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Research Papers

Short Submissions

Pragyaan: Journal of Law

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Panel of Referees

From the Chief Editor

It is our pleasure to present our second issue of Pragyaan: Journal of Law. The experience has been marvelous and full of challenges. Our team faced all challenges with never-ending energy and attitude. It depicts boundless enthusiasm, emotions, imagination and of course talent of the young minds. We applaud this creative endeavor with fine contribution from academicians and practitioners for the success of the journal.

Pragyaan: Journal of Law is a peer refereed bi-annual Journal. Accordingly, it brings to the readers only select articles of high standard and relevance. In a country governed by the rule of law, it is important that awareness about the laws is created among those who are supposed to be concerned with these laws. Academicians can play a very important role in the development of the law, and there is need to encourage young minds to participate in development of law based on the needs of the changing society and technical advances. This Journal provides an excellent platform to all the academicians and practitioners to contribute to the development of sound laws for the country. The current issue addresses vital issues such as Medical negligence, Woman and Crime, Regulatory Environment, Women Empowerment, Higher Education, Corruption, Legal Interpretation, Bail and Clinical Trials.

We would like to express our gratitude to the Management of the institute, Chief Advisor, Editorial Advisory Board and the Panel of Referees for their constant guidance and support. Appreciation is due to our valued contributors for their scholarly contributions to the Journal. We would also like to thank our Editorial members, Dr. T.N. Prasad and Faculty of Law whose valuable suggestions and continuous support especially Dr. Ramandeep Kaur for her hard work and dedication to make this edition a success. We are also thankful to those who facilitated quality printing of this Journal.

We wish to encourage more contributions from academicians as well as practitioners to ensure a continued success of the journal.

We hope that this issue of Pragyaan: Journal of Law will prove to be of interest to all the readers. We have tried to put together all the articles coherently. Suggestions from our valued readers for adding further value to our Journal are however, solicited.

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Pragyaan: Journal of Law

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Research Papers

Short Submission

Remedying the Instances of Medical Negligence: A Welfare States' Responsibility

Shikha Dimri *

ABSTRACT

The concept of doctor patient relationship and the doctors' duty towards the patient has changed a lot in the last few decades .With the growing acknowledgement of the patients' rights such as right to medical care, emergency medical care and right to remedies in cases of negligence, doctor- patient relationship has travelled more towards consumer- service provider relationship. Courts have done extraordinary efforts to provide remedy to the victims of medical negligence under the different laws available. However, the accountability of the doctors under the law of professional negligence has developed after the enactment of the Consumer Protection Act 1986, which has not only changed the law of medical negligence, but created an inexpensive and speedy remedy against medical malpractices. In the earlier cases, it was held that medical practitioners were immune from a claim for damages on the ground of negligence. This position has been reversed in subsequent cases. This paper tries to examine the concept of negligence in medical profession in the light of interpretation of laws available and to find out whether the different laws available to the victims are sufficient or not. The paper also covers the remedies available to the victims of medical negligence other than that given by the Consumer Protection Act.

Keywords: Negligence, Medical negligence, Professional negligence, Medical practitioners, Medical malpractices, Consumer protection, Welfare State.

Introduction

Constitution of India intends to establish India as welfare state. Part III of the Constitution provides Fundamental Rights in form of civil, political, economic & cultural rights to its citizens. The Directive Principles of State Policy is the basic inspiration and insight for a welfare state. Directive Principles of State Policy state that state shall secure order in which social, economic and political justice is provided to all. State shall take steps to promote matters like improving public health, education, livelihood, raise the level of nutrition, standard of living etc. It is the basic duty of the State to apply these principles in making laws. Article 21 of the Constitution of India guarantees that "no person shall be deprived of his life or personal liberty", and right to life includes the Right to Food and Healthy Environment; and Right to Food and Healthy Environment is inalienably linked with consumption. Thus it is the utmost duty of the State to enact legislation for protection and promotion of an individual's rights and for the dignity and welfare of its citizens. This makes it imperative to provide for the welfare of the individual as a consumer, a client and a customer.

In *Francis Coralie v. Union Territory of Delhi*[1] Bhagwati Justice held : "We think that right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings."[2]

Article 37 of the Indian Constitution declares that the Directive Principles are "fundamental in the governance of the country" and that "it shall be duty of the State to apply to these principles in making laws". Moreover, the ideal of a welfare state is embodied in Article 38 of the Constitution of India, which proclaims that: "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of the life." Further Article 39(b) and (c) of the Indian Constitution imposes a duty on the State to strive "to direct its policies towards securing the distribution of the ownership and control of the material resources of the community in such a way to sub-serve the common good and that the operation of the economic system should not result in the concentration of wealth and means of production to common detriment." These provisions mentioned under Indian Constitution oblige the State to promote the

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1 *(1981) I SCC 608: AIR 1961 SC 746*

2 *Ibid*

3 *See Salmond Jurisprudence (1974).*

welfare of the people and protection of the consumers is one of the duties imposed on the State.

Article 19(1) (g) of the Constitution guarantees "to practice any profession, or to carry on any occupation, trade, or business". Article 19, however, empowers the State to impose "reasonable restriction" on the exercise of this right "in the interest of the general public". Thus, the Constitution of India by virtue of Article 38 and 39 imposes the responsibility on the State to promote the welfare of the people and provision enshrined under Article 19 of the Constitution provides enough constitutional power to discharge the responsibility mentioned under the chapter of Directive Principles of State

Policy. Article 47 of the Indian Constitution provides that "The State shall regard the raising of the level of the nutrition and the standard of living of its people and improvement of public health, as among its primary duties…".

As Salmond observed, the modern welfare state functions include the maintenance of welfare activities and the discharge of welfare duties for benevolent purposes. The modern welfare state is a common carrier of letters and parcels, it builds ships, it provides highways, bridges, education, broadcasting and municipal gas, water and electricity, health and medicines, it conducts saving banks, it controls the production and distribution of commodities, it engages upon scientific research, it controls rents and construction of buildings, etc."[3] Justice, benevolence and freedom from oppression is the watchwords of a welfare state. In the words of another great jurist Prof. W. Friedmann the welfare state functions as the protector or dispenser of social service, industrial manager, economic controller and as an arbitrator[4].

Medical Negligence and Its Causes

This paper tries to find out whether the remedy provided under different laws for the victims of medical negligence are proper and sufficient or not. Before taking up these issues it's worthwhile to have some understanding of the term 'Medical Negligence'.

Several authors and jurists have defined negligence or the Tort of negligence as follows :

According to Dr. Winfield, Negligence as a tort is the breach of a legal duty to take care, which results in damage, undesired by the defendant to the plaintiff.

Alderson, B. defines - "Negligence is the omission to do something which a reasonable man, guided upon those considerations, which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do."

In Jacob Mathew case[5], the Supreme Court of India has gone into details of what is the meaning of negligence by medical professionals. Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply.

A case of *occupational* negligence is different from one of *professional* negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed.

When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence.

So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

In the Bolam case[6], the court held that:

> *… In the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if he conforms with one of those proper standards, then he is not negligent.*

The term "Medical Negligence" relates to the medical

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4 *See W. Friedmann, Law in the Changing Society, (1972), pp 506-07*

5 *Criminal Appeal No. 144-145 of 2004 decided by Supreme Court on August 5, 2005*

6 *(1957) 2 All ER 118*

7 *I (1994) CPJ 509: 1994 CCJ 475*

profession and is the outcome of some irregular, unethical and unprofessional conduct on the part of any member of the profession or related services in discharge of professional duties. Basically, medical negligence means negligence resulting from the failure on the part of the doctor to act in accordance with medical standards, which are being practiced by an ordinarily and reasonably competent man practicing the same profession. Halsbury's Law of England states that standard of adroitness is required by the medical practitioner in the following words: "The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men." In *Dr. C.J. Subramania v. Kumarasamy*[7], the Madras High Court has observed that medicine is an inexact science and it is unlikely that a responsible doctor would intend to give an assurance to achieve a particular result. Not everytime a mere error of judgment can be categorized as negligence in legal sense, but it is such an error which a reasonably competent man, acting with ordinary care might commit[8].

The one difficult question relating to this medical profession has been whether the medical practitioners shall enjoy immunity or they be made answerable before the established institutions of justice like other professionals. The question has been raised many times in number of cases to fix the liability of medical practitioners for their negligent acts..[9] Medical negligence committed by professionals and related staff during the discharge of their services is punishable since time immemorial. The Babylonian king Hammurabi dated back to 2900 BC enacted a law which laid down the rights and duties of doctors and punishment in case of negligence. Ancient Egyptian and Roman law punished the physicians with banishment or death for malpractice.[10] In Kautilya's Arthashastra we find the mention of the punishment to the medical practitioners if they do not give prior information about treatment involving danger to life[11]. The Charaka Samhita gives a detailed code of duties, privileges and social status of physicians.[12] As a response to the social problems, courts have initiated exercising their jurisdiction against the doctors for their negligent acts by formulating certain new principles of liability and by following the traditional principles. The first recorded medical negligence suit under English law was filed in 1374 whereas in USA it was filed in the year 1794[13] . Certain new institutions also have come up to secure the accountability of the medical practitioners with the aim and object of protecting the rights of the individuals and providing remedies to them, considering them as the consumers of medical service.

The present trend among medical practitioners, whether consultants or surgeons, is to require the patients before starting the treatment to go through various investigations costing them a lot of money. They feel that at time superfluous diagnostic tests are called for by some medical practitioners which unnecessarily add costs to the patients. They also feel that medical practitioners sometimes suggest that investigatory reports which are quite costly obtained from specified persons who may not be the best in their lines. Consumer forums should take a due note of this practice in the larger interests of consumers in general.

In a medico legal case, the doctors as well as the police officials are under statutory obligations not only to see that injuries suffered by a person who has been brought to the hospital be properly taken care of, specially in cases of head injuries extra care is needed..[14] In *Indian Medical Association v. V.P. Shantha*,[15] the Supreme Court said, "A contract of personal service' has to be distinguished from a 'contract of person service. In the absence of a relationship of master and servant between the patient and medical practitioner, the service rendered by a medical practitioner to the patient cannot be regarded as serviced under a 'contract of personal services'. Such service is service rendered under a 'contract for personal services' and is not covered by exclusionary clause of the definition of 'services' contained in Section 2(10)(o) of the Act."[16]
The Court further said, "it would thus appear that medical practitioners though belonging to medical profession are

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[8] *See Anoop K Kaushal Medical Negligence and Legal Remedies (2008) p-13-14*

[9] *Anoop K Kaushal, Medical Negligence and Legal Remedies, (2008) p.13*

[10] *Camps FE, Gradwohl's Legal Medicine, The History of Medicine, (3rd Ed.), (1976), p. 1-14.*

[11] *See Rangarajan L.N, Kaitilya's Arthashastra, (1992), p. 251*

[12] *See Mittal Shillekh, Sonia, Evolution of Forensic Medicine in India, at http://medind.nic.in/jal/t07/i4/jalt07i4p88.pdf*

[13] *See Tapas Kumar Koley ,Medical Negligence and the law in India ,(2010) pp. xvi-xvii*

[14] *Pooam Sharma v. Union of India, AIR 2003, Del. 50*

[15] *(AIR 1996 SC 550)*

[16] *The Consumer Protection Act,1986*

[17] *Ibid*

not immune from a claim for damages on the grounds of negligence. The fact that they are governed by the Indian Medical Councils Act and subject to the disciplinary control of Medical Council of India and or State Medical Councils is no solace to the person who has suffered due to their negligence and the right to such person to seek redress is not affected."[17]

Although, some professions like medicine have their own agencies, which have the power to examine the cases of professional misconduct. The Indian Medical Council Act, 1956 provides for the setting up a Medical Council with sufficient powers to control the medical profession. But there is no provision for compensating the victims as per the existing rules of these bodies. The decision of the disciplinary committees of these bodies are not reported to the public or widely circulated among the people. The civil courts are over-crowded with litigation. The victims should have an access to forums that could grant meaningful relief and the consumer forum has emerged as an effective alternate solution.

The Supreme Court in *Laxman v. Trimbak*[18], held:

"The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires."

In the historic of case of *Indian Medical Association v. V.P. Shantha*,[19] the question, was whether the Consumer Protection Act, 1986 applied to medical practitioners, hospitals and nursing homes. It was held in this case that medical practitioners were not immune from a claim for damages on the ground of negligence. The court also approved a passage from Jackson and Powell on Professional Negligence and held that:

"The approach of the Courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general a professional man owes to his client duty in tort as well as in contract to exercise reasonable care in giving advice or performing services."

