the sale of the ultrasound machines only to registered bodies.

6) Honour Killing

In order to curb this social evil, the government of India is planning to bring a bill (2010), to provide for deterrent punishment for 'Honour' killings.

7) Provisions under Indian Penal Code

Dowry death Section 304B: Death of a woman within 7 years of her marriage.
Section 498A: When husband or his family subjects woman to cruelty ("intentional" behavior that causes serious injury or harassment for dowry).
Section 376: Rape law
Section 294: Obscene acts and songs
Section 354: Intent to outrage a woman's modesty

8) ***The Protection of Women against Domestic Violence Act (PWDVA) 2005:*** highlights
Rights-based (civil) law
Advocates the right to live with dignity
First law in India to define DV in a comprehensive way
Legal right to live a life free of violence

Conclusion

According to National Family Health Survey (NFHS) in India out of 5 women 1woman (20%) face domestic violence from their husbands, where as global statistics shows that between 20-50% women are facing domestic violence in her day to day life. According to The National Crimes Record Bureau (2007) the total crime against women has been increased by 12.5% from 2006. So it is gradually increasing. Though many laws and programmers have been launched by the government of India but due to the lack of implementation woman are still facing violence in society. Many crimes are committed against woman. But still no effective law has been passed by our legislature.

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Cross Border Corruption in India and means of its Elimination through Transparency and Accountability in Governance

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Abstract

Corruption has become a global phenomenon and now it is omnipresent. Corruption has progressively increased and is now rampant in our society. Corruption in India is a consequence of the nexus between bureaucracy, politics and criminals. In last three decade, many cross border corruptions took place which has been authored with foreign counterpart. In this paper, emphasis has been endeavored on analysis of cross border corruptions which have occurred with the nexus of corrupt foreign agency/dealers/agents and with the ministers, diplomats and other representatives of our country which resulted into huge loss of government revenues. In curbing such corruption transparency in the system of dealing such transaction and accountability of our representatives is effective. Accountability is another key requirement for the prevention of cross border corruption. Governmental, non governmental institutions must be accountable to the public, for their various functions performed on behalf of the country.

Key Words: - cross border corruption, transparency, accountability, bureaucrats.

Introduction

Corruption has become a global phenomenon and now it is omnipresent. Corruption has progressively increased and is now rampant in our society. Corruption in India is a consequence of the nexus between bureaucracy, politics and criminals. India is now no longer considered a soft state. It has now become a consideration state where everything can be had for a cons- ideration. Today, the number of ministers with an honest image can be counted on fingers. At one time, bribe was paid for getting wrong things done but now bribe is paid for getting right things done at right time. Cross border corruptions are high-level corruption and scams which are now threatening to derail the country's credibility and economic growth. This type of corruptions has resulted into less attraction of investment and aid in a competitive global market. At the same time, business within the country has faced ever stiffer competition with the globalization of trade and capital market, and has become less willing to tolerate the expenses and risk associated with corruption. Such corruptions are authored in foreign nations with politicians, leaders and diplomats of our country. In post independence era, cross border scams like jeep scandal 1948, Bofors scandal 1980, Airbus scandal 1990, Hawala scandal 1996, Common wealth game 2010,Vodavone tax evasion 2013, Agusta Westland chopper deal scam 2013 etc are the

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some examples. The other recent high level corruptions like Securities scam of Harshad Mehta 1992, Urea scam 1996, Telecom fraud 1996, Fodder scam 1996[1], Satyam Computer Services scandal 1996, Stock market scam 2001, 2G spectrum scam 2010, Coalgate

Coal gate scam 2012, Saradha Group chit fund scam 2013 etc are the some handful example of domestic scams and scandals which has also ruined the image of our country. Our country has not able to acquire 50 marks in corruption measurement tools, transparency tools and other governance and development indicators, which are prerequisite for the overall development of a nation[2]. Corruption is not a serious concern only for our country but at world wide it has taken a devastated form of cancer.

At global level, United Nations Convention against Corruption was adopted by the General Assembly by resolution 58/4 of October 31, 2003 and it entered into force on December 14, 2005. On May 12, 2011, our country became the 152nd country to ratify United Nations Convention against Corruption. This ratification is characterized as a reaffirmation of the commitment of our country to fight against this epidemic menace and to undertake vigorously administrative legal reforms. In this paper, emphasis has been endeavored on cross border corruptions which have occurred with the nexus of corrupt foreign agency/dealers and with the ministers, diplomats and other representatives of our country. In curbing such corruption transparency in the system of dealing such transaction and accountability of our representatives will be effective. The impact of corruption can be minimised to a certain extent by incorporating more and more transparency into the governmental official system. Transparency includes keeping proper record and providing prompt and speedy information on various deals undertaken by the concern officials/politicians with foreign counterparts, necessary disclosure decentralization of powers etc. Right to information Act 2005 has provided the necessary rights to all citizen of this country to seek information from governmental institutions/officials, is contributing transparency in cross border corruptions. Accountability is another key requirement of good governance. Governmental, non governmental institutions must be accountable to the public, for their various functions performed on behalf of the country. Who is accountable to whom, varies depending on whether decisions or actions taken internal or external to an organisation or institution. Accountability cannot be enforced without transparency in the system and rule of law. A detail focus on transparency and accountability in governance in curbing cross border corruption is another key area to discuss in this paper.

Major Indian Cross Border Corruptions

Cross border corruption is caused by excessive regulations and authorization requirements, complicated taxes and licensing systems, mandated spending programmes, lack of competitive free markets, monopoly of certain goods and service providers by government controlled institutions, bureaucracy, lack of penalties for corruption of public officials, and

lack of transparent laws and processes[2]. Here few major cross border corruptions which have rocked the Indian economy and society is worth to mention.

Jeep Scandal 1948

The history of corruption in post-Independence India starts with the Jeep scandal in 1948. VK Krishna Menon, the then High Commissioner for India in London signed a deal with a foreign firm worth Rs 80 lakh for jeeps for the Indian Army in Kashmir without observing normal procedure. He ignored protocols and signed this contract for the purchase of army jeeps with a UK based firm. While most of the money was paid up front for supply of 200 jeeps but only 155 jeeps landed, the then Prime Minister Nehru forced the government to accept them. Govind Ballabh Pant the then Home Minister and the then Government of Indian National Congress announced on September 30, 1955 that the Jeep scandal case was closed for judicial inquiry ignoring the demand of the opposition and the Inquiry Committee led by Ananthsayanam Ayyangar.

Bofors Scandal 1980

It was a major corruption scandal in India in the 1980s and 1990s, initiated by Congress politicians and implicating the Prime Minister, Rajiv Gandhi and several others who were accused of receiving kickbacks from Bofors AB for winning a bid to supply India's 155 mm field howitzer. It was alleged that Ottavio Quattrocchi, who was close to the family of Rajiv Gandhi, acted as a middleman in the deal and received kickbacks of Rs 64 crore to facilitate the deal from the Swedish firm Bofors. The deal for 400 Bofors guns was worth $1.3 billion.

The scale of the corruption was far worse than any that India had seen before and directly led to the defeat of Gandhi's ruling Indian National Congress party in the November 1989 general elections. The Swedish company paid INR640 million (US$12 million) in kickbacks to top Indian politicians and key defence officials. The case came into light during Vishwanath Pratap Singh's tenure as defence minister. On 5 February 2004, the Delhi High Court quashed the charges of bribery against Rajiv Gandhi.[4] On 16 January; the Indian Supreme Court directed the Indian government to ensure that Ottavio Quattrocchi did not withdraw money from the two bank accounts in London. The CBI, the Indian federal law enforcement agency, on 23 January 2006 admitted that roughly Rs 210 million, about US $4.6 million, in the two accounts have already been withdrawn by the accused. The British government released the funds later.

However, on 16 January 2006, CBI claimed in an affidavit filed before the Supreme Court that they were still pursuing extradition orders for Quattrocchi. The Interpol, at the request of the CBI, has a long-standing red corner notice to arrest Quattrocchi. Quattrocchi was detained in Argentina on 6 February 2007, but the news of his detention was released by the CBI only on 23 February. Quattrocchi was released by Argentinian police. However, his passport was impounded and he was not allowed to leave the country. As there was no

extradition treaty between India and Argentina, the case was presented in the Argentine Supreme Court. The government of India lost the extradition case as the government of India did not provide a key court order which was the basis of Quattrocchi's arrest. In the aftermath, the government did not appeal this decision because of delays in securing an official English translation of the court's decision. A Delhi court provided temporary relief for Quattrocchi from the case, for lack of sufficient evidence against him, on 4 March 2011[5]. On 12th July 2013, Quattrochi died of a heart attack in Milan.

Despite the controversy the Bofors gun was used extensively as the primary field artillery during the Kargil war with Pakistan and gave India 'an edge' against Pakistan according to battlefield commanders.

It is important to mention here that after passing of 25 years of long period no accused were punished but most of the prominent accused has expired though. This major scam has been criticized by experts, social workers, political parties and people at large for the manner in which it has handled. There was delay in lodging first information report (FRI) and in framing charge-sheet against accused by Central bureau of intelligence (CBI). CBI put up a very weak case for Quattrocchi's extradition from Argentina. Subsequently, no appeal preferred against the verdict of lower court of Argentina because of delays in securing an official English translation of the court's decision. This shows that there is no effective machinery and lack of political will for completing prompt investigation

Airbus Scandal 1990

Indian Airline's signing of the Rs.2,000 crore deal with Airbus made by France instead of Boeing caused a furore following the crash of an A-320 airliner. New planes were grounded which caused Indian Airlines a weekly loss of Rs 2.5 crore[6]. In March 1990 India's Central Bureau of Investigation (CBI) filed a first information report (FIR). It was investigating the allegations that Airbus had bribed highly placed public servants and others to induce Indian Airlines (IA) to order its aircraft. There was allegation against Mr. Rajiv Gandhi, who was also a former pilot. IA received an offer from Airbus for A320 aircraft, a smaller and less expensive plane than Boeing's 757. It required urgent attention. Second, that in November 1984, the aviation ministry gave IA just three days to appraise the offer for Mr. Gandhi's office[7].

Much later, in 1990, *Indian Express*, an Indian newspaper, reported a leaked manuscript note which showed that Mr Gandhi had decided at a meeting on August 2nd 1985 that IA "should go in for Airbus A320 aircraft". In March 1986 state-owned IA had ordered 19 Airbus A320s, worth $952m, with an option for 12 more, later exercised. This was despite the fact that, when IA set up a committee in 1983 to recommend replacement aircraft for its ageing Boeing fleet, the A320 was not considered as it had not then been launched or flown. With approval from the Indian government, IA had in July 1984 paid Boeing a deposit for 12 Boeing 757s, large narrow-bodied aircraft. Several civil servants

and IA officials were named in the FIR. One name not on the list was that of Rajiv Gandhi, India's prime minister in 1984-89, who was assassinated in May 1991. However the Delhi High Court ruled out that the Indian government should not approve further purchases from Airbus until the CBI had obtained the information it wanted from the French Government[8].

There is no progress by CBI in investigation even after passing 12 years as Government of France is not cooperating. This scandal is still mysterious to us who has received the kickbacks. This also shows the importance of transparency and accountability in the public governance in checks and balance in cross border corruptions.

Hawala Scandal 1996

Another scam which defaced the politics of India is Hawala scam. This major scam to the tune of $18 million bribery scandal, which came in the open in 1996, involved payments allegedly received by country's leading politicians through hawala brokers Jain brothers. From the list of those accused also included Lal Krishna Advani who was then the Leader of Opposition. Other prominent political figures who were alleged to involve in this scandal were V.C.Shukla, P Shiv Shankar, Sharad Yadav, Balram Jakher and Madan Lal Khurana. Thus, for the first time in Indian politics, it gave a feeling of open loot all around the public, involving all the major political players being accused of having accepted bribes and also alleged connections about payments being channeled to militant groups in Kashmir. This scam was not investigated properly by Central Bureau of Investigation so leading into innocence of the leaders by the court.

Commonwealth game 2010 Scandal

The XIXth Commonwealth Games (CWG) is perhaps one of India's most well known scam in which all Indians have been robbed in their home. This event was held in Delhi from October 3-14, 2010 and Suresh Kalmadi was the chairman of the Organizing Committee of this event. Corruption, negligence and irregularities in organizing this event has cost the nation more than Rs 2,300 crore, according to the report of Controller Auditor General of India. It consisted of a number of corrupt deals involving overstated contracts. Kalmadi was held main accused who also handed out Rs 141 crore contracts to Swiss Timing for its timing equipment; the deal was inflated by Rs 95 crores. Less than 10 days before the games, athletes were told to move into apartments that were shabby and dilapidated. The day after the conclusion of the Games, the Indian Government announced the formation of a special committee to probe the allegations of corruption and mismanagement against the Organizing Committee. The probe committee will be led by former Comptroller and Auditor General of India VK Shunglu. This probe was in addition to the Central Bureau of Investigation, Enforcement Directorate, and Central Vigilance Commission investigations. The probe committee is tasked with looking into "all aspects of organizing and conducting" the Games, and "to draw lessons from it." It was given three months to submit its report, but the report was never publicly released. Mr. Kalmadi is currently out on bail. This scam

was not investigated properly by investing agencies resulted into huge loss of money and also affect the image of the country. This scam also highlighted how in the lack of transparency and accountability, the investigating agencies of the country faced the problems during their investigation.

III Role of Transparency and Accountability in Elimination of Cross Border Corruption

In all above cross border corruption it is evident that transparency in the system and accountability of governmental officials is necessary to curb such high level corruption and to fix their liability. Accountability cannot be enforced without transparency in the system and rule of law. In minimizing cross border corruptions in India, transparency in the system of dealing such transaction and accountability of our representatives will be effective. The impact of corruption can be minimised to a certain extent by incorporating more and more transparency into the governmental official system.

According to Transparency International, "Transparency is about shedding light on rules, plans, processes and actions. It is knowing why, how, what, and how much. Transparency ensures that public officials, civil servants, managers, board members and businessmen act visibly and understandably, and report on their activities. And it means that the general public can hold them to account. It is the surest way of guarding against corruption, and helps increase trust in the people and institutions on which our futures depend".
Transparency includes keeping proper record and providing prompt and speedy information on various deals undertaken by the concern officials/politicians with foreign counterparts, necessary disclosure, decentralization of powers etc.

The following are the main parameters of cross border corruption which need attention of our leaders either sitting in Government or in opposition:

1. Bribes in the deal, allotment of tender in the foreign deals.
2. Embezzlement of public fund in such deals,
3. Theft of public money
4. Siphoning of the public or common resources into private pocket
5. Money laundering
6. Non monetary bribes such as favours, services and gift.

Right to information Act 2005 has provided the necessary rights to all citizen of this country to seek information from governmental institutions/officials, is contributing transparency in cross border corruptions.

Role of Right to information Act 2005 in achieving transparency in the system

Dismantling the wall of secrecy, the Right of information Act was passed in 2005 by the parliament of the country which has been proving an effective tool to curb the corruption.Under various provisions of the Act, any citizen may request to provide

information from a "public authority" (a body of Government or "instrumentality of State") which is required to reply expeditiously or within thirty days. The Act also requires every public authority to computerise their records for wide dissemination and to pro-actively publish certain categories of information so that the citizens need minimum recourse to request for information formally. The Act specifies time limits for replying to the request.

- If the request has been made to the Public Information Officer (PIO), the reply is to be given within 30 days of receipt[9]. If the request has been made to an Assistant Public Information Officer, the reply is to be given within 35 days of receipt[10].
- If the PIO transfers the request to another public authority (better concerned with the information requested), the time allowed to reply is 30 days but computed from the day after it is received by the PIO of the transferee authority.
- Information concerning corruption and Human Rights violations by scheduled Security agencies (those listed in the Second Schedule to the Act) is to be provided within 45 days but with the prior approval of the Central Information Commission.
- However, if life or liberty of any person is involved, the PIO is expected to reply within 48 hours[11].

The time between the reply of the PIO and the time taken to deposit the further fees for information is excluded from the time allowed. If information is not provided within this period, it is treated as deemed refusal. Refusal with or without reasons may be ground for appeal or complaint. Further, information not provided in the times prescribed is to be provided free of charge. Appeal processes are also defined. The Act also provides exemption of disclosure of certain informations[12]. These are:-

1. Information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, "strategic, scientific or economic" interests of the State, relation with foreign State or lead to incitement of an offense;
2. Information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;
3. Information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;
4. Information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;
5. Information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;
6. Information received in confidence from foreign Government;
7. Information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

8. Information which would impede the process of investigation or apprehension or prosecution of offenders;
9. Cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers;
10. Information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual (but it is also provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied by this exemption.

Right to information guaranteed under the Right to information Act, is not absolute in view of section 3 of the Act, which provides that "subject to the provisions of the Act all citizens have the right to information". Section 8(2) of the Act states that certain information are exempted as stated above, from disclosure which are not in the interest of the country as mentioned in Official Secrets Act 1923. The impact of corruption can also be minimised to a certain extent by incorporating transparency into the system. Transparency can be achieved by deregulation of excessive regulations: If one were to categorize bribes, it could be said that some bribes fall into the category of "insurance fees to avoid unfavourable treatment", other bribes fall into the category of "preferential treatment" and the remaining ones "facilitate speedy processing". The root cause of each lies in excessive and archaic regulations. A major step towards transparency would be to de-regulate procedures in the system. With the fast development of information technology, today people of any country need expeditious information. If any organisation is not able to provide information sought within stipulated time frame then it is deemed that the there is no transparency in the organisation.

Information on various foreign deals to be discussed in the public arena but if it not advisable on the security of the country then these must be discussed in the special sessions of parliament or in separate meeting of the prominent leaders of both the side, ruling as well opposition.

Removal of Language Barriers: Many foreign deals are in the language of that country so to make it meaningful this barrier has to be removed and common English language should be used so that there should not be any ambiguity in such deal.

Accountability is another key requirement for the prevention of cross border corruption. Governmental, non governmental institutions must be accountable to the public, for their various functions performed on behalf of the country. Who is accountable to whom, varies depending on whether decisions or actions taken internal or external to an organisation or institution. Accountability makes the abuse of political parties less likely, while at the same time helping to empower governments to serve the end that democratically elected governments are legitimately asked to pursue. The representatives of the people and

administrators of the country must be answerable for their act so an effective legislation was felt necessary. An effort has been done by Anna Hazare, a social activist and his team for effectively curb the corruption and proposed Jan Lokpal bill which has not yet been passed by the upper house (Rajya Sabha).

Some Important Features of Jan Lokpal Bill

- There will be an institution called Lokpal at the centre and Lokayukta in each state will be set up.
- The Lokpal shall work independently like the Judiciary and no minister or bureaucrat will be able to influence their investigations.
- The investigations of corruption cases shall be completed within one year and the corrupt officer shall be sent to jail within two year through speedy trail.
- The loss caused to the government shall be recovered from the offender at the time of conviction.
- If any work of a citizen is not completed within the prescribed time limit in any government office, Lokpal shall have power to impose penalty on the guilty officer.
- The CVC, departmental vigilance and anti corruption branch of CBI shall be merged into Lokpal.
- The Lokpal shall provide protection to whistle blower in case of any corruption and those who are victimizes for raising their voice against corruption.

Conclusion

With a booming economy in the 2000, it seemed like India was on the fast track to becoming a developed nation. However, recent slow growth has not only reigned in this optimism, but it has also revealed just how rampant government corruption is throughout the country. Major cross border scandals and domestic scandals in the telecommunications industry and the coal mining industry have come to light in the past year, rocking the country and bringing the previous coalition government under serious criticism. Tens of billions of dollars of taxpayer revenue have been wasted as a result of such corruption, and many fear this is only the tip of the iceberg. Some reports suggest that as much as fifty percent of government money intended for welfare programs and subsidies ends up in the pockets of politicians, bureaucrats, and influential businessmen instead. With 600 million people living in poverty, 300 million living without electricity and 65 percent of the entire population under thirty-five years of age, most without any marketable skills, India cannot afford to waste any of its resources if it wants to improve the welfare of its citizens. While corruption scandals have made the headlines in India recently, the black money problem issues have been deeply entrenched in the bureaucratic and political system for decades. Politicians and bureaucrats in India have amassed a great deal of private wealth, much of which is black — deposited, untaxed, in overseas accounts. This results in a significant loss of revenue for India, with some estimates reporting about $419 billion in taxable income and profits being laundered out of the country over the past decade. This loss of revenue stems largely from a treaty India has with Mauritius. “Indians can deposit funds in

Mauritius bank accounts tax free, allowing politicians to 'round trip' their money — it comes back into India as white money through fake projects or to fund their election campaigns. As a result, this tiny island has become India's largest financier; hence this believes should signal a major red flag that corruption is taking place. In fact, last year, facing mounting international pressure, the Indian government adopted a tax code that will close this loophole for untaxed overseas deposits. While this reform is encouraging, the new tax code was supposed to be implemented in 2013, but it has already been pushed back to 2014, which means India will continue to lose sizable amounts of revenue for at least another year.

Transparency in the system and accountability of governmental officials is necessary to curb cross border corruption and to fix their liability. Accountability cannot be enforced without transparency in the system and rule of law. Right to information Act should be strengthened if we want transparency in the system. Independent committees are to be formed, every time, for all foreign deals to scrutinize. In forming such committee the leader of opposition parties to be included. Punishments as per the Prevention of Corruption Act are to be strictly awarded to those bureaucrats who are involved in such corruption. The Supreme Court of India is very conscious and punished many political leaders and bureaucrats, found guilty of corruption. Now, Jan Lokpal Bill has also been passed by the Parliament which will facilitate to prevent cross border corruptions to a certain extent by incorporating more and more transparency into the governmental official system.

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[1.] This scam broke out in 1996 in the town of Chaibasa, Bihar when the animal husbandry department embezzled funds of around Rs 950 crore meant to purchase cattle fodder, medicines and animal husbandry equipment in Bihar. Chief Minister Lalu Prasad Yadav was forced to resign along with former Chief Minister Jagannath Mishra. Mr. Lalu Prasad Yadav has been sentenced to jail for 5 years and also Rs.25 lakh fined, former Chief Minister Jagannath Mishra has been punished with 4 years imprisonment and Rs.2 lakh fine and all other 45 accused were punished by CBI special court on 5th October 2013. Presently Mr. Lalu Prasad Yadav has been released on bail.

[2.] According to Transparency International's Corruption Perceptions index 2012. There is improvement in the score in compare to the index of 2011.(49th position now against 95th position of 2011).

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[7] Available on https: www.economist.com access on 25th April 2014 at 15:16 pm.

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Cruelty Against Husband

Dharam Deshna*

Introduction

The payment of a dowry gift, often financial, has a long history in many parts of the world. In India, the payment of a dowry has been prohibited since 1961 under Indian civil law. Subsequently, Sections 304B and 498A of the Indian Penal Code were enacted, making it easier for the wife to seek redress from harassment by the husband's family.[1]

Every law has its backside. People often tend to misuse laws to satisfy their personal needs while ignoring the main purpose for which the law was enacted. Now a days, the laws which were enacted to prevent the interest of women act as a strong weapon of harassment and cruelty against men. Though it is the women who have always been subjected to be tortured and harassed by the husband and relatives, in fact saying this will not be proper as cases of torture and harassment against the husband by the wife is increasing day by day[2]. Freedoms of education, job opportunities, economic independence and social attitude have brought tremendous change in the status of women. The balance of scale has tilted reversely in favour of women bailable in nature. It is indeed a misfortune that the law which was enacted to protect the interest of a particular group of people is now being used by the same group of people in a fallacious manner. Women often use the backing of law as a tool to satisfy their personal hatred towards their husband and his family members. This paper is a humble attempt to find out what all acts/omissions amounts to cruelty. How women use the loopholes in law to work for their own benefit? Authors also intend to explore and find out reason as to why such practice is increasing day by day with the aid of recent case laws. Towards the end authors aim to find out possible suggestions in order to deal with the issue.[3]

Meaning of Cruelty

The concept of cruelty has varied from time to time, place to place and from individual to individual. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions, their cultural and human values to which attaches importance ***Vinita Saxena vs. Pankaj Pandit***.[4] What may amount to cruelty in one case may not amount to cruelty in another case .Mental cruelty broadly means; when either party causes mental pain, agony or suffering of such a magnitude that it severs the bond between the wife and husband. In other words, the party who has committed wrong is not expected to live with the other party ***S. Hanumantha Rao vs. S.Ramani,*** [5]

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Though it is the duty of the court to decide the case based on facts and circumstances but what amounts to cruelty is an important aspect as misuse of Laws by the wife against husband in society is growing day by day and most apparently some Indian Urban educated women have turned the tables and are using these laws as weapon to unleash personal vendetta on their husbands and innocent relatives and there are certain grounds on which cruelty against husband can be proved:

- Misuse of Dowry Laws, Domestic Violence Act and 'Sec: 498-A' of IPC by wife against husband and in-laws of husband through lodging false complaints.
- Desertion by wife which means wife deliberately intending for separation and to bring cohabitation permanently to an end.
- Adultery by the wife means wife having sexual relationship with some other person during the lifetime of marriage and there must be strict law to punish wife who has committed adultery.
- Wife opting out for second marriage without applying for the divorce proceedings.
- Threatening to leave husband's home and threat to commit suicide by the wife.
- Cruel behavior of wife where wife tearing the shirt of the husband, refusing to cook food properly or on time and breaking of the mangalsutra in the presence of husband's relatives.
- Abusing and accusing husband by way of insulting in presence of in-laws and in some cases wife abusing husband in front of office staff members.
- Wife refusing to have sex with husband without any sufficient reasons which can be considered as a ground of cruelty and husband can file a divorce petition.
- Lowering reputation of the husband by using derogatory words in presence of family members and elders
- Lodging FIR against husband and in-laws which has later proved as false report.