The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment, which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the Court finds that he has attended on the patient with due care, skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence.[20]

In cases where the doctors act carelessly and in a manner, which is not expected of a medical practitioner, then in such a case an action in torts would be maintainable. As was held in Laxman's case, by the Supreme Courts. A medical practitioner has various duties towards his patient and he must act with a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. This is the least which a patient expects from a doctor.[21]

In another historic case of *Spring Meadows Hospital v. Harjol Ahulwalia through K.S. Ahluwalia*[22] the Apex Court stated in paragraph 10 of the judgment that even delegation of a responsibility to another may amount to negligence in certain circumstances. A consultant could be negligent where he delegates the responsibility to his junior with the knowledge that the junior was incapable of performing his duties property.' Supreme Court gave its view regarding the inclusion of medical negligence cases within the purview of Consumer Protection Act, 1986 in IMA Case [23]. The Supreme Court held in this case that, the definition of services in section 2(l)(o) of the Act can be split up into three parts- the main part, the inclusionary part and the exclusionary part. The main part is explanatory in nature and defines services to mean service of any description which is made available to the potential users. The inclusionary part expressly includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment ,amusement or the purvey of news or other information. The exclusionary part excludes rendering of any service free

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[18] *AIR 1969 SC 128*

[19] *(AIR 1996 SC 550)*

[20] *See, Ibid*

[21] *Ibid*

[22] *MANU/SC/1014/1998*

[23] *AIR 1996 SC 550*

[24] *IMA case,para 17*

of charge or under a contract of personal services. The inclusive part of the definition of 'service' is not applicable and we are required to deal with the questions failing for consideration in the light of the main part will require consideration only if it is found that in the matter of consultation, diagnosis and treatment a medical practitioner or a hospital/nursing home renders a service falling within the main part of the definition contained in Section 2(l)(o) of the Act. We have, therefore, to determine whether medical practitioners can be regarded as rendering a "service" as contemplated in the main part of Section 2(l)(o)[24]. This was the most important issue clarified by the Supreme Court. It removed all confusions prevailing initially regarding the inclusion of medical services under the purview of the Act [25]. All types of medical services were brought under the purview of Consumer Protection Act,1986.

Remedies Available in Cases of Medical Negligence

In India, patient's rights form the obligations of a physician or health care centre as provided under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002.

Besides the common law principles of negligence there are a number of provisions enacted in the Statues by which the conduct of the medical practitioners and others connected with this profession is regulated. According to these Statues the members of Medical Profession have to adhere to certain norms of the professional bodies themselves as a matter relating to professional discipline, but if the same conduct falls within the definition of a legal duty of care it may be dealt with by the authorities of the state as a matter of professional negligence. Under Article 21 of Indian Constitution, Right to health care is a Right granted to each and every citizen as well as non-citizens[26]. It is quite contrary to Right to refuse to attend a patient, granted to doctors. In Parmananda Katara v. Union of India, Supreme Court held that Right to refuse to attend a patient is a right of every doctor but cannot be claimed in whatsoever emergency state[27]. If a doctor does so, it is considered as a breach to legal duty, an essential and sufficient element of negligence.

Right to health care is also declared as a Human Right in Article 25(2) of UDHR and Article 7(b) of International Covenant on Economic, Social and Cultural Rights. The Supreme Court has cited this while up holding the Right to health for workers in CESC Ltd. V. Subash Chandra Bose.[28]

The legal remedies for an instance of medical negligence are available under various laws and rules. Whenever there is a right , there has to be remedy for infringement of such right, such remedy may be directly provided for, along with the procedure, or may be incidental, for example., if Article 21 provides a right, its breach is always to be remedied even if there is no procedure for it is laid down under Article 21. Remedies available under Indian Law, for cases of Medical negligence, can be enumerated as follows:

1. The Indian Contract Act, 1872 : When a patient goes to a doctor for medical treatment, he enters into an implied contract with the doctor that he will use reasonable professional skill and care in treating the patient. If the doctor fails to fulfill this contractual obligation the patient can take action and claim damages under Sec. 73 of the Indian Contract Act. This remedy is not popular since it involves cumbersome procedure and technicalities, like the Court Fee, fee for the lawyer etc. Section 73 of Indian Contract Act says when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

2. The Consumer Protection Act,1986 : At the outset the courts and the forums held that relationship between doctors and patient is not covered by the Consumer Protection Act. The Consumer Protection Act seeks to provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumers dispute and for matters connected therewith.

   In cases where the services offered by the doctor or hospital do not fall in the ambit of 'service' as defined in the Consumer Protection Act, patients can take recourse to the law relating to negligence under the law of torts and successfully claim compensation. The onus is on the patient to prove that the doctor was negligent and that the injury was a consequence of the doctor's negligence[29]. Such cases of negligence may

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[25] *See Tapas Kumar Koley ,Medical Negligence and the law in India ,(2010) p.140*

[26] *Constitutional Law of India by DURGA DAS BASU, 2nd Edition 2008*

[27] *Parmananda Katara Vs. Union of India (AIR 1989 SC 2039)*

[28] *CESC Ltd. and others Vs. Subas Chandra Bose (AIR 1992 SC 573)*

[29] *Philips India Ltd. v. Kunju Pannu AIR 1975 Bom. 306*

[30] *Kalra Satyanarayana v. Lakshmi Nursing Home 1 (2003) CPJ 262*

[31] *Achutrao Haribhao Khodwa v. State of Maharashtra (1996) 2 SCC 634*

[32] *State of Haryana v. Smt Santara AIR 2000 SC 1888*

[33] *Lakshmi Rajan v. Malar Hospital III (1998) CPJ 586*

include transfusion of blood of incorrect blood groups[30], leaving a mop in the patient's abdomen after operating[31], unsuccessful sterilisation resulting in the birth of a child[32], removal of organs without taking consent[33], operating on a patient without giving anaesthesia[34], administering wrong medicine resulting in injury[35], etc.

In case of *Consumer Unity and Trust Society, Jaipur v The State of Rajasthan & Others*[36] the National Consumer Disputes Redressal Commission held that the persons who avail themselves of the facility of the medical treatment in government hospitals are not consumers and the said facility offered in the government hospital cannot be regarded as service hired for consideration. This decision was not appraised and was viewed as the death knell of emerging consumer protection law in the country[37]. In case of *Moble Rossvelt v State of Kerala*[38] this decision was followed. The Madras High Court in case of *Dr. C. S. Subramanian v Kumarswamy*[39] held that service rendered to a patient by a medical practitioner or hospital, by way of diagnosis and treatment, both medicinal and surgical, would not come within the meaning of 'service' as defined under the Consumer Protection Act.

However, in 1992, in an appeal from Kerala State Commission, the National Consumer Disputes Redressal Commission included the medical profession under s.2(1)(o) of the Consumer Protection Act.

3. The Indian Penal Code, 1860: Patients may file complaints against negligent doctors under the provisions of the Indian code (See. 304A, 336, 337 388 of IPC, 1860). On proof of negligence penal action against the doctor can be taken. Here also the difficulty is proof of negligence arises for the patients, therefore very few cases are reported where such action has been taken against erring doctors. According to a recent Supreme Court decision, the standard of negligence is also required to be proved against a doctor in cases of criminal negligence, to fix the amount of penalty.

4. The Law of Torts : If a doctor does not take reasonable degree of care, which he is required to take and thereby causes injury to his patient, he can be sued under the Law of Torts.

Breach of any duty by a doctor confers upon the aggrieved patient a right of action for negligence under the Law of Torts. Proof of breach of duties again involves lot of technicalities. Cumbersome procedures create difficulties in taking action against the negligent doctor. Previously very few suits used to be filed in India under the Law of Torts because the legal process took lot of time and the compensation awarded by the courts was niggardly but now conditions have changed because of changes in the law and awakening of the people. Legal action against the Medical practitioners has become very common.

Conclusion

Although the courts have made extraordinary efforts to provide remedy to the victims of medical negligence by placing them under the ambit of Consumer Protection Act, 1986 and the other legislations as mentioned above. But a lot has to be done yet, as the present trend among medical practitioners, whether consultants or surgeons, require the patients before starting the treatment to go through various medical tests costing them a lot of money, which sometimes are unnecessary and at time purposeless diagnostic tests are called for by some medical practitioners which unnecessarily add to costs of the patients. Medical practitioners sometimes demand and urge that investigatory reports of the patient which are quite costly should be obtained only from specified persons who may not be the best in their lines. Consumer forum need to take a due note of this practice in the larger interests of consumers in general so that the interest of the common man is protected and they should not be deprived of their rights of living healthy. The very nature of the medical profession makes it vulnerable to civil and criminal suits. Sometimes Law requires to protect the innocent doctors too. It is important to punish guilty doctors but it is also important to protect doctors who act in good faith. The courts must strike a perfect balance between two. Also, owing to the very nature of the cases, the consumer forums may have specialized benches or members equipped with technical knowledge and skill to adjudicate such cases.

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[34] *P N Rao v. G Jayaprakasu AIR 1950 AP 201*

[35] *Spring Meadows Hospital v. Harjol Ahluwalia AIR 1998 SC 1801*

[36] *1991 (1) CPR 241*

[37] *D.N. Saraf, Supplement to the Law of Consumer Protection in India, 1990, quoted by Mustaq Ahmad in "Consideration : Whether a pre-requisite in Medical Services"' 7 KULR 2000 at p. 172.*

[38] *1991 (1) CPR 330*

[39] *1994 (1) CPJ 509*

[40] *Vasantha P Nair v Cosmopolitian Hospital and Ors (1991) 2 CPR 155;(1991) II CPJ 444(Kerala SCDRC)*

[41] *Cosmopolitian Hospital Pvt Ltd v Vasantha P Nair and Cosmopolitian Hospital v VP Santha (1992) I CPJ 302 (NCDRC),(1992) I CPR 820 (NC), (1993) I CTJ 170 (NC),1992 CPC 447 (NC), 1993 CCJ 148,1993 CCJ 148, (1992) 3 Comp LJ 80*

[42] *Suresh Gupta (Dr) v. Govt. of NCT of Delhi (2004) 6 SCC 422*

Women Crime in India: From Prevention to Post-Incidence Responsibility

Dr. Brijendra Singh Yadav *

ABSTRACT

The involvement of women in crime and in the criminal justice system is growing. While the increasing presence of women as victims and offenders, as well as criminal justice practitioners, has triggered more attention from the research and policy communities, the number and complexity of the issues involved requires that still greater attention be paid to them. Much better understanding of these issues- and concerted action to resolve them-are required to help overcome the historically marginal status of women and their often unfair treatment in the criminal justice system.

The advancing problem of transnational crime makes these already ambitious tasks even more difficult. The political, economic and technological changes that are occurring on a global scale presently are increasing problems and challenges for all levels of society. Transnational crime increases the potential victimization of all people in marginal positions, but this is especially so with respect to women because of their vulnerability to sex crimes. Their dire economic straits in many developing countries render women an easy prey for a trafficker that has also fuelled up the issue of women crimes in India.

Due to the complex circumstances surrounding women and offending, especially in light of the current problem of trafficking and forced prostitution, incarceration should be the sanction of last resort, and should be reserved only for the most serious crimes. We must develop a wide range of alternatives and intermediate sanctions and adequate programs to meet the special needs of women offenders after their release back to society. There is a pressing need for community-based alternatives and after care programs that help reduce the societal alienation and social stigma most often associated with women offenders and prisoners.

So the present paper focuses attention on the critical analysis of the basic root causes leading to this type of degradation of Indian Human Resource in the form of Women Crime, its preventive measures and its remedies at the best possible extent in prison and post prison formats.

Background

In recent times, the number of criminal offences committed by females has increased at a much higher rate than the number of crimes committed by males. In India it is estimated that the female crime rate has increased by 362.53 per cent during 1971 - 1990. Socially the crimes committed by females are considered to be more serious when compared with the male criminality because of the role played by a woman as mother, wife, caretaker and more to say a central figure in the family. The various dimensions of women and crime have recently been developed into a broad field of research in the areas of Social Work, Sociology, Criminology and Women Studies. Starting from Otto Pollak (1950), Smith (1962), Sharma (1965), Ahuja (1969), Eliott and Voss (1974), Elizabeth Winshuttle (1981), Nagla (1982), Rani (1983), Khosh (1986) Joseph (1992), Saxena (1994) etc., are notable researchers who immensely contributed to the knowledge on women and crime. For the past two decades the topic of women and crime has began to attract much attention because of renewed interest in Women and Economic Development. Research and experience have indicated that women in comparison to men are no different in terms of their personality, achievement, motivation, dependency and other related attitudes.

Therefore, there is a vast potential remaining untapped, which could be fully handled and guided to join the main stream of economic development. They have proved themselves successful in all fields in which they have been given an opportunity. The concern to develop women resulted from the fact that they represent 50 per cent of the world population, but receive only 10 per cent of the world's income and own less than 1 per cent of the assets. In this juncture a micro level study on socio-economic status of women prisoners was planned to suggest various strategies for their rehabilitation.