Grounds for Cruelty

When wife- humiliating her husband in the presence of family members and friends as in the case of ***Krishna Banerjee vs. Bhanu Bikash Bandyopadhya***,[6]taunting her husband on his physical incapabilities. Denying him access to physical relationship, Wife opting out for second marriage without applying for the divorce proceedings, deliberately wearing clothes which her husband dislikes, neglect, Extra-marital affairs of wife can also be a ground of cruelty against the husband, coldness and insult, threatening to commit suicide, keeping husband outside the door of house, Cruel behavior of wife where wife tearing the shirt of the husband, refusing to cook food properly or on time and breaking of the mangalsutra in the presence of husband's relatives, visiting her parent's family off and on against her husband' swishes, undergoing an abortion despite her husband asking her not to do so, refusing to do household work, complaining to husband's employer, disobedience. In other words, the party who has committed wrong is not expected to live with the other party ***S.Hanumantha Rao vs. S. Ramani***, [7]Making false allegations by wife against the husband amounts to mental cruelty. In order to consummate marriage, ordinary and complete sexual intercourse must take place ***Gudivada Venkateswararao vs. Gudivada***

Nagaman[8] Marriage would be avoided or dissolved on the ground of impotence if it is established that at the time of marriage either spouse was incapable of effecting the consummation, either due to structural defect in the organs of generation rendering complete sexual intercourse impracticable or due to some other cause.[9] Acts of commission by a woman in filing a criminal complaint against her husband and his relatives resulting in the husband being in distress in jail constitute mental cruelty to him and, therefore, he is entitled to get the relief of divorce, the Madras High Court has held the that cruelty would normally consist not of harmful acts but of injurious reproaches, complaints, accusations or taunts. It should be established that one party in the marriage, ignoring consequences, had misbehaved, which the other party could not be called upon to endure, and that misconduct had caused injury to health or a reasonable apprehension of such injury K. T. Sangameswaran, Man granted divorce on grounds of cruelty.[10]

Section 498A of I.P.C. and Its Mis-Use

Initially section 498A came into existence in order to protect women from dowry harassment and domestic violence. But presently, the instances of misuse of this provision have become a daily phenomenon. It is no wonder that Supreme Court in the landmark case of ***Sushil Kumar Sharma vs. Union of India***[11] has condemned 498A as 'Legal Terrorism'. Since cruelty is a ground for divorce under section 13 (1) (ia) of Hindu marriage Act, 1955. Wife often use this provisions in order to threaten husband .According to the information received from the Hon'ble High Courts (during the year 2011), 3, 40,555 cases under Section 498-A IPC were pending trial in various courts towards the end of 2010. There were as many as 9, 38,809 accused implicated in these cases excluding Punjab and Haryana courts (243rd report of Law commission on section 498A of IPC).This data makes it crystal clear that day by day the problem is getting more severe

Bureau data show Since 2007, around 2.5 lakh women have been arrested under Section 498A of the Indian Penal Code, which deals with cruelty to a married woman by her husband and his relatives. This comes to an average of over 40,000 arrests of women per year under the section more than under any other criminal law section .According to the crime bureau's latest report, around 2.1 lakh women were arrested in 2011. Of these arrests, those under 498A accounted for 47,951 or 22.6 per cent, and those under Section 304B (dowry deaths) for another 5,031 or 2.37 per cent, for a combined tally of about 25 per cent. Most 498A arrests are related to dowry harassment Lawyers say that the women arrested under this section, which is non-bailable, are mostly sisters and mothers of the accused husband.

Legislative Approach

- The Hindu Marriage Act, 1955: Under section 13 of The Hindu marriage act, cruelty is a ground for divorce.
- Section 27 of The Special Marriage Act, 1954, provides for 12 grounds for divorce. One of them is cruelty.

- Section 2 of The Dissolution of Muslim Marriages Act, 1939 also provides for dissolution of the marriage on the ground of cruelty
- Section 32 of The Parsi Marriage and Divorce Act, 1936, provides for 11 grounds for divorce. One of them is cruelty.
- Section 10 of The Indian Divorce Act, 1869, provides for 7 grounds of dissolution of marriage of Christians. One of them is adultery coupled with cruelty

Conclusion and Suggestion

Women NGOs should not serve as a catalyst to promote frivolous complaints rather they should fight against false complaints. Trivial matters should be dealt in trivial manner. Wife and their relatives should be made aware of the consequences of their act .It has been observed that, during the pendency of the case filed under section 498A, husband and their relatives are forced to come to court in order to defend their case. In the process, even though final verdict is in favour of husband, the mental and financial agony suffered during the entire proceeding is also a matter of concern. By now it is clear that the law is tilted towards women. In order to combat with the present scenario, law should be made gender neutral. In addition to this, penalty should also be given for making false accusation. It is rightly said that the significance of the court's directive goes beyond what happens to Section 498A. It marks a conceptual shift, a turn away from the culture where women were seen only as victims who were incapable of leveling false allegations. The conception of women as the silent suffering sort who could do no wrong has influenced the administration of justice in both open and subtle ways. The assumption of women's innocence is apparent in laws devised to deal with rape and other crimes against women where the presumption of innocence is not available to the accused (Amend dowry law to stop its misuse, SC tells govt, Aug 17, 2010, The Times of India).

Suggestion

The Malimath committee in 2003 proposed that Section 498A be made bailable and compoundable.[12]. In August 2010, the Supreme Court asked the Government of India to amend the Dowry Laws to prevent their misuse[13]In January 2012, the Law Commission of India, after a review recommended dilution of anti-dowry law (Section 498-A).In its latest recommendation to the law ministry, the commission headed by Justice PV Reddi, has recommended to the government to make Section 498-A of the Indian Penal Code (IPC), which deals with harassment for dowry and cruelty to a woman in her matrimonial home, a compoundable offence[14] Hindustan Times. 2011-02-28. The commission said the offence should be allowed to be made compoundable provided the women is facing no external pressure[15] This means that those who would be booked in cases under this section would find it easier to get bail.[16] Hence, focus should also be on speedy and prompt disposal of the cases. For this some amendments should be brought into force which specifies time-period for the same. Unless required, husband should not unnecessarily be burdened to show physical presence. Further, some concepts should be made clear in order to do away with ambiguity. A strict law need to be passed by the parliament for saving the institution

of marriage and to punish those women who are trying to misguide the court by filing false reports just to make the life of men miserable and 'justice should not only be done but manifestly and undoubtedly be seen to be done .Though the amendments introduced in the penal code are with the laudable object of eradicating the evil of Dowry, such provisions cannot be allowed to be misused by the parents and the relatives of a psychopath wife who may have chosen to end her life for reason which may be many other than cruelty. The glaring reality cannot be ignored that the ugly trend of false implications in view to harass and blackmail an innocent spouse and his relatives. A strict law need to be passed by the parliament for saving the institution of marriage and to punish those women who are trying to misguide the court by filing false reports just to make the life of men miserable and 'justice should not only be done but manifestly and undoubtedly be seen to be done'1[17].

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Dimensions of the Right to Development as a Human Right: A Review of the Convention on the Rights of Persons with Disabilities

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Persons with disabilities are still often 'invisible' in society, either segregated or simply ignored as passive objects of charity. They are denied their rights to be included in the general school system, to be employed, to live independently in the community, to move freely, to vote, to participate in sport and cultural activities, to enjoy social protection, to live in an accessible built and technological environment, to access justice, to enjoy freedom to choose medical treatments and to enter freely into legal commitments such as buying and selling property. It is in this context that, The Convention on the Rights of Persons with Disabilities yields its significance by being the first human rights treaty of the third millennium. It is also the only UN human rights instrument with an explicit sustainable development dimension. It became one of the most quickly supported human rights instrument in history, with strong support from all regional groups.155 States signed the Convention upon its opening in 2007 and 126 States ratified it within its first five years. The Convention on the Rights of Persons with Disabilities is an international human rights treaty of the United Nations intended to protect the rights and dignity of persons with disabilities. Parties to the Convention are required to promote, protect, and ensure the full enjoyment of human rights by persons with disabilities and ensure that they enjoy full equality under the law. The Convention has served as the major catalyst in the global movement from viewing persons with disabilities as objects of charity, medical treatment and social protection towards viewing them as full and equal members of society with necessary human rights.

The text which was adopted by the United Nations General Assembly on 13 December 2006 and opened for signature on 30 March 2007, came into force on 3 May 2008.[1] As of October 2013, it has 158 signatories and 138 parties, including the European Union (which ratified it on 23 December 2010 to the extent responsibilities of the member states were transferred to the European Union).[2] The United States Senate failed to ratify the Convention on December 3, 2012, as ratification received just 61 of the 67 votes (2/3 of the Senate) required for ratification.[3] The Convention is monitored by the Committee on the Rights of Persons with Disabilities.

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Genesis

1981 to 1992 was the UN "Decade of Disabled Persons". In 1987, a global meeting of experts to review progress recommended that the UN General Assembly should draft an international convention on the elimination of discrimination against persons with disabilities. Draft convention outlines were proposed by Italy and subsequently Sweden, but no consensus was reached. Many government representatives argued that existing human rights documents were sufficient. Instead, non-compulsory "Standard Rules on the Equalisation of Opportunities for Persons with Disabilities" were adopted by the General Assembly in 1993. In 2000, leaders of five international disability NGOs issued a declaration, calling on all governments to support a Convention. In 2001, the General Assembly, following a proposal by Mexico, established an Ad Hoc Committee to consider proposals for a comprehensive and integral Convention to promote and protect the rights and dignity of persons with disabilities, based on a holistic approach.[4]Disability rights organisations, including the International Disability Alliance as coordinator of an ad hoc International Disability Caucus, participated actively in the drafting process, in particular seeking a role for disabled people and their organisations in the implementation and monitoring of what became the Convention.[5]

The Various Provisions of the Convention

The Convention follows the civil law tradition, with a preamble, in which the principle that "all human rights are universal, indivisible, interdependent and interrelated" of Vienna Declaration and Programme of Action is cited, followed by 50 articles. Unlike many UN covenants and conventions, it is not formally divided into parts.

Article 1 defines the purpose of the Convention as to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. Articles 2 and 3 provide definitions and general principles including communication, reasonable accommodation and universal design.

Articles 4–32 define the rights of persons with disabilities and the obligations of states parties towards them. Many of these mirror rights affirmed in other UN conventions such as the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights or the Convention Against Torture, but with specific obligations ensuring that they can be fully realised by persons with disabilities.

Rights specific to this convention include the rights to accessibility including the information technology, the rights to live independently and be included in the community (Article 19), to personal mobility (article 20), habilitation and rehabilitation (Article 26), and to participation in political and public life, cultural life, recreation and sport (Articles 29 and 30).