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[2] *Crime, Gender and Social Order in Early Modern England. Contributors: Garthine Walker author.Publisher: Cambridge University Press. Place of publication: Cambridge, England. Publication Year:2003. Page Number: v.*

Need of the Study

Traditionally, the Indian woman has been the foundation stone of the family and society in general. She creates life, nurtures it, guards and strengthens it. In her task, as mother, she plays a vital role in the development of the nation. She is, as wife and mother, committed to serving the family, but she is also its center, for it is through her that the family is perpetuated and in this lies the pride of her status in society at large. She is the transmitter of tradition, the instrument by which Indianculture is preserved. If the foundation is not solid or carefully maintained by those responsible for her protection, not merely the family but the society itself is bound to crack and dismember. Modernization, industrialization and urbanization have been invoked to account for the upsurge of female delinquency because they correlate closely with each other. As urbanization increases, traditional roles decrease with increased mobility, people loose stability and personal relationships are disrupted.

There is a definite need for more in-depth and intensive study on female criminality to acquire greater insight into the problem. For the past two decades the topic of women and crime has begun to draw much attention because of the recent interest in women and their development.

There is a great need to study women in crime because the place and role of women in the Indian society has undergone considerable changes during the last two decades leading to a greater participation in the criminal activities by them. Since the research on women criminals is fragmentary in nature, scope and coverage, and is still in initial stages, the present study examines and explains women prisoners status in the socio-economic context.

The basic objective is to study:

1. Why do women commit crime?
2. What is their socio-economic status?
3. What measures should be taken to prevent women crime?
4. How should offenders be dealt with?
5. How can the rehabilitation process motivate the prisoners to lead a better life with values?

Women as Offenders- A Bitter Reality With Root

Victimization of women is a difficult issue to address. There exist many entrenched cultural ideologies in virtually all countries that serve to support tolerance and even encouragement of the victimization of females. Women throughout the world have been and will continue to become victims of gender-based violence- violence inflicted by the family, sexual abuse of girls in the household, intimate partner abuse and marital rape, dowry-related violence, trafficking, sexual assault and female genital mutilation. This victimization is exacerbated by such factors as poverty, racism and xenophobia. Many women who enter the justice system as offenders have experienced some form of prior victimization. Oftentimes they have had a series of negative relationships with men, including being exploited or physically abused (Janeksela, 1997).

In dealing with female offenders, it is necessary to recognize this unusual duality of criminality and victimization. These two factors often themselves have origins in the same underlying socio-economic conditions and status. Research has found that many women's pre-prison lives have involved economic distress, victimization and self-abuse through drugs and alcohol (Cairo, 1996). If crime and justice policies dealing with women offenders are to be successful, these policies must address this reality.

[3]One stark example of the poverty-crime nexus can be found in the crime of human trafficking. Women who fall victim to trafficking are most likely poor, uneducated and unskilled, and have limited opportunity for making it on their own (IOM, June 1998). Once these women are under the control of traffickers and pimps, they are often subjected to abusive, coercive, deceptive and brutal practices (IOM, June 1996). But even when the criminal justice system does become involved in trafficking cases, all too often the women are either immediately deported or are simply put in jail (IOM, 1995). One of the points of consensus is that policies should not further women's victimization the state should not punish women's attempts to cope and survive in difficult circumstances, nor should it blame them for their victimization.

Women are still clearly in the minority among prison populations, but their numbers are increasing at a faster rate than those of male offenders. In addition, many incarcerated women are non-violent offenders, serving time for drug or property offences (Cook, 1999). While the growth in numbers of female inmates has resulted in marginal improvement in services for incarcerated women, the rapid increase has not been matched by a commensurate increase in programs that are specifically tailored toward women's needs. Programs and services need to take account of cultural and racial diversity among the growing women's population in prisons and jails. Criminal justice policies and programs must recognize

[3]*Offending Women: Female Lawbreakers and the Criminal Justice System. Contributors: Anne Worrall - author. Publisher: Routledge. Place of Publication: London. Publication Year: 1990. Page Number: iii.*

and address their distinctive health needs, their responsibilities as mothers, the cultural barriers and isolation confronting women imprisoned outside their homeland, and their vulnerability to sexual exploitation and human rights abuses by male staff. This need seems to be greatest in developing nations.

Due to the complex circumstances surrounding women and offending, especially in light of the current problem of trafficking and forced prostitution, incarceration should be the sanction of last resort, and should be reserved only for the most serious crimes. We must develop a wide range of alternative and intermediate sanctions. There is a pressing need for community-based alternatives and after care programs that help reduce the societal alienation and social stigma most often associated with women offenders and prisoners.

Recently, the Bangalore police nabbed a 40-year old serial killer. A chain snatching gang was caught by Delhi Police. And there is one startling theory coming forward-both had women as criminal and that they were performing acts that were hitherto relatively unheard as done by women in India before serial-killing and robbery. Crime, in India, is not a male bastion anymore. However, when it comes to crime, until the last twenty years, the lack of literature on female criminality is often astounding. One reason given for lack of interest is that females have traditionally been seen as law-abiding. It is certainly true in the context of what the statistics speak but sex crime ratio differ depending on what act is being considered as crime. The various involvements in crime of men and women is one of the most striking and criminological truth needs to be studied in order to ascertain are its causes.

The history of mankind reveals that the woman has been the foundation stone of a family in particular and society in general. Since the dawn of civilization, women have been seen as preservers of social norms, traditions, customs, morality and family cohesiveness. Woman has been given a position of pride in every religion. My immediate concern is why the woman, who is considered to be foundation stone of family and every spiritual faith, without whose blessings the work of infusing new life into humanity cannot be accomplished, has gone astray making her mark on the crime scene and this is what has encouraged me to write this paper on women's involvement in criminality in the social, cultural, economic and political milieu of India.

The gravity of the challenge increases manifold when we go through the latest available data on crime from the National Crime Records Bureau (NCRB). While women criminals are still a minority (they comprise only 5% of the criminals convicted for heinous crimes) & the Crime in India Reports reveal that the number of females arrested for criminals activities in 2003 was 1,51,675, and this shot upto 1,54,635 in 2007. Also, interestingly, the nature of crimes committed by them too, is gradually witnessing a sea change- from softer crimes like drug trafficking and prostitution to heinous crimes like murder. 3439 women were arrested for murder in 2005 and 3812 in 2007 that is an increase from 5.4% in 2005 to 6% in 2007 (NCRB figures). Also most of the females committing crimes in the age group 30-45 years.

Female Criminality: Theoretical Perspective

The early researchers attributed female criminality to biological or sociological antecedents. Although crime, as a behaviourial or social problem, is complicated and not easily understood, the criminality of women is seen more complicated, less understood and subject to easy control. Women are considered as turning crime as a perversion of feminine role whether their causes are biological, psychological, social or environmental.

a. Innate Criminals/ Biological Viewpoint

Ceasar Lombroso's contribution is considered as the beginning of scientific study on female crime. He viewed, "female deviance as rooted in the biological make up or as inherent feature of the female species". He observed female criminals to be more terrible than the male criminals because her cruelty was much more 'refined' and diabolic. Lombroso thought women shared many traits with children and they were morally deficient and their lack of intelligence was the reason of their relatively small participation in crime

In nineteenth century, Lombroso and Ferrero (1895) wrote a book called, "The Female Offender". Their theories were based on atavism; a belief that all individuals displaying anti-social behavior were biological throwbacks. The born female criminal was considered to have the criminal qualities of men and the worst qualities of women.

Otta Pollak explained the influence of hormonal changes over menstruation, pregnancy and menopausal stage. He said that in the pregnancy and menopausal phase, the psychological characteristics such as emotional changes of moods, abnormal craving and impulses and temporary impairment of consciousness point in the direction of criminal causation.

But, in the present age of information technology and impersonal relations at the threshold of the 21st century, such theories seem to be unreasonable and unscientific.

All these theories depict crime as an inherent human trait which does not amply describe the phenomenal variations in the nature of crime being committed these days, when crime has risen up to the status of career for many, involving highly advanced professional skills and typical scientific techniques.

b. Psychological Viewpoint

Freudian hypotheses hold that women who are not passive and content with their traditional roles as mothers and wives are maladjusted. Women who accept traditional roles as mothers and wives are "adjusted ones" and are different from the maladjusted women, who refuse or fail to internalize the values associated with the role in the society. He also said that women, who do not internalize the traditional roles and values of the society, attend institutions for higher learning, take up professions outside the four walls of their homes, join feminist movements or commit crimes. He maintained that all females experience some degree of jealousy of males but 'normal' women manage to accept and internalize societal definitions of femininity, centered around single minded interest in motherhood.

The limitations of an attempt to explain crime strictly in psychological terms are partly conceptual which fail to appreciate the significance of social factors in generating the deviant behaviour.

c. Sociological Viewpoint

A plethora of writings on sociological viewpoint emerged during the last few decades including Equality theory, Economic theory, Opportunity theory, Social disorganisation theory, and Role theory

Predominant theories such as Thomas (1907) and later, Pollack (1961), believed that criminality was socially induced rather than biologically inherited. Pollack (1961) believed, it is the learned behaviour from a very young age that leads girls into a masked character of female criminality, that is, how it was and still is concealed through under-reporting and low detection rates of female offenders. He further states, in our male-dominated culture, women have always been considered strange, secretive and sometimes dangerous. A greater leniency towards women by police and the justice system needs to be addressed especially if a true equality of genders is to be achieved in such a complicated world.

These contemporary theorists reject earlier theories based on psychological and physiological viewpoints. Criminal behaviour, as Sutherland and Cressy insisted, is learned through interaction with other persons. The learning includes both techniques for committing the crime and a more subjective element- the specific direction of motives, derives, rationalisations and attitudes. Role theorists like Heidensohn and Hoffman offer explanation of female criminality in terms of social differentiation of gender roles. Hoffman emphasised that different socialisation given to girls expect them to be non- violent and do not allow them to learn how to fight and use weapons. It prevents the women to acquire necessary technical ability or strength for crime. Unfortunately, these role theorists have desperately failed to propound any concrete idea about the etiology of crime.

'Double burden' of work and household responsibilities, official indifference to the needs of women, the increasing rate of family breakdown, the alcoholisms of husbands, the psychological trauma of divorce and financial difficulties in rearing up 'left with children'- all contribute to incidents of female criminality.

d. Psychological Viewpoint[4]

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Sanyal also observed that women convicts displayed emotional stability, insecurity, rejection or frustration in childhood. They encountered harsh living conditions, disappointments in love and a large number of unfortunate experiences which generally made it difficult for them to face realities of life.

e. Feminist theory

In light of this demographic shift in incarcerated populations, and the failure of traditional criminology to account for women's crime, some criminologists have begun taking steps to fill the void in the criminological

[4] *Sarah Deer; Social Justice, Vol. 31,2004 Federal Indian Law and Violent Crime: Native Women and Children at mercy of the State*

literature that addresses female criminality. The feminist pathways research is explicit in its pursuit of life events that lead/force/nudge women into crime. Again, even this approach has its own drawbacks. This approach is often ethnographic and uses retrospective data (i.e., interviews with incarcerated women asking them how they ended up in jail) to develop an understanding of the key transitions in women's lives that place them in jeopardy of entering the crime.

Although it may be true that society has changed since the days of Lombroso and Ferrero, past theories appear to remain within much of today's justice system. Women have so many choices of which they didn't before. It may appear native to assume that women and crime may be explained by any one theory. Any crime for that matter, whether male or female, may not be explained by any one theory. It is an established and non-arguable fact that males and females differ biologically and sociological influences, such as gender-specific role-playing appears to continue within most families. Its a matter of proportion not difference. According to Edwards (1984), the enemy is within every woman, but is not her reproductive biology; rather it is the habit regarding it into which she has been led by centuries of male domination

This unequal position of women in society due to social oppression and economic dependency on men and the state, needs to be addressed. Offences by women remain sexualised and pathologised. In most ways, crimes women commit are considered to be final outward manifestations of an inner medical imbalance or social instability. Their punishment appears to be aimed principally at treatment and reconciliation.

Many argue, the main culprit for aggression as seen in many men is testosterone. This hormone appears responsible for much of the male crime, even in today's society of increased knowledge on the subject. In contrast, extensive research over the past twenty-five years done on the testosterone/aggression link focusing on prenatal testosterone predisposing boys to be rougher than girls concluded that it was very difficult to show any connection between testosterone and aggressive behaviour. Cross-cultural studies of ninety-five societies revealed 47% of them were free of rape while at least thirty-three societies were free of war and interpersonal violence was extremely rare. Based on these studies, it may be evident to suggest that sociological factors and environmental influences appear to have greater credibility in explaining criminal behaviour, whether male or female.