In addition, parties to the Convention must raise awareness of the human rights of persons with disabilities (Article 8), and ensure access to roads, buildings, and information (Article 9). Articles 33–39 govern reporting and monitoring of the convention by national human rights institutions (Article 33) and Committee on the Rights of Persons with Disabilities (Article 34). Articles 40–50 govern ratification, entry into force, and amendment of the Convention. Article 49 also requires that the Convention be available in accessible formats.

Guiding principles of the Convention

There are eight guiding principles that underlie the Convention:

(i) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons.
(ii) Non-discrimination.
(iii) Full and effective participation and inclusion in society.
(iv) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity.
(v) Equality of opportunity.
(vi) Accessibility.
(vii) Equality between men and women
(viii) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities

Major Dimensions of the Right to development of the Disabled under the Convention

1. Definition of disability and the Principle of "reasonable accommodation"

The Convention adopts a social model of disability, and defines disability as including those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

The Convention defines "reasonable accommodation" to be "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms" at Article 2 and demands all aspects of life including inclusive education.

2. Prevention of discrimination

Article 8 of Convention stresses the awareness raising to foster respect for the rights and dignity against discrimination: To raise awareness throughout society, including at the

family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities.

To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life. To promote awareness of the capacities and contributions of persons with disabilities.
Initiating and maintaining effective public awareness campaigns designed: (i) to nurture receptiveness to the rights of persons with disabilities. (ii) to promote positive perceptions and greater social awareness towards persons with disabilities. (iii) to promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to workplace and the labour market. Encouraging all organs of the mass media to portray persons with disabilities in a manner consistent with the purpose of the present Convention. Promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.

3. Accessibility

The Convention stresses that persons with disabilities should be able to live independently and participate fully in all aspects of life. To this end, States Parties should take appropriate measures to ensure that persons with disabilities have access: to the physical environment, to transportation, to information and communications technology, to other facilities and services open or provided to the public.

4. Situations of risk and humanitarian emergency

Article 11 of the Convention affirms that States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of armed conflict, humanitarian emergencies and the occurrence of natural disaster.

5. Recognition before the law and legal capacity

Article 12 of the Convention affirms the equal recognition before law and legal capacity of the persons with disabilities. States Parties should: reaffirm that persons with disabilities have the right to recognition everywhere as a person before the law; recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life; take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity; ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstance, apply for the shortest time possible and are subject to

regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

6. Access to justice

Article 13 of the Convention affirms the effective access to justice for persons with disabilities, stating that: States parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as a direct and indirect participants, including as witnesses, in all legal proceeding, including at investigative and other preliminary stages.

In order to help to ensure effective access to justice for persons with disabilities, states Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff. This Article together with the Article 12 is cited by the "Handbook on prisoners with special needs"[6] by United Nations Office on Drugs and Crime.

7. Right to education

The Convention states that persons with disabilities should be guaranteed the right to inclusive education at all levels, regardless of age, without discrimination and on the basis of equal opportunity. States Parties should ensure that: children with disabilities are not excluded from free and compulsory primary education, or from secondary education;

Adults with disabilities have access to general tertiary education, vocational training, adult education and lifelong learning; persons with disabilities receive the necessary support, within the general education system, to facilitate their effective education; and effective individualized support measures are put in place to maximize academic and social development. States Parties should take appropriate measures, such as: endorsing the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring; supporting the learning of sign language and promoting the linguistic identity of the deaf community; advocating that education of persons, particularly children, who are blind and/or deaf, is delivered in the most appropriate languages and means of communication for the individual; and employing teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train education professionals and staff about disability awareness, use of augmentative and alternative modes and formats of communication, and educational techniques and materials to support persons with disabilities.

8. Right to health

Article 25 specifies that "persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability."[7]

9. Protecting the integrity of the person

Article 17 of the Convention states that every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

10. Right to Family

Article 23 of the Convention prohibits compulsory sterilization of disabled persons[8] and guarantees their right to adopt children.

11. Habilitation and Rehabilitation

Article 26 of the Convention affirms that "States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these services and programmes: Begin at the earliest possible stage and are based on the multidisciplinary assessment of individual needs and strengths; Support participation and inclusion in the community and all aspects of society, are voluntary, and are available to persons with disabilities as close as possible to their own communities, including in rural areas. States Parties shall promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation service. States Parties shall promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities, as they relate to habilitation and rehabilitation.

12. Participation rights

The Convention on the Right of Persons with Disabilities recognised that "disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others" and that "persons with disabilities continue to face barriers in their participation as equal members of society." The Convention makes participation of the disabled one of its principles, stating "The principles of the present Convention shall be:...Full and effective participation and inclusion in society", subsequently enshrining the right of disabled to participate fully and equally in the community, education, all aspect of life (in the context of habilitation and rehabilitation), political and public life, cultural life, leisure and sports.[9] States Parties should take appropriate measure such as:

To enables persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.

In accordance with international law, to ensure that law protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials. So that persons with disabilities should be entitled, on an equal basis with others, to recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture.

13. Work and employment

Article 27 requires that States Parties recognize the right of persons with disabilities to work, on an equal basis of others. This includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. And that States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to inter alia: Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, continuance of employment, career advancement and safe and healthy working conditions; Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances; Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others; Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training; Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment; Promote opportunities for self-employment, entrepreneurship, the development of cooperative and starting one's own business. Ensure that reasonable accommodation is provided to persons with disabilities in the workplace. Promote the acquisition by persons with disabilities of work experience in the open labour market. Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.

14. Adequate standard of living and social protection

Article 28 requires that States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of these rights without discrimination on the basis of disability.

States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that rights without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of the rights, including measures;
To ensure equal access by persons with disabilities to clean water and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs.

To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes.

To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care. To ensure access by persons with disabilities to public housing programmes. To ensure equal access by persons with disabilities to retirement benefits and programmes.

15. Right to vote

ISG Top Voter is a machine designed specifically to be used by voters with disabilities.
Article 29 requires that all Contracting States protect "the right of persons with disabilities to vote by secret ballot in elections and public referendums".[10]According to this provision, each Contracting State should provide for voting equipment which would enable disabled voters to vote independently and secretly. Some democracies, e.g., the US, Japan, Netherlands, Slovenia, Albania or India allow disabled voters to use electronic voting machines or electronic aides which help disabled voters to fill the paper ballot. In others, among them Azerbaijan, Kosovo, Canada, Ghana, United Kingdom, and most of African and Asian countries, visually impaired voters can use ballots in Braille or paper ballot templates. Many of these and also some other democracies, Chile for example, use adjustable desks so that voters on wheelchairs can approach them. Some democracies only allow another person to cast a ballot for the blind or disabled voter. Such arrangement, however, does not assure secrecy of the ballot.

Article 29 also requires that Contracting States ensure "that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use." In some democracies, i.e. Sweden and the US, all the polling places already are fully accessible for disabled voters.

16. Reservations

A number of parties have made reservations and interpretative declarations to their application of the Convention[11]as can be seen under: Australia does not consider itself

bound to stop forcibly medicating those labeled mentally ill. (b) El Salvador accepts the Convention to the extent that it is compatible with its constitution. (c) Malta interprets the right to health in Article 25 of the Convention as not implying any right to abortion. It also reserves the right to continue to apply its own election laws around accessibility and assistance.(d) Mauritius does not consider itself bound by the Article 11 obligation to take all necessary measures to protect people with disabilities during natural disasters, armed conflict or humanitarian emergencies, unless permitted by domestic legislation.(e) The Netherlands interprets the right to life in Article 10 within the framework of its domestic laws. It also interprets Article 25(f), which bars the discriminatory denial of health care, as permitting a person to refuse medical treatment, including food or fluids. (f) Poland interprets Articles 23 and 25 as not conferring any right to abortion. (g) The United Kingdom has reservations relating to the right to education, immigration, service in the armed forces and an aspect of social security law.

In addition to the above Convention there is an Optional Protocol to the Convention on the Rights of Persons with Disabilities which allows its parties to recognise the competence of the Committee on the Rights of Persons with Disabilities to consider complaints from individuals.[12] The text is based heavily on the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. The Optional Protocol entered into force with the Convention on 3 May 2008. As of September 2012, it has 92 signatories and 78 parties.[13] Also relevant would be to mention The Committee on the Rights of Persons with Disabilities which is a body of human rights experts tasked with monitoring the implementation of the Convention and which consists of 18 members.[14]

The efforts taken for the betterment of the position of the disabled by the different International Conventions and the National Policies is to ensure that the so called vulnerable category of persons find some meaning in their existence and realise the full essence of the Right to Life which is the greatest of all human Rights conferred. Relevant thus would be to quote the former UN Special Rapporteur on the Standard Rules, Bengt Lindqvist, who said:

"The blind have never demanded to be able to enjoy Rembrandt's paintings, since we know that we cannot see them. But we do demand to be able to read the same newspapers as others read, because that is possible. And if we do not get to do that, then, this would be a huge violation of our so called human rights."

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LAW

U.N. Security Council Resolutions Introduction

Ashalika Pandey*

The resolutions of the Security Council are binding upon the Members. This is evident from the Article 25 of the Charter which provides that the *Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present charter*.[1]

There is no controversy in respect of binding effect of the resolutions of the Security Council relating to the enforcement measures under Ch.VII of the Charter. But there is some controversy in respect of the binding character of the other decisions of the Security Council, especially those made under the provisions of the charter relating to international disputes and dangerous situations. In its advisory opinion concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West-Africa).* Notwithstanding Security Council Resolution 276(1970)[2], the International Court of Justice laid these doubts to rest.

The World Court observed: "It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Ch. VII of the charter. It has not possible to find in the Charter any support for this view, *Article 25 is not confined to decisions in regards to enforcement action but applies to 'the decision of the Security Council' adopted in accordance with the Charter*. Moreover, that Article is placed, not in Ch. VII, but immediately after Article 24 in that Part of the Charter which deals with the functions and powers of the Security Council. If Article 25 had reference solely to decisions of the Security Council concerning enforcement actions under Article 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since the effect is secured by Article 48 and 49 of the Charter".

But it should be observed that the controversy as to the scope of Article 25 persists, at least in the attitudes of several States, and that the majority view in the Namibia Advisory opinion has not been accepted as a definite disposal of the issue.

Chapter VI and VII of the UN Charter

There are two chapters (Ch. VI and VII) which are especially relevant to understand the resolutions passed by Security Council.

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Security Council Resolutions under Chapter VI:

A United Nations Security Council resolution is a UN resolution adopted by the fifteen members of the Security Council; the UN body charged with "primary responsibility for the maintenance of international peace and security".

The UN Charter specifies (in Article 27) that a draft resolution on "non-procedural matters" is adopted if nine or more of the fifteen Council members vote for the resolution, and if it is not vetoed by any of the five permanent members. Draft resolutions on "procedural matters" can be adopted on the basis of an affirmative vote by any nine Council members. Chapter VI authorises the Security Council to issue recommendations but does not give it power to make binding resolutions.[3]

Resolutions the Security Council adopts under Chapter VI are intended to be followed and implemented via negotiated settlements between concerned parties. *One of the UN resolutions adopted under Chapter VI of the UN Charter is Resolution 242, adopted in 1967 after the Six-Day War.* It calls on Israel and its Arab neighbours to accept the resolution through negotiation, arbitration and conciliation. Under Chapter VI of the UN Charter, the recommendations of UN Resolution 242 cannot be imposed on the parties concerned, as Arab leaders often argue. In fact, the title of Chapter VI also offers a clue to its nature, for it deals with "Pacific Resolution of Disputes."

Security Council Resolutions under Chapter VII:

In contrast, resolutions adopted by the Security Council under Chapter VII invest the Security Council with power to issue stringent resolutions that require nations to comply with the terms set forth in the resolution. This leaves no room to negotiate a settlement with the affected parties. Thus, Chapter VII deals with "Threats to Peace, Breaches of the Peace and Acts of Aggression." When Iraq invaded Kuwait in 1990, the Security Council adopted resolutions under Chapter VII that only required the aggressor, Iraq, to comply[4].

What make a council decision binding?[5]

The Council may:

- Adopt both binding decisions and non-binding language (such as recommendations) in resolutions explicitly under Chapter VII; and
- Adopt decisions intended to be binding in resolutions not under Chapter VII, or where the source of authority is ambiguous.

The question as to:

Whether the Council has imposed an obligation binding under Articles 24 and 25 should be determined from the Council's actual language in any given situation? And this seems true for resolutions adopted explicitly under Chapter VII as well, since they often also contain non-binding provisions such as recommendations. It is not the reference to a particular chapter that is the ultimate arbiter of whether a resolution contains binding provisions.

Nevertheless it is a practical reality that Council language often does display a degree of ambiguity and that this stems from the complex bargaining that frequently precedes the adoption of a resolution. This process is governed by the need for political compromise and sometimes the urgency of a particular situation. These factors often trump a more careful consideration of wording and clarity.

Another is the absence of an authoritative source of interpretation of Council resolutions other than the Council itself. However, it should be noted that, in most cases, the Council does use relatively clear language in its operative paragraphs. For example, it can be clearly established that by using "urges" and "invites," as opposed to "decides," the paragraph is intended to be exhortatory and not binding. But some cases are unclear. This is particularly true when the Council adopts paragraphs beginning with words such as "calls upon" and "endorses".

Another key question in the context of binding resolution: Who can be bound by a Security Council decision?[6] or Which international actors can be bound by the Council? In general, international obligations are usually addressed to *states*. Member states have the responsibility under international law to implement Council decisions whether general or specific. Articles 25, 48 and 49 indicate that states have the obligation not just to tolerate binding Council decisions, but, depending on the specific content of those decisions, to carry them out and join in offering mutual assistance. Council resolutions may:

- Bind all member states when that is the clear intent; or
- Bind those who are under specific obligations when the relevant paragraphs single out states or groups of states.

It is important to note that the *Charter refers to "states", and not simply "governments."* This suggests that not just the executive, but that the state as a whole is responsible for ensuring that the legislative and judiciary at all levels (local and national) observe and implement binding Council decisions.

But what is the situation regarding the binding character of resolutions for non-state actors, non-member states, and regional and international organisations? With respect to entities other than states, there have been numerous cases in which the Council has addressed demands directly to non-state actors and individuals. This includes armed groups, *de facto* governments and political factions. Perhaps the two of the most prominent historical cases are Council demands towards the Angolan rebel *União Nacional para a Independência Total de Angola* (UNITA), and Afghanistan's Taliban.

However, uncertainty remains regarding the obligations of non-state actors and individuals. Are Council demands directed at them legally binding? The Charter is silent about non-state actors, and there are concerns about the continuous, practical expansion of Security Council powers. The problem of binding non-member states was particularly sensitive in

the early years of the United Nations, especially as many new states emerged after the Second World War and as a result of decolonisation.

The question was addressed cautiously in early Council practice. In resolutions 232 (1966), 277 (1970), 388 (1976) and 409 (1977), the Council urged states not members of the UN to act in accordance with its resolutions. This was based on Article 2 (6), which determines that, the organisation:

"shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."

Under Article 2 (6), the organisation collectively—including the Security Council—shall ensure that non-member states act in accordance with UN Charter principles so far as may be necessary for the maintenance of international peace and security. In meeting this obligation, the Security Council has at its disposal in principle a range of tools, from soliciting cooperation to more coercive measures.

In these initial stages, the Council seems to have preferred to appeal to non-members rather than issue demands. During the 1970s the Council expanded the ambit of its reach and began the use of "all states" as opposed to "all states members." In resolution 418 (1977), the Council imposed an arms embargo on South Africa in which "all states" were required to comply.

This practice intensified after the Cold War, in particular in the context of resolutions related to the former Yugoslavia. One example is resolution 827 (1993), which established the international tribunal. In that resolution, the Council decided that: *"all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute."*

But there remains some uncertainty as to whether non-member states are under a binding obligation to comply. If certain provisions in a resolution are in the end seen as not binding, what value do they have? Certain provisions in Council resolutions may be recommendations which, by their very nature, are not binding. However, they may also contain a degree of obligation. Judge Hersch Lauterpacht has suggested that, *"A resolution recommending… a specific course of action creates some legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation… The state in consideration, while not bound to accept the recommendation, is bound to give it due*

consideration in good faith."
(It could also be argued that the Charter creates the obligation of seeking a pacific solution to any situation. In making recommendations, the Council may bring to the surface that obligation if only by clarifying the link between a particular situation and the general duty to seek a peaceful solution.)

The same conclusion could logically be extended to other non-binding provisions, such as demands included in presidential statements. While states are not legally obliged to accept and carry out such provisions, the mere fact that the Security Council, the body conferred with primary responsibility for international peace and security, has pronounced itself on an issue may give rise to the obligation to duly consider Council messages in good faith.

Conclusion

1. There are several conclusions drawn from the above discussion with regard to Security Council Resolutions[7]:
2. Chapter VII is not the only basis in the Charter for the adoption of binding Council decisions. The Council can create obligations, based on its powers under Articles 24 and 25.
3. In some cases, the Council invokes Chapter VII (for purely political purposes) but with no intent to impose binding obligations.
4. It is important to emphasise, however, that this should not be interpreted as a "green light" for ambiguous drafting on the part of Council members. This word of caution seems relevant for both those who argue that only Chapter VII resolutions are binding, and for those who argue against it. As a matter of policy, the clearer the language adopted, the better the prospects for effectiveness and credibility of Council decisions. Clarity may not be possible on every occasion, but it seems critical that every effort be made to avoid decisions that only prolong the problem rather than solve it.
5. For resolutions with no mention of Chapter VII, there is therefore a zone of uncertainty.
6. In some cases that may be a deliberate political tactic—one which allows compromise on strong action or a binding measure while using softer or more ambiguous language in order to offer some olive branch to the country in question. However, as we have seen, such a tactic can also prove to be counterproductive, opening the way for future disagreements.
7. In other cases, this may be a result of the fact that the legal basis for the action in question may lie elsewhere, for instance in consent or the right of self-defence. The Council may be less inclined to consider a Chapter VII resolution in such instances. But, as explained above, issues of erosion of consent and competence/legitimacy to grant it may emerge as complicating legal and political factors for a multinational force or a peacekeeping operation.
8. Where there is unity in the Council, the explicit use of Chapter VII enables clarity.

For many UN members clarity is particularly important when Council decisions have to be translated into domestic law. It is often important to be able to demonstrate to parliaments that Council enforcement measures are legal and valid.

9. This was the case with the proposal to transfer Charles Taylor's trial to International Criminal Court facilities in the Netherlands. The Dutch government signalled that it would be prepared to accept the transfer only if, *inter alia*, the Council adopted a Chapter VII resolution to avoid Taylor's detention from being contested in Dutch courts (S/2006/207). This resulted in resolution 1688 of 16 June 2006.

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Inadvertent Negligence

Anuranjan Sharma*

Introduction

A crime is an unlawful act or default which is an offence against the public and renders the person guilty to the act or default liable to legal punishment.[1] Since it is considered as anti-social action the state reacts consciously by inflicting pain.[2] Criminal law has been mainly concerned with the protection of the elementary social interest in the integrity of life, liberty and property. In words of Wechsler an eminent American Jurist "The purposes of the Penal Law is to express a social condemnation of forbidden conduct, buttressed by sanctions calculated to prevent it."

Whatever views are held about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that were permit official agencies to bring to bear an individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works gross injustice to those caught within its coils. The law the carries such responsibilities should surely be as rational and just as law can be.

Therefore legislature while drafting the penal laws ensured that extenuating factors may not lead to exoneration of guilty. Thus when we come across different crimes like culpable Homicide, Murden, death or rash or negligent act etc. We notice subtle distinctions, and degree's, these various degree of crime determines the imputability and liability.

The topic inadvertent negligence comes under Sec. 304A IPC. Sec. 304A: reads as following: Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable Homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both."

Sec. 304A is directed at the offences outside the range of section 299 & 300 i.e. where there is neither intention nor knowledge. It limits itself to those rash and negligent act which causes death but fall short of culpable Homicide.[3] The provision of this section

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apply to cases where there is no intention to cause death and no knowledge that the act done in all probability would cause death.

Scope

Where the act in its nature criminal, the section has no application.[4] The section does not apply to cases where the death has arisen, not from the negligence or rash mode of doing the act, but from, some result supervening upon the act which could not have been anticipated. In order that a person may be guilty under this section, the rash or negligent act must be the direct or proximate cause of the death. The section deals with homicide by negligence. The section does not apply to a case in which there has been the voluntary commission of an offence against the person. Acts, probably or possible commission of an offence against the person. Acts, probably or possible involving danger to others, but which in themselves are not offences, may be offences under Sec. 336, 337, 338 or 304A, if done without due care to guard against the dangerous consequences. Acts which are offences in themselves must be judged with regard to the knowledge or means of knowledge of the offender and place in the appropriate place in the class of offences of the same character.[5]

Where a man strikes at another with a spear, he is committing a criminal offence, and that offence remains just the same whether he hits his intended victim or by chance hits a third person who intervenes between the two.[6]

Negligence Advertent and Inadvertent & Duty to Take Care

Responsibility for some crime may be incurred by the mere neglect to exercise due caution. Where the mind is not actively but negatively or passively at fault. This is inadvertent negligence. Since advertent negligence is known as recklessness, the term negligence is used as inadvertent negligence. In both cases the risk was an unreasonable risk that a prudent person would not take but the reckless person was aware of the risk, the negligent person ought to have been aware of it but was not.

Advertent negligence is generally called as willful negligence. In this kind of negligence, the harm done is foreseen as probable but it is not intended or willed. In inadvertent negligence, the harm done is either foreseen or willed. However, in both these cases carelessness or indifferent as to consequence is present. The distinction between advertent and inadvertent negligence can be understood by following illustration:

An operating surgeon may be fully aware of the serious risk involved in carrying out the surgical operation of his patient but if he still performs the operation as a result of which the condition of the patient deteriorates, it will be case of advertent negligence. If the surgeon wrongly operates the patient due to ignorance or a mistake his negligence would be inadvertent.

"Rash or Negligent Act"[7]

Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury or knowledge that it may cause injury or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with necklessness or indifferences to the consequences.

Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable proper care or precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.

Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the belief that the actor has taken sufficient precaution to prevent their happening. The imputability arises from acting despite the consciousness.

Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection.

'Not amounting to Culpable Homicide'

"Sec. 304A is directed at offences outside the range of Sec. 299 and 300, and obviously contemplates those case into which neither intention nor knowledge enters. For the rash or negligent act which is declared to be a crime is one 'not amounting to culpable homicide', and it must therefore be taken into account that words intentionally or knowingly inflected violence, directly or willfully caused is excluded.[8]

"Death Must be the Direct Result"

In order to impose criminal liability under this section, it is essential to establish that death is the direct result of the rash or negligent act of the accused. "It must be causa causans – i.e. the immediate cause, and not enough that it may be causa sine qua non – proximate cause."[9]

"Res ipsa loquitur"

Where a vehicle driven at a high speed knocked down the deceased who was walking on the left side of the road and breaking the roadside fencing got stuck up in a ditch, it was held that the maximum 'res ipsa loquitor' was applicable and the accused driver could be held guilty of rash and negligent driving.[10]

The Supreme Court explained the principle in the following words "The principle of res ipsa loquitor is only a rule of evidence to determine of the Onus of proof in actions relating to negligence. The principle has application only when the nature of the accident and attending circumstances would reasonably lead to the belief that in the absence of

negligence the accident would not have occurred and the thing which caused injury is shown to have been under the management and control of the wrong doer."[11]

Punishment

The punishment prescribed under this section is imprisonment of either description for a term, which may extend to 2 years, or with fine or with both. A sentence in cases arising under this section is a matter of discretion of the trial court. Sentence depends on the degree of carelessness seen in the conduct of the accused.[12] Though, contributory negligence is not a factor, which can be taken into consideration on the question of the guilt of the accused, it can be a factor for consideration in determination of sentence.[13]

Cases

Supadi Lukada vs. Emperor[14] **-** The accused, a girl of seventeen who happened to be carrying her infant daughter tied on her back, having been exasperated at an altercation which she had with her husband, attempted to commit suicide by jumping into well. She was found alive in the well next day but her child was drowned. The trial judge convicted the accused of an attempt to commit suicide and also of murder and her infant child under Sec. 309 and 303. Later on, it was held that the offence which the accused had committed was not murder, but causing death by negligent Omission, i.e. Omission to put the child down before jumping into the well. The learned judges of the Bombay High Court held that when the girl attempted to commit suicide into the well she could not be said to have been in normal condition and was not, therefore, even aware of the child's presence and that as she was not conscious of the child, there was not such knowledge as to make section 300(4) applicable. The learned judges of the Bombay High Curt found the girl guilty under 304A.