In is evident from the numerous specific studies already published that no single theory or type of explanation is adequate for the wide variety of behaviour variously called 'crime'. Despite many theories no view point can sufficiently satisfy the quest for the area. The involvement of women in terrorist activities, smuggling, violence, communal riots etc. witnessed the adoption of untraditional trends of crime by them, defying all available theories and trends of crime, because most of these crimes are problems of structural immorality and ethnic affinity. It therefore, becomes the need of the day to study the problem from fresh angle in order to understand the phenomenon in its totality- recent trends, etiology, personality traits and its impact on society.

Major Criminal Happenings in the Indian Land:

1. State CBI/ SIT v. Nalini & Others

On the night of 21 May 1991 a diabolic crime was committed. It stunned the whole nation. Rajiv Gandhi, former Prime Minister of India, was assassinated by a human bomb in Tamilnadu. Assasin Dhanu, an LTTE (Liberation Tigers of Tamil Elam) activist, who detonated the belt bomb concealed under her waist and Haribabu, a photographer (and also a conspirator) engaged to take photographs of the horrific sight, also died in the blast. A camera was found intact on his body at the scene of crime. The film in the camera when developed led to unfolding of the dastardly attacks committed by the accused and others. A charge of conspiracy for offences under the Terrorist and Disruptive Activities (Prevention) Act, 1987; Indian Penal Code,1860; Explosive substances Act 1908; Arms Act 1959; Passport Act 1967; Foreigners Act 1946; Indian wireless Telegraphy Act 1933; was laid against 41 persons, 12 of whom were already dead and 3 absconded. All were awarded death sentence on the charge of conspiracy to murder under S120B read with S302 IPC and various other minor offences.
Nalini along with the deceased accused Sivarasan, Dhanu and Shubha met Haribabu at bus stand and proceeded to the venue of the public meeting on 21st May 1991. Nalini provided cover to Dhanu and Shubha and when Rajiv Gandhi arrived, Dhanu gained access near him and while in close proximity to him, she detonated the explosive device kept concealed in her waist belt, resulting in the blast. The apex court by an unanimous verdict confirmed death sentence against Santhan, Murugan and Arivu. As regards the extreme penalty of death to Nalini was concerned it was confirmed by majority of 2:1 (JJ Wadhwa and Quadri concurred). J Thomas commuted sentence of death to life imprisonment.

2. State (Delhi Administration) v. Laxman Kumar

The appeals were filed by Delhi administration and other by Indian Federation of Women Lawyers came up before the SC of India against the judgement of Delhi HC acquitting the respondents. Laxman was married to Sudha

and were living with Laxman's brother and their family. Shakuntala, the mother-in law of the deceased used to visit frequently. One day, cries for help were heard from their house. On hearing the cries, neighbours rushed to the flat and found Sudha aflame. The neighbours extinguished the fire and she was taken to the hospital where she died the next day. Sudha made a categorical statement soon after the neighbours gathered near the flat, and while on her way to the hospital, pointed to her mother-in-law, as the killer, stating that she had set her on fire after pouring kerosene on her body. Sudha also indicated Laxman as having actually set her on fire after pouring kerosene.

SC awarded life imprisonment to Shakuntala and Laxman, holding them responsible for killing Sudha by setting her on fire.

3. Renuka Bai v. State of Maharashtra

The SC on 1 September 2006, in one of its historic judgments, upheld death penalty of two sisters, Renuka and Seema, who had horrified Maharashtra by describing them as a menace to society.

The facts of the case were horrifying. Nine of 13 children in the age group between nine months and two and a half years in Sholapur and Nasik districts of Maharashtra, had been kidnapped from time to time either from school or market during 1990-96 and killed by the accused. The accused, with a perfect accomplice in their mother Anajanabai, and husband Kiran Shinde had made chain and purse snatching as their profession. Anjanabai died before trial and Shinde got pardon on turning approver.

The trial court of Kolhapur found the sisters, guilty of murdering six children and awarded death sentence to them and Bombay HC confirmed their sentence. The appellants were not committing these crimes under any compulsion but they took it very casually and killed all the children, least bothering about their lives or agony of their parents.

Women Offenders: Preventive Measures to be taken

Increasingly punitive criminal justice policies, coupled with the economically disadvantaged status of women, have led to an increase in the number of women held in pre-trial detention in many countries.

The number of foreign national women criminality is increasing in many countries, due to the increase in human trafficking and migration. The profile of female prisoners is quite different to that of men. Their backgrounds, offences they commit, their caring responsibilities and the particularly harmful effects of imprisonment on women are different from those on men need to be taken into account in devising criminal justice policies, in order to ensure that women are not imprisoned unnecessarily and unjustifiably. It can be adequately emphasized that a large majority of female offenders do not pose a risk to society and their imprisonment does not help, but hinders their social reintegration. Many are in prison as a direct or indirect result of the multiple layers of discrimination and deprivation experienced at the hands of their husbands, family and the community. Most female offenders need is to be treated fairly in the criminal justice system, taking into account their backgrounds and reasons that have led to the offence committed, as well as care, assistance and treatment in the community, to help them overcome the underlying factors leading to criminal behaviour. By keeping women out of prison, where imprisonment is not strictly necessary or justified, their children may be saved from the enduring adverse effects of their mothers' imprisonment, including their possible institutionalization and own future incarceration.

Women's rate of imprisonment can be decreased by introducing legislative reforms, which could include the decriminalization of certain acts, the removal of mandatory sentencing, which does not allow for discretion, based on the circumstances of the offence, vulnerability and caring responsibilities of the offender, and the more frequent use of alternatives to prison. Due to the non-violent nature of most crimes committed by women and the minimal risk most female offenders pose to the public, they are ideal candidates for noncustodial sanctions and measures.

[5]Social Treatment during Prison: A Learning Approach:

i. Prison management :

- Ensure that prison management is gender-sensitive
- Taking affirmative action to counter-balance discrimination encountered by women prisoners;
- Adopting a gender-sensitive management style;
- Recognizing the different needs of female prisoners and providing programmes and services that address these needs.

ii. Staff:

- Employ senior female prison staff in key positions;

[5]*Women in the Criminal Justice System. Contributors: Clarice Feinman - author. Publisher: Praeger. Place of Publication: Westport, CT. Publication Year: 1994. Page Number: iii.*

Build the capacity of female staff and provide them with special training on the needs of female prisoners

Provide psychosocial support to female staff;

Develop a clear policy against discrimination and sexual harassment in the workplace;

Train male staff on gender sensitivity, sexual misconduct and discrimination issues.

iii. Assessment and classification:

Develop a gender-sensitive risk assessment and classification system

Takes into account the very low risk most women offenders pose to others and the particularly harmful effects of high security measures have on them;

Takes into account women's backgrounds, such as experience of domestic violence, as well as their caring responsibilities, in their allocation and sentence planning process;

Ensures that women's sentence plans include programmes which meet their gender-specific needs;

Ensures that those with mental disabilities are housed in the least restrictive accommodation and receive treatment.

iv. Safety and security: This includes Separation and supervision, Prisoner complaints, Prisoner searches, Body restraints, Disciplinary segregation, Suicide and self-harm attempts.

Accommodate all female prisoners in accommodation which is physically separate from that occupied by men.

Ensure that women prisoners are supervised by female staff.

If, contrary to the above recommendation, male staff is allowed to work in women's prisons, they should never be employed in contact positions responsible for the direct supervision of prisoners and safeguards should be stringently applied.

Introduce clear policies and guidelines relating to sexual misconduct by staff in prisons, aiming to provide maximum protection to women prisoners.

Establish clear and confidential prisoner complaints mechanisms, and ensure that the investigations of allegations of sexual misconduct and other forms of ill-treatment and torture are undertaken promptly and impartially by an independent authority, and that safeguards are in place to protect prisoners who complain from retaliation.

Ensure that male members of staff are never involved in the personal searches of female prisoners, and that intimate body searches are undertaken only by an external medical practitioner, and only if there is genuine justification.

Consider eliminating intimate body searches altogether, by using alternative means of screening.

Reduce to a minimum the use of body restraints. Never use body restraints on pregnant women during medical examinations, transfer to hospital and birth.

Reduce to a minimum the use of disciplinary segregation.

Develop therapeutic strategies to prevent suicide and self-harm.

Develop a reception area and induction programme for new arrivals, which provide a supporting environment, encourages and facilitates contact with families and friends and ensures that all new entries are fully familiarized with the prison regime, including where to seek help when in need.

Never punish prisoners for self-harm and suicide attempts.

v. Prisoner activities and programmes:

Provide female prisoners equal access to work, vocational training and education as men.

Introduce specific programmes that address the underlying factors that lead to criminal behaviour in women

Programmes addressing substance abuse issues; mental health; history of abuse and domestic violence.

Programmes that address women's gender-related difficulties, such as: parenting and child visitation programmes; programmes to build confidence and life skills.

Find creative ways to compensate for resource problems, such as using a rotation system for classes and enabling peer education and skills training.

Increase civil society participation in activities.

Take into account the multiple gender-specific and cultural/ linguistic/ religious/spiritual needs of foreign national women and members of racial and ethnic minorities and indigenous peoples, in designing programmes and enabling such groups' access to them.

vi. Sports and recreation:

Ensure that women have equal access as men to sports and recreational facilities in prisons.

vii. Healthcare:

Ensure that prison conditions and services are designed to protect the health of all prisoners, recognizing that providing the underlying determinants of health is key to the protection of the physical and mental wellbeing of all prisoners.

Ensure that prison health services are not isolated from civil healthcare services, and that collaboration between the two (and ideally integration of the two) forms part of prison health service management strategies and policies.

Ensure that prisons have properly trained primary healthcare teams.

Introduce a gender-specific framework for healthcare in women's prisons, which emphasizes reproductive and sexual health, mental health, treatment for substance abuse and counseling victims of violence.

In developing responses to HIV/AIDS in penal institutions, to ensure that programmes and services are responsive to the unique needs of women, including, for example, prevention of mother to child transmission.

Ensure that preventive healthcare measures of particular relevance to women are available.

Ensure that the specific hygiene needs of women are met, including adequate sanitary facilities for the personal care of women with children, those who are pregnant, breastfeeding and menstruating.

Provide staff training in basic medicine and first aid, including for children.

Ensure that child healthcare specialists are accessible, when required.

viii. Access to legal assistance:

Provide information to offenders about their legal rights;

Taking account of the particular challenges faced by many women in accessing justice, ensure that assistance is provided to female prisoners to contact lawyers, paralegal services and relevant NGOs, and provide facilities for meetings with lawyers, and if required interpretation services.

Cooperate with NGOs and paralegal aid services in assisting indigent women in the criminal justice system, especially in countries and communities where legal aid may be limited or unavailable.

ix. Contact with the outside world :

Adopt measures and rules that match the particular needs of women for contact with their families and children.

Take measures to compensate for the difficulties in undertaking family visits.

Consult with prisoners as to who should be allowed to visit them.

Develop contact with the community.

Train staff to conduct visits in an atmosphere of human dignity and provide a child-friendly environment for visits.

x. Preparation for release and post-release support:

Cooperate with probation services, social welfare agencies and NGOs to design comprehensive and coordinated pre and post-release reintegration programmes for women.

Programmes should enable women to complete any educational or vocational training courses, and healthcare programmes, including substance addiction treatment programmes in the community.

Utilize options such as open prisons and half-way houses to the maximum possible extent for female prisoners.

Consider revising prison legislation and regulations to apply more liberal conditions for the granting of remission and parole in the case of women prisoners (especially mothers), in line with a gender-sensitive management policy.

Ensure that protection is provided to women at risk after release, in cooperation with community protection agencies and NGOs.

Societal Ethos with the Ex- prisoners:[7]

The process of preparation for release and resettlement begins in prison and continues after release and there is a need for continuity of assistance spanning this period. This requires close liaison between social agencies and services, as well as relevant community organizations and prison administrations during sentence.

In addition, there needs to be a programme of assistance to prepare for release close to the date of release (often starting 1-2 months prior to the release date), to ensure that the social, psychological and medical support needs of the prisoner are met and continue uninterrupted after

[7] *Rosemary Gartner, Ross Macmillan; Canadian Journal of Criminology, Vol. 37, 1995 The Effect of Victim-Offender Relationship on Reporting Crimes of Violence against Women*

prison. Activities undertaken in prison need to be linked to services outside to ensure continuum of care and monitoring of released prisoners.

Former prisoners should be able to complete any educational and vocational training courses, as well as any medical treatment started in prison. The obstacles, and their intensity, encountered in post-release reintegration by women in different countries and cultures may vary immensely. Due to the particular gender related difficulties women are likely to face following imprisonment, prison authorities should cooperate with probation services, social welfare departments and NGOs to design comprehensive pre- and post-release reintegration programs for women.

Assistance provided should cover rehabilitation requirements including employment needs, taking into account the parental status and caring responsibilities of the women, parenting skills, psychological support and continued treatment for any substance addiction and other health problems. Efforts to support and strengthen relationships between the released prisoner and her family members (as well as others who may have been caring for her children) are also important to minimize the difficulties likely to be encountered following release, due to the different expectations of both sides.