State of Karnataka vs. Mohd. Ismail[15] **–** In this case a 27 year old motor cyclist pushed from behind an old walking man of 85 years who sustained head injuries and died on the spot, the death was held as the result of rash and negligent conduct.

S.N. Hussain vs. State of A.P.[16] **–** This is an appeal by special leave from the order of conviction and sentence passed by the High Court of Andhra Pradesh. The appellant, who was a bus driver, had been charged before the learned Munsif Magistrate, Alampur, for offense under Sec. 304-A and 337 IPC but was acquitted. The state govt. appealed against the to the High Court and the High Court has convicted him under all these sections and sentenced him to suffer rigorous imprisonment for 2 years under Sec. 304-A, IPC. The appellant's defence was that he was neither rash nor negligent and the accident was unavoidable. He did not realize at all that a goods train was passing at the time and since the gate was open he crossed the railway crossing absolutely oblivious of the fact that a train was approaching. The learned trial magistrate accepted the defence but the High Court was pleased to hold that the appellant was both rush and negligent.

Here High Court held that appellant was whether rash or negligent can be understood by following distinctions : [17]"Rashness consists in hazardowing a dangerous Wanton act with the knowledge that it may be cause injury. The criminality lies in such a case in running the risk of doing such an act with recklessness or indifference as to the consequences."

Criminal negligence on the other hand, is the gross and culpable neglect or failure to exercise that reasonable and proper care and precautions to guard injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. This definition of criminal rashness and criminal negligence given by straight. J. in ***Empress* vs. *Idu Beg***.[18] & has been adopted by court in ***Bhalchandra Woman Pathe vs. State of Maharahstra***.[19]

On the basis of this distinction court found that this case was the clear case of unavoidable accident because of the negligence of the gateman in keeping the gate open and inviting the vehicles to pass.

Finally the order of conviction and sentence was set aside and the appellant was acquitted.
***Cherubin Gregory vs. State of Bihar*[20] -** The appellant was changed with an offence under Sec. 304A of the IPC for causing death of One Mst. Madilen by contact with an electrically charged naked copper wire which he had fixed up at the back of his house with the view to prevent the entry of intruders into his latrine. The principal point of view which appears to have been argued before the learned Judges was that the accused had a right of private defence of the property and that the death was caused in the course of exercise of that right.

The learned court said that 'A trespasser is not an outlaw, *a caput lupinem.* The mere fact that person entering a land is a trespasser does not entitle the owner or occupier to inflect on him personal injury by direct violence. It is, no doubt, true that the trespasser enteres the property at his own risk and the occupier owes no duty to take reasonable care for his protection, but at the same time the occupied in not entitled to do willfully acts such as set a trap or set a naked live wire with the deliberate intention of causing harm to trespassers.[21]

Cases related to Medical Negligence
***Lakshmanan Prakash (Dr.) vs. State*[22]** A person sustained fracture injuries in an accident. He died while he was under operation. The cause of death was found to be administration of spinal anesthesia which was injected through spinal chord without checking the bearing capacity of the patient. Court found it the case of criminal negligence. "The failure of the surgeons to check the state of the patient after anesthesia will amount to negligence" the court said.

In another case,[23] the accused a Homoeopathic practitioner administered to a patient suffering from guinea worm, 24 drops of stramonium and a leaf to dhatura without

studying its effect; the patient died of poisoning. The accused was held guilty under this section.

Mahadev Prasad Kaushik vs. State of U.P. **(2008)[24] –** In this case the victim took his father to the hospital for pain in back-bone. The Doctor administered the wrong injection, due to which the condition of the patient deteriorated and finally he died.

The victims stressed that the act of the doctor was culpable homicide amounting to murder. Whereas doctors denied and in order to escape the liability declared that the patient was 'brought dead' to the hospital. The matter went to the court. The learned court said that the intention to kill cannot be attributed to the doctor, in this case, however the medical practitioner failed in duty to take care which an ordinary prudent man have taken while doing the act. The doctor must have checked the injection before giving it. Therefore liable for Medical Negligence.

Other Cases: related to 304(A) were

1. Where the accused received poison from her paramour to administer to her husband as a charm and administered it with the result that death ensured, but she did not know that the substance given to her was noxious until she saw its effects.[25]
2. Where the accused receiving a powder from an enemy of her relative took no precaution to ascertain whether it was noxious and mixed it with food believing that by doing so she would become rich but four of the persons what at food died.[26]
3. Where the accused administered to her husband a deadly poison (arsenic oxide) believing it to be love potion in order to stimulate his affection for her and the husband died.[27]

It was held in all the above causes that the acts of the accused were either rash or negligent.

Conclusion

Negligence in Sec. 304A is both advertant and inadvertent. Advertant negligence is known as Recklessness and inadvertence by name negligence itself. In both the cases there is a risk involved in the act, of which the reckless person is aware even than he continues to do the act believing it would not happen & it happens.

Whereas the negligent person is not aware of the risk but he incurs liability due to his failing in duty to take care which an ordinary prudent man would have taken in such circumstances.

References:

1 Halsburg's Laws of England, 3rd Edn., p. 271.
2 Bonger, Introduction to Criminology.
3 *Empress vs. Idu Beg* (1881) 3 All 776.
4 *Domodaran*, (1988) 12 Mad 56.

[5] *Ketabdi Mundul, (*1879) 4 Cal 764, 766.
[6] *Challu,* (1941) All 441.
[7] 304(A) IPC.
[8] *Idu Beg,* (1881) 3 All 776, 778, 779.
[9] *Suleman Rahiman Mulam vs. State of Maharashra,* AIR 1918 All 429.
[10] *State of MP vs. Jagdish,* 1992, CrLJ. 746.
[11] *Mohammed Ayn1uddin vs. State of A.P.* AIR 2002 SC 2511.
[12] 1974 Cri LJ 468.
[13] AIR 1927 Lah 165 referred to in AIR Manual, 4th Edn. Vol. 28, p. 435, n 17(5).
[14] (1925) 27 Bom LR 604.
[15] (1989) Cr LJ 235.
[16] AIR 1972 SC 685.
[17] *Empress vs. Idu Beg* (1881) 3 All 776.
[18] (1881) 3 All 776.
[19] (1968) SCD 198.
[20] AIR 1964 SC 205.
[21] *Cherubin Gregory vs. Stae of Bihar,* AIR 1964 SC 2051.
[22] 1999 CrLJ 2348 (Mad.)
[23] *Juggan Khan vs. State of Madhya Pradesh,* AIR 1965n SC 831.
[24] *Mahadev Prasad Kaushik vs. State of U.P.,* Jt. 2008(11) SC., 218, 2008(4) RCR (Criminal) 502 (SC).
[25] *Mussammat Bakhan,* (1887) PR No. 60 of 1887. In a some what similar case the Bombay High Court acquitted the accused of the offence of Murder : Nagawa, (1902) 4 Bom LR 425.
[26] *Jamna* (1909) 31 All 290.
[27] *Ramava* (1915) 17 Bom LR 217.

LGBT Rights - Are the Laws Rightly Stated

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Introduction

The only abnormal people are those who don't love anybody. If all the people of the world thought this way, the world today would be in a situation of unbiased peace. However, the actual picture differs a lot from this notion, today, the world stands divided on various factors. People look for reasons to discriminate with each other; we take pleasure in identifying ourselves to one particular group and then ferociously indulge in constantly proving our group better and letting down the other group. There are so many reasons that create a divide-religion, sex, caste, creed, race, physical appearances, territories, psychological conditions and what not; and now the human creatures of god have created another criterion for widening this divide, the people of the world have agreed upon discriminating love and sexual interests. This is what calls for a discussion on the rights of LGBT persons.

LGBT is an initialism that stands for lesbians, gay, transgender and bisexual and along with heterosexual they describe people's sexual orientation or gender identity. Informally, they can be said to be the persons with some different sexual or love interests than the persons with usual thought process. The term lesbians refer to the women who are romantically and/or sexually attracted to women; the term gay refers to men who are sexually and/or emotionally attracted towards men; the term transgender is an umbrella term used to describe people whose gender identity differs from that usually associated with their birth sex; while a bisexual person is someone who is emotionally and/or sexually attracted to persons of both sexes. These persons are differentiated and debated upon only because of the reason of their different sexual orientation and different love interests.

At present, the world is divided in its opinion regarding such persons. Some parts of the world stay on the darker side and practice utmost cruelty and disguise against such persons denying them the basic human rights, totally disapproving of the interests of such persons reasoning their views on religion, values and such acts being unnatural and offensive; while there are various regions of the world which accept such relationships with arms wide open, where such people are not treated with such adverse diversification and are also allowed to marry and adopt children; while there are a number of other nations which take a neutral view and neither do they penalise such acts nor do they recognise them fully; this

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paper discusses about such diversified opinions and laws prevailing in various parts of the world.

There prevails a very strong sense of disparity and controversy on the international front regarding the legal rights of the LGBT persons, and the issue as to whether such people should be denied or granted legal rights and should be treated at par with other people of the so called normal sexual and emotional inclination still remains disputed. *"Equality may perhaps be a right, but it seems that no power on earth can turn it into a fact"* it appears that the present scenario proves this right.

LGBT is an acronym that collectively refers to the lesbian, gay, bisexual, and transgender community. In use since the 1990s, the term LGBT is an adaptation of LGBT, which itself started replacing the phrase gay community beginning in the mid-to-late 1980s, which many within the community in question felt did not accurately represent all those to whom it referred. This initialism has become mainstream as a self-designation and has been adopted by the majority of sexuality and gender identity-based community centers and media in the United States and some other English-speaking countries.

The word **"lesbian"** is derived from the name of the Greek island of Lesbos, home to the 6th-century BCE poet Sappho[1.] From various ancient writings, historians have gathered that a group of young women were left in Sappho's charge for their instruction or cultural edification. Not much of Sappho's poetry remains, but that which does reflects the topics she wrote about: women's daily lives, their relationships, and rituals. She focused on the beauty of women and proclaimed her love for girls[2].

The word **"gay"** describes a person who is sexually attracted to people of the same sex. They are often also romantically interested in people of the same sex. This means males who like other males or females who like other females. The word "gay" can mean any homosexual person, but sometimes it specifically means homosexual men. Bisexuality is romantic attraction, sexual attraction or sexual behavior toward both males and females. The term is mainly used in the context of human attraction to denote romantic or sexual feelings toward both men and women. It may also be defined as encompassing romantic or sexual attraction to people of all gender identities or to a person irrespective of that person's biological sex or gender, which is sometimes termed *pansexuality*[3]. **Transgender** is the state of one's gender identity (self-identification as woman, man, neither or both) not matching one's assigned sex (identification by others as male, female or intersex based on physical/genetic sex)[4].

A person is called **"Intersex"** when his/her genitalia may be malformed. They may also have male and/or female secondary sex characteristics (such as body shape). **"Queer"** is originally a term which has various meanings assigned to it like: Deviating from the expected or normal; strange, Odd or unconventional, as in behaviour; eccentric, of a

questionable nature or character; suspicious, *Slang* Fake; counterfeit but in the current context, it can be said to be a slang used for homosexuality.

Basically LGBT persons are the ones which lead a different life from the main stream heterosexuals either by the reason of the varied love and sexual interests; or they can be said to be the persons who are not in sync with the gender that they were born with because of some natural complications or by the mere reasons of their interests and inclinations.

History of LGBT

The history of LGBT people dates back further than most people may think. Some incorrectly believe that being lesbian, gay, bisexual or transgender (LGBT) is a contemporary movement. History demonstrates, however, that as long as there have been people, there have been LGBT people. LGBT communities have played an important role in the history of the world. Most people in orthodox countries like India oppose the LGBT movement as being a mark of modernization or of aping the west but the reality differ from this notion. In modern cultures, a myth has been spread, mostly by homophobic religious groups, that homosexuality is primarily a modern phenomenon, that it is a chosen orientation, and it is a symptom of moral decline. Most men in ancient Greece and Rome engaged in at least occasional homosexual contact, and a not insignificant number of the marriages consummated in both civilizations were homosexual. The ancients did not view gender as a determining factor of who should love or be married to whom; the qualifications related solely to matters of age and biological relationship.