Prison authorities should utilize options such as open prisons and half-way houses, to the maximum possible extent for female prisoners, to ease their transition from prison to liberty and to re-establish contact between female prisoners and their families at the earliest possible stage.

Where early conditional release (parole) is discretionary, the cases of women prisoners should be considered favorably, unless there are particular risks or exceptional circumstances involved. Consideration may be given to revising prison laws and regulations to apply more liberal conditions for the granting of remission and parole in the case of mothers, in line with the gender-sensitive management policy.

Sometimes women may be unable to return to their families, since they will have been abandoned due to their imprisonment. The prison authorities should work closely with community support agencies and NGOs to help former women prisoners find suitable accommodation and jobs, and to settle back into their communities.

It is vital that continued support is provided to women with a history of abuse and domestic violence. During preparation for release prison authorities should establish contact and exchange information with community services, including probation services, NGOs and other social and psychological support services to ensure ongoing support to women at risk. Legal assistance should be provided as necessary.

All prisoners should be made aware of the risk of drug-related death in the immediate post-release period as a result of drug overdoses. All prisoners with drug addictions should be linked into ongoing after-care with community-based services immediately on release from prison. This should be part of a comprehensive and integrated approach to treatment in prison and the community.

In some countries rape victims or those who have been convicted of "moral offences" may face the risk of murder on release from prison, by the male members of their families (so-called "honour killings"). They should be provided protection. Prison authorities should collaborate with specialized community services, where they exist, and relevant NGOs to assist such women after release. They may need to be accommodated in confidential shelters while suitable housing is found. As a minimum, shelters should incorporate facilities and expertise to provide psychosocial support and legal advice to former prisoners. Care should be taken that protection provided to prisoners should not be in the form of, or in practice amount to, an extension of imprisonment. Protection should be provided on a voluntary basis, ideally in shelters or safe-houses managed by community services or NGOs, or with a joint management arrangement.

In addition, the establishment of community centers, providing assistance with health, education and legal matters to women could be a way of providing ongoing assistance to female former prisoners who are disadvantaged due to economic, cultural and social factors.

Conclusion and Recommendations:

In this modern era of competitiveness wherein each and everything is becoming digitized and automatic but still we have certain thing which is barricading the run towards the attainment of globalization i.e. the increasing crime and criminals especially the women in this globe.

Through this research paper I tried to explore various root causes of women crime, crime prevention techniques has also been discussed which could be practiced in order to avoid this adulteration in the society.

I further presented the desired Prison- management techniques to be practiced by the police officials to make the offenders the right citizen through the learning approached being provided to then in the prison.

Finally, the paper delivered the social ethos and responsibilities of citizen of nation towards the ex- offenders with regard to their rehabilitation and sustenance in the society. At last, it is suggested the author suggests that there should be proper follow-up of the practices that reduce the women criminal frequency and at the same time increase their security in lives after prison time is over so as to prove the women, the real maker of this earth.

Regulatory Environment of Indian Organized Retail – Issues and Challenges

*Maneesh Yadav**

ABSTRACT

Retailing is distinct as a decisive set of activities or steps used to sell a product or a service to consumers for their personal or family use. It is accountable for corresponding individual demands of the consumer with supplies of all the manufacturers. A retailer is a person, agent, agency, company or organization, which is instrumental in reaching the goods, merchandise, or services to the ultimate consumer.

Retailing in India is regulated from different laws related to different fields i.e. Environment laws, Labour laws, Land related laws and Foreign Direct Investment Promotion Board etc. Towards slackening India's retail buy and sell, the government had decided to unbolt the retail sector by announcing 100% FDI in single brand retailing. It means foreign companies willing to enter the Indian market will now be able to invest up to 100 percent in setting up production facilities, distribution network and retail shops. As per the current regulatory regime, FDI in single branding is 100% through government route.

In this backdrop, this study makes an effort to study problems and legal issues involved in Indian organized retail.

Keywords: Foreign Direct Investment, Organized Retail, Unorganized Retail, Single Branding

I. Introduction

Retailing is defined as a conclusive set of activities or steps used to sell a product or a service to consumers for their personal or family use. It is responsible for matching individual demands of the consumer with supplies of all the manufacturers. A retailer is a person, agent, agency, company or organization, which is instrumental in reaching the goods, merchandise, or services to the ultimate consumer.

(A) History of Organized Retail in India

The materialization of organized retail emerged in before 1950's when the country's textile majors ventured into retail concept through company-owned or franchise outlets. There were also exclusive tailoring shops for instance, that ultimately expanded their span of operations to become leading regional fashion retailers-Mumbai Charagh Din, Kolkata's Burlington, Delhi's Mohanlal Sons and Banglore's PN Rao to name a few . As far as retail real estate was concerned, the country's first 5, 00,000 sq.ft. shopping centre from Mangal Tirth Estate called Spencer Plaza came up in Chennai in 1990.

Organized retail segment has been growing at a blistering pace, exceeding all previous estimates. According to a study by Deloitte Haskins and Sells, organized retail has increased its share from 5 per cent of total retail sales in 2006 to 8 percent in 2007. The fastest growing segments have been the wholesale cash and carry stores (150 per cent) followed by supermarkets (100 per cent) and hypermarkets (75-80 per cent). Further, it estimates the organized segment to account for 25 per cent of the total sales by 2011. In addition, according to KSA Technopak, the organized retail is estimated to be Rs. 35,000 crores in 2005, and was expected to grow to Rs. 13.5 lakh crores by 2010. Its growth rate is 25-30 percent every year. The contribution of organized retail to the retailing sales is likely to rise to 9 % by the end of the decade .

(B) Organized v. Unorganized Retail

Concise definition of organized retail is not available as such but business process undertaken by licensed retailers registered for sale tax, income tax, tin filing and other legal formalities are known as organized retail. This materialization of organized sector has been due to the characteristics of human populations and psychographic changes taking place in the life of urban consumers. Main supporting cause to organized retails is nuclear families, workload, lifestyles, and western impact on Indian culture and society. According to a McKinsey & Company report titled 'The Great Indian Bazaar: Organized Retail Comes of Age in India' Indian Organized retail is likely to boost from 5% of the total market in 2008 to 14-18% and reach

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US$ 450 billion by 2015 .

On the other hand, traditional mode of selling like small independent outlets i.e. Kirana shops managing daily goods are know as unorganized retail. The main sector problem faced by unorganized retail was low margin of profit and higher rate of purchase.

II. A Brief Review of Literature

Retailing is the set of business activities that adds value to the products and services sold to consumers for their personal or family use. Often people think of retailing only as the sale of products in stores, but retailing also involves the sale of services, overnight lodging in a doctor's examination, a haircut, a DVD rental, or home –delivered pizza (Michael Levy, Barton A Weitz & Ajay Pandit, 2008). Retailing is a science as well as an art. It is as a science related to decision-making about merchandise, store operation etc. based on available information. It is an activity aimed at offering innovative and personalized solutions to the problems of consumers and making a shopping experience complete to the extent possible (KVS Madaan, 2009).

Organized retailing is a service oriented professional set up, which provides consumers a pleasant shopping experience. There are two characteristics of organized retailing-consumer focus and professional management (S.A. Chunawalla, 2006). FDI is a method of allowing external finance into an economy. FDI also facilitates international trade and transfer of knowledge, skill and technology. Developing countries, emerging economies and countries in transition increasingly see foreign direct investment as a source of economic development, modernization and employment generation, and have liberalized their FDI regimes to attract investment (Swapna Pradhan, 2007).

Thus, a significant amount of literature exists on the subject of organized retailing and foreign direct investment mentioned in the studies of different writer that can be used for further research.

III. Objectives

The secondary data based study has been conducted keeping in mind the permitted FDI inflow in India and regulatory framework of Indian retail sector. Therefore, the objective of this study is to find out legal problems in Indian organized retail and challenges of FDI policy.

IV. FDI entry routes in India

According to Section-5 of the Act, any person may sell or draw foreign exchange to or from an authorized person if such sale is a current account transaction. No declaration form is required in case of sale of goods outside India. Any person may sell or draw foreign exchange to or from an authorized person for a capital account transaction subject to restriction of Reserve bank of India . Foreign Direct Investment makes available a new venture with new markets and marketing sources, cheaper construction amenities right of entry to new skill, products and financing process.

India has kept the retail sector largely closed to outsiders to safeguard the livelihood of nearly 15 million small storeowners and allows 100 percent foreign investment in single brand retail with prior government permission. Foreign direct investment in retail space, specialized goods retailing like sports goods, electronics and stationary is being contemplated. Reserves can be created by non-residents in the shares/fully, compulsorily and mandatorily convertible debentures/ fully, compulsorily and mandatorily convertible preference shares of an Indian company, through two routes; the Automatic Route and the Government Route. Under the Automatic Route, the foreign investor or the Indian company does not require any approval from the RBI or Government of India for the investment. Under the Government Route, prior approval of the Government of India through Foreign Investment Promotion Board (FIPB) is required. FDI is prohibited under the government route as well as the automatic route in the retail trading (except single brand product retailing) .

Current FDI policy allows 100 per cent FDI in cash-and-carry wholesale formats and same per cent FDI are allowed in single-brand retailing. However, the regulations have been interpreted as guiding to a blanket ban on foreign investments in the sector. Thus, even investments by financial investors like FIIs and PE funds are prohibited, limiting the flow of capital required for the growth of the sector. A clarification of issues will enable investments by financial investors in the retail sector. This can be done by allowing investments by investors such as FIIs, Venture Capital Funds and other financial investors in the sector. Foreign Direct Investment data released by the Indian Department of Industrial Policy and Promotion shows major investment of foreign capital is in service sector followed by computer hardware and telecommunication sectors. Only 0.05 % of total FDI inflow was in retail trading (Single Branding) up to March 2011.

V. Regulatory Framework in Indian Organized Retail

Retailing in India is regulated from different laws related to different fields i.e. Environment laws, Labour laws, Land

related laws and Foreign Direct Investment Promotion Board (FDIPB) etc.

Towards slackening India's retail buy and sell, the government had decided to partially open the retail sector by announcing 100 percent FDI in single brand retailing – an initiative to invite big names like Nike, Addidas, Marks & Spencer to operate in Indian retail sector. This means that overseas companies enthusiastic to come into the Indian bazaar will now be able to put in up to 100 percent in setting up production facilities, distribution network and retail shops in single retailing. Position of FDI in multi branding is not clear. The government is yet to make known the strategy that will make the situation clearer .

As per the current regulatory regime, retail trading (except under single-brand product retailing — FDI up to 100 per cent, under the government route) is prohibited in India. Simply put, for a company to be able to get foreign funding, products sold by it to the general public should only be of a 'single-brand'; this condition being in addition to a few other conditions to be adhered to. That explains why we do not have a Harrods in Delhi. Additionally, the Circular explains that the aim of opening FDI in single-brand retail is to attract investments in production and marketing, improving the availability of such goods for the consumer and encouraging increased sourcing of goods from India, among others. Some important laws in brief are-

(A) Labour Legislations

Labor regulations for India's retail sector come under the jurisdiction of the state governments and are contained in the Shops and Establishments Act (SEA). The Shop and Establishments Act controls stores and other profitable trade like residential hotels, restaurants and cinema houses. The Shop and Establishments Act is to maintain the welfare of those working first in the unorganized segment by guaranteeing that owner provided relaxed working conditions .

Among other things, The Shop and Establishments Act governs the working hours of employees, number of days the establishment should remain closed, weekly off and how much overtime work employees are permitted to work. Likewise, the Minimum Wages Act, 1948, governs employee's wages and some important norms for fixing minimum wage are :

- Three consumption units per earner,
- Minimum food requirement of 2700 calories per average Indian adult,
- Cloth requirement of 72 yards per annum per family,
- Rent corresponding to the minimum area provided under the Government's Industrial Housing Scheme and
- Fuel, lighting and other miscellaneous items of expenditure to constitute 20 % of the total Minimum Wages
- Children education, medical requirement, minimum recreation including festivals/ceremonies and provision for old age, marriage etc. should further constitute 25% of the total Minimum Wage .

(B) Environmental Issues and Legal Provisions

India has a complicated legal structure with over two hundred laws relating to ecological protection. All polluting facilities are legally required to obtain consent (Permits) from a respective SPCB to establish (CTE) and consent to operate (CTO). Major national laws for environmental compliance are like Water (Prevention and Control of Pollution) Act, 1974, Air (Prevention and Control of Pollution) Act, 1981 and Environment (Protection) Act, 1986. Major institutions for necessary compliance are Ministry of Environment and Forests, the Central & State Pollution Control Board and State Departments of Environment.