Indeed a vast corpus of literature has been left us by the ancients, which celebrates same-sex relationships, and which in many cases is homoerotic. Much of the literature of "straight society" also makes clear, in a variety of ways, that homosexual relationships were widely acknowledged, not considered immoral or "sinful," but rather were considered a normal part of life. In many "primitive" societies, such as those studied in Africa and the Pacific Islands, the patterns seen are often the same as those seen in ancient Greece and Rome. Adolescent males would often pair-bond, engage in frequent homosexual relations, and exhibit great love for each other, until the time came to become fathers and husbands. They would then make a choice – going on to find (or be assigned) a wife, and abandoning their same-sex partner. The choice was often difficult – and not a few chose to remain with their same-sex partner for the rest of their lives. A lot of ancient texts like the Bible, the Quran etc. mention about homosexuality be it in its condemnation and criticism, this in itself serves as a proof of its existence since the very beginning.

The Present Situation

LGBT: Country-Wide Phenomenan

Regarding LGBT rights the world stands differentiated in opinions. Some countries legalize and allow such rights while some others totally disapprove of them and even criminalize such acts. There are certain nations like Iran, Saudi Arab, Yemen, Sudan, Mauritania and a few others which not only disapprove of homosexuality but may also

impose death penalty for practicing homosexuality. While certain other advanced nations like Canada, Brazil, Argentina, South Africa, Sweden, Oslo, Spain and France are amongst the very few progressive countries which legalise same-sex marriage.

United States of America:

LGBT rights in the United States have evolved over time and vary greatly on a state-by-state basis. Sexual activity between consenting adults and adolescents of a close age of the same sex has been legal nationwide since 2003, pursuant to the U.S. Supreme Court ruling in ***Lawrence vs. Texas***[5] . Age of consent in each state varies from age 16 to 18; some states maintain different ages of consent for males/females or same-sex/opposite-sex relations.

Although The U.S.A. is a very progressive nation, it recognises foreign same sex marriages but still hasn't expressly legalised the same. LGBT rights related laws including family, marriage, and anti-discrimination laws vary by state. Some states offer civil unions or other types of recognition which offer some of the legal benefits and protections of marriage. Adoption policies in regard to gay and lesbian parents also vary greatly from state to state. Some allow adoption by same-sex couples, while others ban all unmarried couples from adoption.

In 1972, the Supreme Court of Minnesota in ***Baker vs. Nelson***[6] ruled that a state's denial of a civil marriage license to same-sex couples did not violate the U.S. Constitution. In 1993, the Hawaii Supreme Court ruled that the state constitution's ban on sex discrimination entitled same-sex couples to a civil marriage license unless the state could prove it had a "compelling state interest" for denying such a license. A lower court in Hawaii then found that the state had failed to show such a compelling interest,[7] and same-sex marriage was legal in Hawaii for a day, before the judge stayed his ruling. Hawaii amended its constitution in 1998 to allow the legislature to restrict marriage to different-sex couples. On November 18, 2003, the Massachusetts Supreme Court ruled in ***Goodridge vs. Department of Public Health***[8] that gay and lesbian couples could not be denied the right to marry because of the Equal Protection Clause of the state constitution. Same sex marriage became legal in Massachusetts on May 17, 2004[9]. On May 15, 2008 the California Supreme Court ruled in In re Marriage Cases[10], declared the stature banning same sex marriage was unconstitutional and gay and lesbian couples could not be denied the right to marry because of the Equal Protection Clause of the state constitution. Same sex marriage became legal in California on June 16, 2008. On November 5, 2008, a constitutional ban on same-sex marriage overturned the Supreme Court decision legalizing same sex marriage but this was itself overturned by Judge Vaughn Walker in Perry v. Brown[11] and ruled unconstitutional because of the state's Equal Protection Clause on August 4, 2010. This was upheld on February 7, 2012 by the United States Court of Appeals for the Ninth Circuit and was heard by the United States Supreme Court in June 2013 with the same results.

On October 10, 2008 the Connecticut Supreme Court ruled in *Kerrigan vs. Commissioner*[12] that gay and lesbian couples could not be denied the right to marry because of the Equal

Protection Clause of the state constitution. Same sex marriage became legal in Connecticut on November 14, 2008. On April 3, 2009 the Iowa Supreme Court ruled in ***Varnum vs. Brien***[13] that gay and lesbian couples could not be denied the right to marry because of the Equal Protection Clause of the state constitution. Same sex marriage became legal on April 26, 2009 in Iowa. On September 22, 2010 the Supreme Court of Florida ruled in In re: Gill that the 1977 ban on homosexuals adopting children in Florida was unconstitutional allowing same sex couples to adopt children in Florida. On April 7, 2011 the Supreme Court of Arkansas ruled in ***Arkansas Department of Human Services vs. Cole*** that the Arkansas Proposed Initiative Act No. 1 that banned non-married couples from adopting children was unconstitutional allowing same sex couples to adopt children in Arkansas.

The Islamic Republic of Iran:

Since Iran is a country which derives its roots from religion and bases its laws on Islam, it is in strong opposition of the LGBT rights. In Iran, homosexuality is a crime punishable by imprisonment, corporal punishment, or in some cases of sodomy, even execution of the accused is legal under the laws of this country's government[14]. Gay men have faced stricter enforcement actions under the law than lesbians. Iran insists that it does not execute people for homosexuality, and those who have either committed rape, murder, or drug trafficking[15]. Transsexuality in Iran is legal if accompanied by a sex change operation; however, transsexuals still report societal intolerance as in other societies around the world[16].

Since the 1979 Iranian revolution, the legal code has been based on Islamic Shariat law. All sexual relations that occur outside a traditional, heterosexual marriage i.e. sodomy or adultery are illegal and no legal distinction is made between consensual or non-consensual sodomy. Homosexual relations that occur between consenting adults in private are a crime and carry a maximum punishment of death. At the discretion of the Iranian court, fines, prison sentences, and corporal punishment are usually carried out rather than the death penalty, unless the crime was a rape.

LGBT Scenario in India:

Chapter XVI, Section 377 of the Indian Penal Code dating back to 1861, introduced during the British rule of India, criminalises sexual activities "against the order of nature", arguably including homosexual acts. It reads as-

377. Unnatural offences: “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine”.

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this section. The ambit of Section 377, which was devised to criminalize and prevent homosexual sex, extends to any sexual union involving penile

insertion. Thus, even consensual heterosexual acts such as fellatio and anal penetration may be punishable under this law.

The movement to repeal Section 377 was initiated by ***AIDS Bhedbha vs. Virodhi Andolan*** in 1991. Their historic publication Less than Gay: A Citizen's Report spelled out the problems with 377 and asked for its repeal. As the case prolonged over the years, it was revived in the next decade, led by the NAZ Foundation (India) Trust, an activist group, which filed public interest litigation in the Delhi High Court in 2001, seeking legalization of homosexual intercourse between consenting adults. In 2003, the Delhi High Court refused to consider a petition regarding the legality of the law, saying that the petitioners had no *locus standi* in the matter. Since nobody had been prosecuted in the recent past under this section it seemed unlikely that the section would be struck down as illegal by the Delhi High Court in the absence of a petitioner with standing. NAZ Foundation appealed to the Supreme Court against the decision of the High Court to dismiss the petition on technical grounds. The Supreme Court decided that NAZ Foundation had the standing to file a PIL in this case and sent the case back to the Delhi High Court to reconsider it on merit. Subsequently, there was a significant intervention in the case by a Delhi-based coalition of LGBT, women's and human rights activists called 'Voices Against 377', which supported the demand to 'read down' section 377 to exclude adult consensual sex from within its purview. However, The Supreme Court has reversed the July 2009 ruling of the Delhi High Court decriminalizing gay sex between consenting adults in private. In the world's largest democracy and its second largest country, gay sex is illegal and the status of homosexuals has become that of criminals once again. In its review petition the center said: "The judgment suffers from apparent on the face of the record, and is contrary to the well established principles of law laid down by the apex court enunciating the width and ambit of Fundamental Rights under Articles 14, 15 and 21 of the Constitution".[17]

Whether Section 377 IPC Violates Constitutional Guarantee of Equality under Article 14 of The Constitution

The scope, content and meaning of article 14 of the Constitution has been the subject matter of intensive examination by the Supreme Court in a cantena of decisions The decisions lay down that though Article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group; and (ii) that the differentia must have a rational relation to the objective sought to be achieved by the statute in question. The classification may be founded on differential basis according to objects sought to be achieved but what is implicit in it is that there ought to be nexus i.e., casual connection between the basis of classification and object of the statute under consideration.[18] In considering reasonableness from the point of view of Article 14, the Court has also to consider the objective for such classification. If the objective be illogical,

unfair and unjust, necessarily the classification will have to be held as unreasonable.[19] The other important facet of Article 14 which was stressed in Maneka Gandhi is that it eschews arbitrariness in any form. The court reiterated what was pointed out by the majority in ***E.P. Royappa vs. State of Tamil Nadu***[20] that "from a positivistic point of view, equality is antithetic to arbitrariness."

Conclusion

After analyzing the world wide scenario of the various aspects regarding the LGBT persons, it can be concluded that there exists three separate worlds of vision regarding such persons, somewhere they are given equal or even special rights in comparison to the others while somewhere they are penalized and even slaughtered for practicing such sexual diversifications: while there are certain nations which keep a blind eye towards such acts. But a majority of nations do not accept such practices because of the paradoxes prevailing in the society. There a lot of misconceptions or myths prevailing in the societies regarding such acts like them, being a consequence of the advanced modern day outlooks or them only being an act of lust. People totally overlook the other aspects like the natural deformities or inclinations and formulate their opinions considering themselves to be superiors by the only reason of being heterosexuals. On the analysis of the country wide scenario, it is observed that even in the countries where equal or special rights are given to such persons, they are still reported case of bias or brutal racist activities against the LGBT persons. It is therefore concluded, that not only the statutes or the government of countries that creates a problem, but the main problem is in the mindset of the people and that is what needs to be changed.

Reference:

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Law & Morality: The Context of Suicide and Homosexuality

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Abstract

With the topic of public morality its autumn and flaunt in its pro-bono dissemination, the article discuss the issue and the psychology behind the act of committing suicide and the law which needs to take a new dimension in the legislative field of homosexuality. It contains some analogical deductions of landmark cases by the Indian Judicial System and it proposes a vanguard to the existing laws. It debates the subject on the moral and the legal aspect. As regards homosexuality, we are firmly of the view that every person should get his/her basic human rights to live a dignified manner. The sentiments of a community should not be constrained on the other community in the grab of the public morality because the shape which the law has to take largely depends on the goals and ideals of the community enacting it. There shall not be any intervention by the third party when two people have mutually consented for an act in private and the same doctrine of consent has to be applied in cases of the attempt to suicide. Thus, the discussion reveals the transformation which the society and societal norms have undergone and appeals to the masses that the law does need a change.

Introductory

From the point of view of Kelsonite concept of law, the Grundnorm of the India law was the British crown who possessed unlimited and unbridled powers of suppression and subjugation of native Indians. And in the words of Krishna Iyer J., the present crisis in the Indian legal system is due to complete dependence on the colonial jurisprudence. Though we have started covering our own aspects for example the recognition of transgender, India has inherited as a hangover of the British rule, theory and practice English legal system which has created conflict between old laws and modern notion of justice. He firmly believed that law consists not of propositions alone, but of legal institutions which cherish in the society. Therefore, according to the changing requirements law has adopted itself and keep on evolving itself.

In so far as our country is concerned, mythologies say Lord Ram and his brothers took jalasamadhi in river Sarayu adjacent to Ayodhya; ancient history says Buddha and Mahavir achieved death by seeking it; modern history of independence says about various fasts unto death undertaken by no less a person than Mahatma Gandhi, whose spiritual disciple Vinoba Bhave met his end only recently by going on fast, from which act (of suicide) even as strong a Prime Minister as Mrs. Indira Gandhi could not dissuade the Acharya. Suicide was permissible in certain circumstances in ancient India. This is evident from the words of Manu when he says:

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"A Brahman having hot rid of his body by one of those mode (i.e. drowning, precipitating, burning or starvation) practiced by the great sages, is exalted in the world of Brahmana, free from sorrow and fear."