(C) Product Packaging and Regulations

The Packaging Laws and Regulations for food products are largely roofed under:

- The Standards of Weights and Measures Act, 1976 and the Standards of Weights and Measures (Packaged Commodities) Rules, 1977
- The Prevention of Food Adulteration Act, 1954 and the Prevention of Food Adulteration Rules, 1955 and its first amendment, 2003
- The Fruit Products Order, 1955
- The Meat Food Products Order, 1973
- The Edible Oil Packaging Order, 1998
- The Agmark Rules

According to The Standards of Weights and Measures Act, every measuring unit by the seller shall be according to the metric-system and not on any other basis. For this purpose, the units to be adopted are the International System of units recommended by the General Conference on Weights and the International Organization of Legal Metrology (ILM) may recommend Measures and such additional units as may be recommended by the ILM. According to these provisions, every package intended for retail sale is required to carry information as regards the name of the commodity, name and address of manufacturer or packer, net quantity, month and year of manufacture/packing and retail price. Mandatory declaration of retail sale price is inclusive of all taxes. The Rules also have similar provisions for regulation of

packaged commodities imported into India .

(D) The Shop and Establishment Act

Major area of dealing is all categories of shops and establishments which do not come under the scanner of Factories Act and regulations. It talks about working hours, recess, provisions for overtime, termination of and other rights of employees and employers duties. Actual motive is to provide remedies to unorganized sector employees. It is a state law and regulated by the state authorities to provide rights to employees and obligations on employers. Major element of the enactment is registration of shop or establishment.

(E) The Consumer Protection Act, 1986

In India, consumer protection and grievances settlement plays a very significant role in national growth. For the same reason consumer protection act was enacted in year 1986. It talks about customer's rights to get information of product and services accuracy, safety against hazardous products and bad services. It is a safeguard to the consumer of any product or service in India. MRP and warranty issues related to the consumer come under the scanner of Consumer Protection Act. Every retailer has to comply with consumer laws to protect the interest of consumer.

VI. Major Issues in Organized Retailing

Indian organized retail sector is facing problems related to certain issues like:

(A) Why Foreign Direct Investment (FDI) in multi retail branding is prohibited in India?
(B) What is the legal status of retail sector in India? Is it 'industry' or 'Retail business'?
(C) Whether Indian government should draft new laws for Indian retail sector?

VII. Findings

After analyzing secondary data, it has been found that FDI investment in retail sector (i.e. Multiple Branding) is facing challenges because of many factors. Indian unorganized sector constitutes major part of retail sector and provides commercial shelter to small traders. Indian organized retail sector is also facing good competition from unorganized sector. For a retailer to operate in India, must comply with different governing laws across the nation.

Further, every single merchant has to comply with local laws, land laws of concerned state, consumer laws and finally with market competition. It is also argued by the different political parties that it will hurt Indian unorganized sector. However, annual report of year 2010-11 shows potential growth in Indian retail sector. Real estate cost and compliance with different state laws creates budgetary burden on the organized retailer. Unavailability of good infrastructure like transport facilities etc. also hamper growth of organized retailer in remote areas. In India, retail is a business not a industry or any special status.

VIII. Conclusions & Suggestions

Uniform laws do not govern Indian retail sector and organized retailer has to comply with local and state laws. Retail sector success defeated because of demographic structure of country also. Different laws according to situations govern Indian retail sector.

In India, uniform code for the retail sector is required and time has come when we should recognize retail as an "industry". Labour laws must be liberalized to increase positive sentiments in retail sector. Globalization demands retail sector to be opened for multi brand retailing. Some restrictions must be put on foreign companies to secure labour welfare in organized retail. Before deciding more FDI in multi-branding retailing, interest of small retailer must be secured. Special enactment must be drafted to regulate Indian retail sector, their labour norms, establishment and compliance. It will also boost infrastructure of the country, which is lacked by scarcity of resources.

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Women Empowerment and Social Justice

*Dr. Tarak Nath Prasad**

ABSTRACT

Since time immemorial a lot has been done for women empowerment and social justice. Still we find that there exists a gender inequality. It has become a routine matter that on viewing television or seeing news papers we find headlines like openly outraging the modesty, Talibani farmans, leaving girl child in garbage or in a public place, humiliation of girl child's mother by in-laws within the four walls, domestic violence, immoral behavior from father/brother to daughter/sister and so on. Today women are walking shoulder to shoulder at par with men. They have proved from kitchen to cockpit that they are not merely passive personalities who can be dominated easily. Still we deliberate upon women's right and equality. In the entire world no man can say that he is not having any concern related to women. Be it mother/sister/daughter/wife/female friend etc, all are women only. But the concern before us is that there are many laws framed to grant equality for the women, empowering them and to make social justice available. This is nothing but a thought which needs to be changed. Without women the very existence of man is a question mark. We need to look back, see present and visualize the future.

We know how to swim
In water like fishes
We know how to fly
In air like birds
But we do not know how to
Live on earth like human beings.

Alexander Selkirk.

Introduction

In the field of social justice, much has been said, deliberated upon. It can't be said that it was a matter of talking only and nothing has been done. If the focus is with reference to women empowerment and social justice we need to compare the primitive society and present day comparatively. We have to look back and then arrive to a conclusion as to whether any change is visible or not in the matter of women's status in our society.

Before expressing the concern about women empowerment or development of women, a series of questions may arise in the mind of all right thinking people as to what is the need of women empowerment and why? It could be an open challenge to the world at large that no human male could say that he is not related to women in any manner. Let us take some direct relations with man and think, which are definitely women only.

i) Mother
ii) Sister
iii) Wife
iv) Daughter
v) Even a female friend

It is really unfortunate that despite the fact that no man can be in existence without women, still we talk about discrimination and feel the necessity of women empowerment with special reference to social justice.

Women's strength

Now a days we find that women are walking with men shoulder to shoulder at equal pace and even more, they have proved from kitchen to cockpit, in every sphere of their life that they are second to none. Be it medical, engineering, armed forces, judiciary, academic, government officials or business field, women are doing extremely well.

If we look towards the highest position in the country like ours we find that the Hon'ble President of India and Hon'ble Prime Minister of India had been women, many chief ministers and Governors of the States are women, Judges in the Hon'ble High Courts and Supreme Court are women. Even in the neighboring countries so many highest positions are held by women. Still we need to think about empowerment of women and to have social justice. It may be quoted that "Abla jeevan hai tumhari yehi Kahani, anchal men dudh aur ankhon men pani."

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Historical Background

History, Holy Books and Smritis are evidence that women have never been treated with dignity. Ram charit manas says "Dhol, Ganwar, Sudra, Pasu, Nari, sakal tadana ke adhikari". With all due regards it is stated that Goddess Sita was subject to Agni Pariksha by Lord Rama who is known as Maryada Purosottam, just because there was a statement from a washer man with reference to Mata Sita's unchastity. This could be another way of viewing towards the issue as to the greatness of King Ravana who stated that he would not touch her. The circumstances in which Goddess Sita was there, the high possibility was available that she might be forced to lose her chastity but in view of the situation, whether she could be blamed is again a question mark, then why agni pariksha? is a further controversial question.

In present day we have laws at hand and it has been decided by the Hon'ble High Court of Allahabad in the Case of Rajesh Kr. Singh v. Smt Rekha Singh[1] that rape of wife cannot be a ground for divorce. Husband can't claim cruelty as he has to live with a rape victim. Probably during Ramayna no law equivalent to Indian Penal Code, Section 325,[2] and 326,[3] (wrt lord Rama) or alike was available and the sister of learned King Ravana i.e. Supnakha's nose was chopped off for the reason of making love appeal to Lakshmana. It really compels to think about the position of women in our society. If we do not close our eyes and ears towards the painful story of women, automatically the fact comes to our sensation that women are always subject to ill treatment/violation either on the name of caste, region or religion.[4]

In Mahabharata the Dharmaraj Yudhister had put Draupadi on bet treating her as property, lost her in gamble and the consequences thereafter, how far were justified is really a big question.

Now slowly moving ahead towards Sati Pratha and its abolition, further cases of happening sati pratha has compelled us to think of social development and women empowerment. Surprisingly the social evils are so deep rooted that a woman becomes enemy of a woman eg. female feticides and female infanticides despite the fact that curbing provisions are already available in IPC 1860[5].

It is evident from the law of land that discrimination among men and women were available since its beginning, a bare reading of Article 15 (1) of the Constitution of India shall suffice the statement[6].

Legal Aspects

If we take a glance of Sections 509,[7] 354,[8] 376,[9] 498A[10] of I.P.C., 112[11] of Indian Evidence Act we find that the women are only at disadvantageous position. The question mark is solely relevant with women for the purpose of legitimacy but the section reads about son and not daughter. Though the meaning of legitimacy is clear and construed for female child too. Further, if few of the existing laws are

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1 *AIR 2005 ALL 16*

2 *Punishment for voluntarily causing grievous hurt: whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*

3 *Voluntarily causing grievous hurt by dangerous weapons or means: whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing, or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

4 *"Lajja" by Ms. Taslima Nasrin a Bangladesi writer.*

5 *Sections 312 to 318.*

6 *Prohibition of discrimination on grounds of religion, race, caste, sex, place of birth- (i) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.*

7 *Word, gesture or act intended to insult the modesty of a woman: Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object intending the such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.*

8 *Assault or criminal force to woman with intent to outrage her modesty: whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment or either description for a term which may extend to two years, or with fine, or with both.*

9 *Punishment for rape: Whoever, except in the case provided for by sub-section(2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: PROVIDED that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.*

10 *Husband or relative of husband of a woman subjecting her to cruelty: Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.*

11 *Birth during marriage, conclusive proof of legitimacy: The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.*

viewed in a social justice perspective it may reveal that women are not on equal footing with men. For example Section 12 (1) (d) of Hindu Marriage Act 1955[1] on reading with reference to Section 13 (1) (i) of the same Act[2]; It may be noted that the discrimination among men and women are available in the law itself, that might be for the justifying reasons but definitely not in the spirit of social justice.

Again in the matter of succession to Hindu male with reference to preference Section 3 (a)[3] & (c),[4] 8 (c)[5] & (d),[6] and 12,[7] of Hindu succession Act 1956 the heirs are excluded only on the ground of female occurring in the way of tracing relation with propositus.

If we see the concept of marriage in Hindus it would be found that it is an eternal union, a union for this life and all lives to come. For Hindus wife is not just patni, she is dharmapatni, sahadharmini, Hridayswamini. In the idealized form, she is samarajyi, patrani, bharya, sachiva, sakhi, grihalakshmi, hridayswamini and in the most idealized form wife is considered to the source of dharma, artha, kama and moksha. Husband is called bhartri the supporter, pati the protector, and patiparmeshwara, the lord and master of his wife who must be adored and obeyed no matter, he be devoid of all merits, virtue or be a gunda. Astonishingly, the wife is ardhangni and sahadharmini but the husband is never ardhangana or sahadharmana.

A brief reference to Muslim marriage and divorce would clear the picture of women as to the rights of pronouncing divorce is not available to wife as available to the husband. In cases of evidence in Muslims, for contradiction of one Muslim male witness two women are required. While comparing the marriage and dower with contract, Mahmood, J., had stated in the case of Abdul Kadir v. Salima"[8] Dower may be regarded as consideration for connubial intercourse by way of analogy to the contract for sale. The right to resist her husband so long as the Dower remains unpaid is analogous to the lien of a vendor upon the sold goods while they remain in his possession and so long as the price or any part of it is unpaid and her surrender to husband resembles the delivery of the goods to the vendee….." Article 44 of the Constitution of India[9] is yet to be implemented. Uniform law for all persons may be desirable. But its enactment in one go may be counterproductive to the unity of the nation;[10] After 18th May 1955 Hindus are legally bound to follow strict monogamy but as per Muslim personal laws one Muslim male can have four wives at a time subject to other conditions. The right to have more than one husband during existence of marriage is not available to the women. However, we find in Mahabharata Draupadi was having five husbands, but it is again a matter of further research based on the prevailing circumstances of that time.

Conclusion

A serious view towards work place of women also needs to be considered to upkeep their modesty and dignity, by way of social awareness and framing appropriate laws as to keep high the social justice. Without going into the controversy against women that, at work places, so long they are not expected to discharge any good towards the benefit of organization and not asked to do their assigned work properly, generally their modesty are not at stake but at time when they are asked to discharge excellence in the best interest of institution the double edged swords on the name of social injustice, insulting/outraging of modesty, women's dignity etc are likely to be used. Of course the facts of the cases like Saheli, A Women's Resources cener, Through Ms Nalini Bhanot and Ors. v. Commissioner of Police Delhi Police Headquarters and Ors. AIR 1990 SC 513, Mrs. Rupan Deol Bajaj and another. Kanwar Pal Singh and another AIR 1996 SC 309, Vishaka and others v. State of Rajasthan and Others SCC 1997 (6) 241 are to be also kept in mind while deliberating towards the women empowerment and social justice.

The axis of concern is to empower women so as to enable the prevalence of social justice. The participant humbly wish to submit and suggest that all the laws having relevance with women needs to be relooked and redesigned accordingly so that social justice should prevail.

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1 *That the respondent was at the time of the marriage pregnant by some person other than the petitioner.*

2 *Has, after solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse;"*

3 *"agnate" one person is said to be an "agnate" of another if the two are related by blood or adoption wholly through males;*

4 *"cognate" one person is said to be "cognate "of another if the two are related by blood or adoption but not wholly through males;*

5 *Thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased;*

6 *Lastly, if there is no agnate, then upon the cognates of the deceased .*

7 *Order of succession among agnates and cognates : The order of succession among agnates or cognates, as the case may be, shall be determined in accordance with the rules of preference laid down hereunder;*

8 *ILR (1886) 8 All 149*

9 *Uniform civil code for the citizens: The state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.*

10 *Pannalal Bansilal v. State of Andhra Pradesh, AIR 1996 SC 1023.*

Higher and Professional Education in India: Dreams versus Reality

*Smriti Singh Chauhan**

ABSTRACT

India has become a `better educated' country in the last decade than in the past. Indian society, from the times immemorial, has been regarding knowledge as the highest virtue of man. There has been a remarkable change with time. Education played a very important role in the freedom struggle. After the independence, higher and professional education has crossed the different stages. But after the introduction of economic liberalization in the country, the higher and professional educational institutions are facing severe problems like shortage of funds, shortage of motivated faculty and lack of interest among meritorious students in opting for research career. Under the changed environment, the institutions must reorient their activities by establishing their link with industry and facilitating exchange of teachers and industry professionals between academic and research institutions and industry; develop and transfer technologies applicable to industry; and initiate schemes to encourage faculties and students to carry out innovative in-house projects. The institutions need to make efforts to minimize the industry academia gap. The students need to be developed as per the industry requirements.

Introduction

"If India wakes up to the world situation and readjusts her educational institutions, I have no doubt that the Universities will have a great and noble part to play in regard to the future of civilization."

- Shri. Alladi Krishnaswami Aiyyar, in 1929.

India, the second most populous country in the world, with about 1.04 billion people, is home to one-sixth of humanity (S. Gupta 28). It has also become one of the world's new economic giants. Since 1980s and between 1990 and 2002, the Indian economy grew at 5.9% annually, compared with the average 2.8% for the world overall. The Economic Intelligence Unit estimates that India's average annual real gross domestic product (GDP) growth rate will remain at this lofty level for the 25 years between 2005 and 2030. The World Bank Report put India's annual GDP growth from 1990 to 1999 at 6.1% — a rate that was expected to increase to 8% in 2010.

India is rushing headlong toward economic success and modernization, counting on high-tech industries such as information technology and biotechnology to propel the nation to prosperity. Unfortunately, its weak higher and professional education sector constitutes the Achilles 'heel of this strategy. There was a time when countries could achieve economic success with cheap labour and low-tech manufacturing. Low wages still help, but contemporary large-scale development requires a sophisticated and at least partly knowledge-based economy. India has chosen that path, but will find a major stumbling block in its higher and professional education.

Development Phases of Higher and Professional Education in India

India has significant advantages in the 21st century knowledge race. It has a large higher education sector — the third largest in the world in student numbers, after China and the United States. It uses English as a primary language of higher education and research. It has a long academic tradition. Academic freedom is respected. There are a small number of high quality institutions, departments, and centers that can form the basis of quality sector in higher and professional education. The fact that the States, rather than the Central Government, exercise major responsibility for higher education creates a rather cumbersome structure, but the system allows for a variety of policies and approaches.

Yet the weaknesses outweigh the strengths. India educates approximately 10 per cent of its young people in higher education compared with more than half in the major industrialized countries and 15 per cent in China. Almost all of the world's academic systems resemble a pyramid, with a small high quality tier at the top and a massive sector at the bottom. India has a tiny top tier. None of its universities occupies a solid position at the top. A few of the

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best universities have some excellent departments and centers, and there are a small number of outstanding undergraduate colleges. The University Grants Commission's recent major support of five universities to build on their recognized strength is a step toward recognizing a differentiated academic system — and fostering excellence. At present, the world-class institutions are mainly limited to the Indian Institutes of Technology (IITs), the Indian Institutes of Management (IIMs) and perhaps a few others such as the All India Institute of Medical Sciences and the Tata Institute of Fundamental Research. These institutions, combined, enroll well under 1 per cent of the student population.

As on 31.3.2006, there were 367 University level institutions including 20 Central Universities, 217 State Universities, 104 Deemed Universities and 5 institutions established under State Legislation, 13 Institutes of National Importance established under Central legislation and 6 Private Universities. There were 18,064 degree and post-graduate colleges (including around 1902 women's colleges), of which 14,400 came under the purview of the University Grant Commission, the rest were professional colleges under the purview of the Central Government or other statutory bodies like the AICTE, ICAR, MCI etc. Of the Colleges under UGC purview 6109 have been recognized by the University Grants Commission (UGC) under Section 2(f) and 5525 under Section 12(B) of the UGC Act, which recognition permits them to receive grants from the UGC.

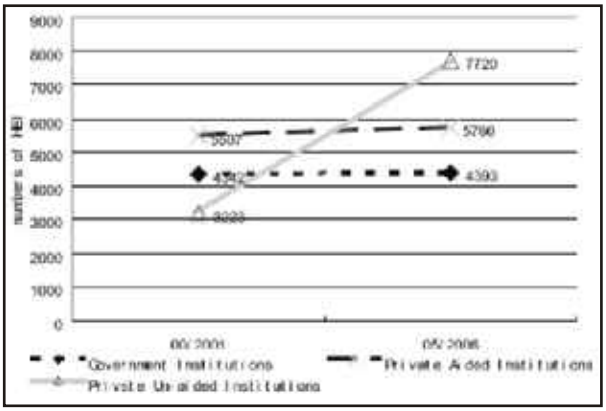
Table1: Growth of Colleges for General Education, Colleges for Professional Education, and Universities during 1950-51 to 2004-2005

Years	Colleges for General Education	Colleges for Professional Education	Universities /Deemed Univ./ Institutes of National Importance
1950-51	370	208	27
1955-56	466	218	31
1960-61	967	852	45
1965-66	1536	770	64
1970-71	2285	992	82
1975-76	3667	3276**	101
1980-81	3421	3542**	110
1985-86	4067	1533**	126
1990-91	4862	886	184
1991-92	5058	950	196
1992-93	5334	989	207
1993-94	5639	1125	213
1994-95	6089	1230	219
1995-96	6569	1354	226
1996-97	6759	1770	228
1997-98	7199	2075	229
1998-99	7494	2113	237
1999-00*	7782	2124	244
2000-01*	7929	2223	254
2001-02*	8737	2409	272
2002-03*	9166	2610	304
2003-04*	9427	2751	304
2004-05*	10377	3201	364

** Includes institutions for Post-Matric courses.
Source: Educational Statistics 2004-05.MHRD 2007

A spectrum haunts the Indian higher educational system, the spectra of privatization. The government's share in overall education expenditure in 1983, which was 80 percent, has gone down drastically to 67 percent in 1999. At the same time, private expenditure on education has increased by about 11 times in the last 15 years. In the case of engineering colleges, the private sector, which accounted for just 15 percent of the seats in 1960, now accounts for 86.4 percent of seats. In the case of medical colleges, the private sector dominance has risen from 6.8 percent in 1960 to 40.9 percent in 2003. Statistics reveal that in 2000-01; around 42% of the 13,072 colleges in India were privately owned and managed. This sizeable chunk, educated nearly 37% of the students who had enrolled into higher education.

Table 2: Growth of HEI (2000/ 01- 2005/ 06)



source: Panwan Agarwal the Working Paper No. 180

Emerging Challenges

India's colleges and universities, with just a few exceptions, have become large, under-funded, ungovernable institutions. At many of them, politics has intruded into campus life, influencing academic appointments and decisions across levels. Under-investment in libraries, information technology, laboratories, and classrooms makes it very difficult to provide top-quality instruction or engage in cutting-edge research. The rise in the number of part-time teachers and the freeze on new full-time appointments in many places has affected morale in the academic profession. The lack of accountability means that teaching and research performance is seldom measured. The system provides few incentives to perform. Bureaucratic inertia hampers change. Student unrest and occasional faculty agitation disrupt operations. Nevertheless, with a facade of normality, faculty administrators are able to provide teaching, coordinate examinations, and award degrees. With this entire situation there are so many other setback are also disturbing the development of higher and professional education.

New courses

One of the methods being adopted by the professional institutes under the professional education is offering highly specialized courses like courses in retail, banking, insurance, tourism, hospitality, CRM, agribusiness and pharmaceutical management. The Department of Management Studies at University of Kashmir has introduced a sub-specialty course in Information Technology and scored impressively in the intellectual capital section. The professional institutes are also offering short term specialized courses in collaboration with multi-national companies. But with these new courses the adequate support material is not available for the education.

Problem of traditional courses

The widespread impression is that unlike professional education courses, the general education courses have failed to keep pace with changes that are taking place in the world of work. The courses offered by the general education colleges are determined by traditional mindset and have continued to remain inflexible. Students complain that they are not able to exercise choice in selecting what they would like to study. They want to study that suits their aptitude and also would meet their future needs. The general perception is that contents of courses that are being offered at present may not be helpful to them in acquiring skills and abilities required by their future employers.

Shortage of Motivated Faculty

Teaching in professional institutions was considered a noble profession couple of decades ago. Due to economic changes the scenario has changed. The cream of qualified personnel is picked up by industry at a much higher salary. There is a sharp decline among meritorious students going for higher studies and research. This has resulted into acute shortage of dedicated and capable faculty.

'Teaching is not a lost art, but regard for it is a lost tradition'. This is a real challenge faced by educational institutions to get a good faculty and when it comes, to retain good faculty. The shortage is across the country. The need of the hour is to get good people for teaching, do extensive research and also go overseas and conduct collaborative research with foreign faculty. Interestingly women are willing to join professional institutes. They feel that it is a right platform where with career one can easily find time for their families.

Lack of Quality Education

The higher educational institutions suffer from large quality variation in so much so that a recent Nasscom-Mackinsey Report (2005) has said that not more than 15% of graduates of general education and 25-30% of Technical Education are fit for employment. Since only a small number of Universities and colleges are eligible for funding by UGC and hence monitoring for quality by NAAC for ensuring quality standards set by it, a vast majority of institutions are under no quality monitoring and control except what is provided under university regulations and occasional university team visits.

Lack of interest in Students

Most of the meritorious students opt for professional courses to get exposure and stand in a better position in this competitive world. The disturbing trend in the recent years has been the entry of foreign universities and institutes who are looking for enrollment of good students. They do offer various incentives directly or indirectly. This is going to pose a major threat to Indian Institutes in times to come.

Shortage of financial resources

The most important and serious challenge being faced by these higher and professional education institutions is that of funds. All the institutions do not get financial aid from the government. There are many self-financing institutes too. The situation has worsened as the costs of pay, allowances, procurement of state-of-art equipment and instruments maintenance of existing infrastructure equipping classrooms

with modern teaching aids and providing other facilities etc. have risen overtime. As a result most of the institutions are facing financial constraints and are unable to meet rising costs.

Lack of Opportunity and recognition

Even the small top tier of higher education institutions face serious problems. Many IIT graduates, well trained in technology, have chosen not to contribute their skills to the burgeoning technology sector in India. Perhaps half leave the country immediately upon graduation to pursue advanced study abroad — and most do not return. A stunning 86 per cent of students in science and technology fields from India who obtain degrees in the United States do not return home immediately following their study. Another significant group, of about 30 per cent, decides to earn MBAs in India because local salaries are higher — and are lost to science and technology. A corp of dedicated and able teachers work at the IITs and IIMs, but the lure of jobs abroad and in the private sector makes it increasingly difficult to lure the best and brightest to the academic profession.

Technology

This is an area where most of the higher and professional institutes invest. The technologies like digitized library to make e-books available to students, WiFi campuses to deal with poor Internet connectivity have become quite essential. The institutes are also installing software in its intranet, through which students can submit assignments. The institutes are busy equipping their classrooms with multimedia, Internet facilities, LCD etc. but still situation is not very encouraging. In comparison to foreign institutes and universities, Indian higher and professional education institutes are still far behind.

Changes: Need of the hour

It is being felt that more job opportunities should be created. The higher and professional education institutes should be provided financial aid for the development of faculty and research.

Student-Centred Education and Dynamic Methods

Student-centered education and employment of dynamic methods of education will require by teachers new attitudes and new skills. Methods of teaching would require through lectures will have to subordinate to the methods that will lay stress on self-study, personal consultation between teachers and pupils, and dynamic sessions of seminars and workshops. Methods of distance education will have to be employed on a vast scale.