Not a shred of evidence suggests that homosexuality in any form was intolerable in our history; though *shastrassuggest* that sexual activities should be utilized for procreation. The ancient Hindu scriptures, such as Rig Veda make clear mention to sexual acts between women. Further the carvings and depictions in the famous temples of Khajuraho, Konark, Puri are proof of the same.

Stories of Muslim Nawabs and Hindu noblemen with habits such as maintaining a harem full of young boys also point towards the existence of the notion of same sex relationships. Not to overlook the fact that India is also the birthplace of the Vatsayan's Kamasutra, which is hailed as the bible of intimate acts that includes a complete chapter referring to homosexuality.

With the coming of the Aryans in 1500 B.C., and assertion of the patriarchal system of society, homosexual tendencies were looked down upon and suppressed. Links to the same find a mention in the Manusmriti, which discusses punishment for homosexual behaviour and this directly indicates that the norm of compulsory heterosexuality was preached and prescribed by the Brahmins.

With the advent of the British Raj came the Puritanical values, which regarded display of sexuality as evil or satanic. To the Puritans, sex existed for the sole reason of procreation, and thus homosexuality was considered to be contrary to God's will.

Law as it Stands Today

Section 309 was enacted with the view of preventive punishment and induce deterrent measure but the reason behind suicide are crude enough that this macabre section further enhances suffering by inflicting punishment for the same would be unjust. The principle of criminal justice system fails if the purpose of punishment frustrates the ends of justice.

Constitutional validity of section 309 has been challenged at various instances but in the case of ***State vs. Sanjay Kumar Bhatia***[1], the Hon'ble Delhi High Court very rightly criticized stating:

"…Instead of the society hanging its head in shame that there should be such social strains that a young man should be driven to suicide compounds its inadequacy by treating the boy as a criminal. Instead of sending the young boy to psychiatric clinic it gleefully sends him mingles with criminals."

Then moral debate arose whether Right to life includes Right to die to which the Hon'ble Apex Court of India in the case ***P. Rathinam vs. Union of India***[2], held that *"it's a cruel and irrational provision which violates Article 21 of the Indian Constitution"*.Expanding

the scope of Article 21, the court upheld that, *Right to Life* includes *Right not to live a forced life*. But the above precedent did not sustained for long and immediately after two years, the same Hon'ble Supreme Court of India in ***Gian Kaur vs. State of Punjab***[3], a Constitution Bench overruled its previous decision, observing *"Right to Life is a natural right embodies in Article 21 of constitution, but suicide is unnatural termination of extinction of life"*.

As regards homosexuality, the law during the British colonial rule was coercive and counterproductive to social needs of the Indian people. It was suppressive and insensitive to the sentiments and expectations of the Indians. The British rulers paralyzed the peace and prosperity of Indians by dividing them on the basis of caste, creed, religion, language and occupation so as to perpetuate tension and conflicts between different communities to meet their selfish needs. Thus, law in India as stood before the India independence was formal, rigid, repressive and punitive as contemplated by the Austinian conception of imperative theory of law. In strict Austinian sense, sanctions were imposed on Indians in the names of *'Justice-According to law'*.

The Chapter XVI, Section 377 of the Indian Penal Code is a piece of legislation which introduced British sense of morality in India by Lord Macualay[4] that criminalizes sexual activity *"against the order of nature"*.

The **Naz Foundation India (Trust) *vs.* Govt. of NCT Delhi**[5]was much appreciated judgment. However, this judgment has been overruled by the Supreme Court[6] which had created huge chaos among the various non-governmental organizations as well as other agencies which works for the homosexuals.

The Hon'ble High Court of Delhi in above judgement was full of learning and references to literature on psychiatry, genetics, religion and court judgement delivered in other jurisdiction, particularly the United States and Canada. It refers to the report of the British Wolfenden Committee and the Sexual Offences Act, 1967, by which English law de-criminalized homosexuality. It fortifies its conclusions by the 172nd report of law Commission which also took the same view: *'Section 377 in its present form has to go'*.

In its 172nd report, the Law Commission has recommended deletion of Section 377 IPC, though in its earlier reports it had recommended the retention of the provision. In this report law Commission of India focused on the need to review the sexual offences law in the light of increased incidents of custodial rape and crime of sexual abuse against youngsters and inter alia, recommended deleting the section 377 of IPC by effecting the recommendation amendments in Section 375 to 376E of India Penal Code.

Causes of Suicide

a) The death of a loved one,
b) A divorce, separation or breakup of a relationship,

c) Losing custody of children or feeling that child custody decision is not fair,
d) A terminal illness,
e) Being victimized (domestic violence, rape, assault, ragged etc).
f) Sexual abuse,
g) Inability to deal with a perceived 'failure' and
h) Drugs and Alcohol abuse.

Under these circumstances an individual can take drastic steps, and to alleviate the pain and suffering, he is compelled to end his misery relinquishing the gift of life but if he fails then he is subjected to dire consequences. It is here do the individuals require help rather than chastisement. Suicide occurs in all ages. Life is a gift given by God and he alone can take it. Its premature termination cannot be approved by any society. But when a troubled individual tries to end his life, it would be cruel and irrational to visit him with punishment on his failure to die. It is his deep unhappiness which causes him to try to end his life. Attempt to suicide is more a manifestation of a diseased condition of mind deserving of treatment and care rather than penalty. It would not be just and fair to inflict additional legal punishment on a person who has already suffered agony and ignominy in his failure to commitsuicide.

The maxim *Actus non facit reum nisi mens sit rea* is a basic tenet of *Criminal Law* which states that act alone does not make a man guilty unless his intentions were so. No person could be punished in a proceeding of criminal nature unless it can be shown that he had a guilty mind[7]. It is the combination of act (*Actus Reus)* and intent (*Mens reus)* which makes a crime. The intent and the act must both concur to constitute a crime[8]. There can be no crime large or small without any evil intent[9]. The responsibility in crimes must depend on the doing of a "willed" or "voluntary act" and a particular intent behind the act[10].

Though doctrine of *mens rea* has no application to the offences in general under IPC, yet the doctrine has been incorporated under the penal provisions by provisions regarding as to the state of mind required for the particular offence have been added in the sections itself by using words as intentionally, knowingly, voluntarily, fraudulently, malignantly, recklessly, maliciously, dishonestly, negligently etc., depending upon the gravity of the offence concerned[11]. The doctrine of *mens rea* is omitted in the crimes which attract strict liability.

To "*commit suicide"* is for a person voluntarily to do an act for the purpose of destroying his life, being conscious of that probable consequence, and having, at the time "*sufficient mind to will the destruction of life"*[12]. The word suicide is not defined in the Indian Penal Code, and as Kerala High Court[13] held that *"finding of suicide must be based on evidence of intention. Every act of self-destruction would not come within the meaning of suicide, provided it is the intentional act of the party knowing the probable consequence of what he is about. Suicide is never to be presumed. Intention is the essential ingredient"*.

Suicide, as has already been noted, is a *Psychiatric Problem*[14]and not a manifestation of criminal instinct. It has been stated that shortly after passing of Suicide Act, 1961 (in England), the Ministry of Health issued recommendation advising all doctors and authorities that attempted suicide was to be regarded as a "medical and social problem", as to which it was stated that the same was more in keeping with present day knowledge and sentiment than the purely moralistic and punitive reaction expressed in the old law.

In **Kharak Singh *vs.* State of Uttar Pradesh,**[15]a question was raised whether the right to privacy could be implied from the existing Fundamental Rights such as Articles 19(1)(d), 19(1)(e) and 21. The majority of the judges said our Constitution does not in terms confer any like constitutional guarantees. "*Further the right to personal liberty takes in not only the right to be free from restrictions place on his movements, but also free from encroachments on his private life. It is true that our constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life…"* So, it was held that the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "*castle*"; it is his rampart against encroachment on his personal liberty.

In case of **Peter Samual Wallace *vs.* Inspector General of Police, New Delhi**[16]**,** DelhiHigh court held that right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether these restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. No-one should be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks on his honour or reputation. Everyone has the right to the protection of the law against such interferences or attacks.[17]

The 210th Law Commission report[18] stated that the act of suicide cannot be said to be against religion, morality or public policy, and an act attempted suicide has no baneful effect on society. Further, suicide or attempt to commit it causes no harm to others, because of which State's interference with the personal liberty of the persons concerned is not called for.

Morality and Social Acceptance of Homosexuality

Homosexuality is not a matter of individual choice. It hinge on on ones sexual orientation. Researchers have different views on the source of sexual orientation. Some say it is a genetic factor or an in born trait; others attribute it to experiences in childhood. Most scientists agree that homosexuality is not a conscious choice that can be voluntarily changed and it is not advisable to try and convert someone's sexual orientation since it

would not only require changing ones sexual behaviour but also reconstructing ones emotional, romantic and mental state of mind.

Further scientists have proved that there are certain neuroatomic differences between gay and heterosexual people. Thus people are born gay and they do not become so as a matter of choice. Sexual preference does not change with moral or social codes across the world, it remains constant across cultures irrespective of what that culture accepts or condemns.
The opinions on morality of homosexuality vary strongly in different cultures and belief system. In recent decades, western society gas gradually come to accept the sexual orientation as normal, and many laws governing homosexuals relationships have been abolished[19]. These changes can be attributed to many of the same causes that led to the sexual revolution, to the persistence of the gay rights movement, to a better understanding of the difference between homosexuality and paedophilia, and to new scientific research on the causes of sexual orientation.

Why it is that legislation on homosexuality has aroused such moral outrage and galvanized so many groups into action? Our concern about the moral quality of life seems to be limited to a number of specific issues only.

The greater permissiveness towards homosexuality is essentially a product of changed ideas of social morality[20]. It is still true that morality is confined to a narrow list of command and prohibitions. The India society has not accepted homosexuality till date but it has been gaining recognition gradually. One of the main contributors to this increasing recognition is the India cinema. Even the media is not too far in trying to get homosexuals their due. Homosexuals are also human species and hence have the right to treated as human without any social boycott.

Unfortunately homosexuality in India as in many other countries attracts intense antipathy which may well be called Homophobia. In common language it means fears and dislike of homosexuality and of those who practice it. The word, which may have been coined in the 1960s, was used by K. T. Smith in 1971 in an article entitled "*Homophobia: A Tentative Personality Profile*"[21]. In 1972, George Weinberg's book *'Society and the Healthy Homosexual'* defined it as *"the dread of being in close quarters with homosexuals"*. Mark Freedman added to that definition a description of homophobia as *'an extreme rage and fear reaction to homosexuals'*.[22]

Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any types of 'morality' that can pass the test of compelling state interest, It must be 'constitutional' morality and not the public morality. This aspect of constitutional morality was strongly insisted upon by Babasaheb in the Constituent Assembly.

Conclusion

The menace of both these sections plays monotone with the twisted sense of morality, subjudicating the will of common man to these anachronistic laws. The legal system of a country is a part of its social system and reflects the social, economic, political and cultural characteristic. The India legal system based on British model is full of technicalities and procedures and this makes the system still foreign to majority of Indians. It is human tendency to highlight differences than realize similarities, which is why Gods diversity in creation instead of being glorified is shunned, feared and despised. Society has become nothing but a manifestation of our dislikes and disagreements and we claim that we don't judge or disagree with those differences but in actuality the society does and we follow its example. There is no cure to a darkness that refuses the light of the day. Moment has come for change which long back has been adopted and accepted by educated world. The universal law of Human Rights also states that social norms, tradition, custom or culture cannot be used to curb a person from asserting his fundamental and constitutional rights. If we were to accept the justification, given to us by cultural views, public policy and societal values, which are used to restrict a person's right then there would have been no progressive legislation enacted in our Country. Further, homosexuality was decriminalized in a select few countries and this triggered of a chain reaction where other states started enacting policies in the nature of anti-discriminatory or equal opportunity laws to safeguard the rights of homosexuals. No more can we remain subject to the whims of bygone era; society is progressing, and now is the time of criminal justice system to do the same.

*"…that the purpose of society is to make men virtuous and such is the purpose of law, that the end of the law is to maintain justice in society, that legal restrictions can be justified only so far as they promote freedom of the individuals in the society"……..****Immanuel Kant***

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