Motivate Faculty members

Special emphasis on value-oriented education will impart a new dimension to the role of the faculty. For value-orientation cannot be imparted without teachers' own value-orientation. Again, the objective of integral development of personality cannot be fulfilled without teachers developing their own integral personality.

It is increasingly recognized that if the fences of peace are to be built in the minds of men and women, and if the qualities of cooperation, mutuality and harmony are to be fostered in students, the role of the faculty will include the task of changing the tendencies of egoism and domination that are the ultimate causes of division and war. It is particularly for this reason that a new programme of faculty development has to be envisaged, and this programme will not only cater to the continuous development of professional skills but also continuous development of faculties' ethical and spiritual abilities.

Appropriate to the new and difficult demands on faculties, we have to constantly raise the status of faculties in the country.

Remove financial crunch

Financial strain in the educational sector imposes several difficult tasks not only relating to fee structure and new partnership of education with industry and various income and profit generating sectors but also to the cost-effective designs of structures and methodologies of education that can cater to the needs of massive programmes of education as also to those of intensive education that aim at individual perfection. The advances in communication technology, specially the satellite based teleconferencing, have made it possible to use distance education for training skills in virtual classrooms. It is expected that technology, rightly designed for developing deeper and higher dimensions of personality, will at once bring down the costs and increase the efficiency of the educational system.

Suggestion

All the problems cannot be eradicated overnight, but we can start up the change for the long term development of professional education..

- Sustained financial support, with an appropriate mix of accountability and autonomy.
- The development of a clearly differentiated academic system — including private institutions — in which

academic institutions have different missions, resources, and purposes.

- Managerial reforms and the introduction of effective administration.
- Truly merit-based hiring and promotion policies for the academic profession, and similarly rigorous and honest recruitment, selection, and instruction of students.

Conclusion

India has survived with an increasingly mediocre higher education system for decades. Now as India strives to compete in a globalized economy in areas that require highly trained professionals, the quality of higher education becomes increasingly important. So far, India's large educated population base and its reservoir of at least moderately well-trained university graduates have permitted the country to move ahead. But the competition is fierce. Indian higher and professional education requires some radical changes to survive this era of challenges. It's a high time to resolve the misalignment between the content and emphasis in current higher education and the needs of the economy.

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Environmental Impact Assessment of Oil and Gas Sector: Laws and Practices

*Ashish Verma**

ABSTRACT

Environmental conservation movement gained momentum in the second half of the twentieth century. Since then there it has been in consistent conflict with the developmental needs. It is undoubted and undeniable that neither conservation nor development can be suppressed. Maintaining balance between the two is the only way to push away the disaster. For this, various techniques and theories have been worked out and environmental impact assessment is one of the late evolved and effective modes of maintaining such a balance.

Oil and gas sector industrial units are one of the most polluting sectors. Oil and gas applications effect the environment at all its stages including exploration, extraction, distribution and consumption. Owing to the very nature of the products, the degree of pollution caused by these projects is also very high. The paper aims at looking into the legal intervention in the establishment and functioning of oil and projects. The paper also attempts to evaluate the application of laws in this regard. For this, some important oil and gas projects and their impact assessment are analyzed.

Keywords: Environment, conservation, sustainable development, oil and gas sector, polluting industrial units, environmental impact assessment, terms of reference, baseline data, project proponent, environmental clearance, environmental impact statement.

Introduction

Our understanding of the connections between human life and other elements of nature is limited. We also have the power to destroy the natural systems that sustain us. Our capacity for destruction is illustrated through the deterioration of the ozone layer, through the extinction of species, and through mass deforestation and desertification. In many parts of the world, economic development projects directed at improving the levels of material comforts have had unintended detrimental effects on people and natural resources. In some parts of the world, water, land, and air have become polluted to such an extent where they can no longer sustain existing levels of development and quality of life. With inadequate environmental planning, human activities have resulted in the disruption of social and communal harmony, the loss of human livelihood and life, the introduction of new diseases, and the destruction of renewable resources. These and other consequences can negate the positive benefits of economic development. Economic development in developing countries has been focused on immediate economic gains and environmental protection has not been a priority because the economic losses from environmental degradation often occur long after the economic benefits of development have been realized.

The past failure of development-planning processes to take adequate account of the detrimental impacts of economic development activities led to the advent of environmental impact assessment (EIA) processes. EIA was first employed by industrialized countries in the late 1960s[1]. Since that time, most countries have adopted impact assessment processes to examine the social and environmental consequences of projects prior to their execution. The purpose of these processes is to provide information to decision makers and to the public as well, about the environmental implications of proposed actions before decisions are made.

Environmental Impact Assessment: Concept and Procedure

EIA is an exercise to be carried out before any project or major activity is undertaken to ensure that it will not in any way harm the environment on a short term or long term basis. Any developmental endeavour requires not only the analysis of the need of such a project, the monetary costs and benefits involved but most important, it requires a consideration and detailed assessment of the effect of a proposed developmental project on the environment. The environmental impact assessment process involves the

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[1] *The National Environmental Policy Act, in the United States, was enacted in 1969 and is known as the first legislative effort towards law making for environmental impact assessment.*

following major objective steps:

1. Understanding the original state of the local environment in the area where the project is proposed.
2. Potential impacts of the proposed action on the environment.
3. Mitigation measures.

Be it the study of the local environment before the project, or the impacts of the project, or the mitigation measures; everywhere it involves a lot of scientific study. This is why the exercise of environmental impact assessment happens to be a multidisciplinary exercise towards conservation.

The main focus of EIA is to ensure that potential impacts at the initial stage of project installation, to achieve this it must be communicated to all members like regulators, planners etc. The importance of EIA was recognized at the Rio Conference of earth summit 1992. Principle 17 of the Rio declaration states that:

"EIA as a national instrument shall be undertaken for the proposed activities that are likely to have significant adverse impact on the environment and are subject to a decision of a competent national authority".

Indian Concern Regarding EIA

In India many projects were installed till 1980 without environmental concern but after fourth five-year plan, a national committee was framed to look over environmental concerns. After that the Department of Environment and Forests, Government of India, issued guidelines for environmental assessment of river-valley projects. It required various studies such as Impacts on forests and wild life in the submergence zone, water logging potential, upstream and downstream aquatic ecosystems and fisheries, water related diseases, climatic changes and seismicity.

A major legislative framework came in 1994 when specific notification was issued with the emphasis of section 3 and 4 and also subsection 3 of section 5 of the Environment Protection Act 1986. This notification is called environment impact assessment notification 1994.

The first step in seeking clearance in the entire environmental assessment process is to determine what statutory legislation it applies. The MOEF has brought out several notifications which restrict these industries before installation of project. Besides this, it has also drawn a framework for already operating industrial units. The clearance can be brought at both central and state level. The central government has published a list of various projects which are subject to environment clearance. Out of this, petrol refinery industries, mining, power, infrastructure etc require prior environmental clearance before the industrial unit is commissioned. According to this notification it is important to seek clearance from the ministry of environment and forest. This notification also states the requirement and procedure for getting clearance and it also lays down the procedure for project rejection if any data or a fact is concealed. The procedure for public hearing is also mention in the notification. It is a major mandate to disclose all the relevant information regarding a developmental project to various sections of society, which are either affected by its implementation or have interests in project. In India public hearing of a development project has been made mandatory for environmental clearance by the Amendment to the EIA Notification of April 10, 1997.

EIA involves some basic steps in the application. It begins with screening which is a primary step in the process of EIA, which deals with initiation and proposal of projects. Then scoping is done, which determines boundary time limit for study. Impact analysis is the procedure which determines the classified impact it bears on the environment. Mitigation is the step which tries to avoid the adverse impacts of the project. Then is reporting which deals with the process to make a report, review is the process to revise if there is any kind of flaws in any of the steps. After that final decision can be prepared.

There were certain constraints in environmental impact assessment notification 1994, which led to some issues in the effective implementation of the notification and due to this; it has been overridden by new EIA notification 2006.

The objectives of the new notification were to formulate a transparent, decentralized, efficient regulatory mechanism. The new notification also incorporates necessary environmental safeguards at initial stages of specified investment projects. It involves stakeholders in the public consultation process. The environmental clearance (EC) process under implementation prior to 2006 highlighted the need to introduce specific processes/categories/activities and also the need for new sectors such as coal washers to be brought in the ambit of the EC process due to the extent of their impact on environment.[2] This notification lists 39 developmental sectors which require Environmental Clearance. It also brings out guidelines from time to time on the

[2] *Mohd. Hanif Quareshi & Others vs The State Of Bihar, 1958 AIR 731, 1959 SCR 629*

[3] *www. Understanding%20EIA%20%20%20Centre%20for%20Science%20and%20Environment.htm*

requirements of environment clearance. All the projects mentioned in schedule are based on potential impacts on the environment and not on the basis of investment value.

Forms of Impact Assessment

There are various aspects of assessment; it may be social, environmental, health etc which are used to assess the EIA and its development and consequences. Out of this, one is strategic impact assessment. It refers to strategic analysis of plans, policies and programmes of environmental impact assessment. SEA refers to a proactive approach to integrate environmental considerations and decision making.

EIA in India may be compared with that in the developed nations, like USA and Canada have well framed legislations which govern the bodies for regulating the procedure for impact assessment. In addition to this, they have active involvement from competent authority including government agencies which take action at initial stages of the project to make it more fair and reasonable. There is an integrated approach for all social and environmental concerns. However, in India, the formal legislation, Environment Protection Act, 1986 has been amended and EIA enacted. There is limited involvement of public and governmental agencies at the initial phase; there is no provision for landscape and visual impacts.[3]

The developed nations have expertise in assessment and mitigation. There is an International association of impact assessment and other bodies to regulate the procedures and work in this field. India is still to gain expertise in this field.

Impact of oil and gas projects over the environment

The oil and gas industrial units are very prone to leave potential impacts over the local environment. There may be some human, socio-economic and cultural impacts, atmospheric impacts, aquatic impacts, terrestrial impacts and ecosystem impacts. Such impacts may be immediate or far-reaching. This necessitates the impact assessment to be done before any project of this sector is actually commissioned. The projects which cannot mitigate the potential adverse impacts on the environment, are quite liable to be dropped. This is why the environmental clearance is a high contributory to environmental conservation. There are certain operational techniques which can be used to improve the environmental clearance procedure, whether in cases of oil spill or pollution. Proactive and preventive measures are most effective to carry on procedures and thus reduce risk of pollution.

Environmental Impacts during the various stages of Oil and Gas Exploration

Aquatic ecosystems are dynamic systems that constantly change, as results of external influences. In any environmental impact assessment study, the water quality changes both in surface and underground is an important factor as it is used not only for drinking purpose, domestic uses and other uses like agriculture. It causes health hazards if the quality of water is not confirming to the prescribed standards. To assess the impact of the various operations that were undertaken by the ONGC, certain analytical tests were carried out at the identified water sources from the villages located in Andhra Pradesh and Assam.

In order to study the impact of oil drilling on the water component of the ecosystem, water samples were collected and analyzed for thirty different parameters so as to obtain a holistic picture of the water quality in its present state at the activity sites. The selected parameters were studied under the following sections; water analysis was carried out in the category of Physical parameters, Chemical parameters (inorganic, organic, heavy metals), Cumulative parameters, and Biological parameters.[4]

Impact of Drilling Activities on Surface Water

On account of their geographical features, surface water bodies are most susceptible to the anthrapogenic polluting sources. Temperature plays a very important role in an aquatic system as it affects the chemical and biological properties such as solubility of oxygen, carbonate-bicarbonate equilibrium, increases the metabolic rate and affects the physiological reactions of organisms, etc. Water temperature is important in relation to fish life. The average ranged from 29.50 C during pre-drilling to 27.70 C during the drilling stages.

Impact of Drilling Activities on Open Well

Open wells are, in view of embankments and other protective measures, are less susceptible to surface pollution as compared to the surface water. However, the water quality of open well often depends on the surface of water i.e. the quality of aquifer that feeds the water to open

[4] *Environmental Economics Research Committee Report on "An Environmental Assessment of Oil and Gas Exploration", p 44*

[5] *http://www.oilandgasbmps.org/resources/air_quality.php. - site last visited on 19th March 2012*

well. Drilling activities often causes changes in the quality of aquifers.

Impact of Drilling Activities on Borewell

Bore wells, due to their sources and structure are least susceptible to pollution unlike the surface water. However, any subsurface activities like drilling etc may cause changes in the water quality of aquifers drastically.

Air Quality

Air quality is one of the basic indicators in determining the impact on a particular environment on account of any activity. The primary sources of emissions from oil and gas exploration operations to air are:

- Flaring, venting and purging gases, including black smoke emissions
- Combustion processes, such as diesel engines
- Fire protection systems
- Road traffic
- Fugitive gas losses[5]

Principal gaseous emissions from oil and gas operations may include carbon dioxide, carbon monoxide, methane, volatile organic carbons (voc), nitrogen oxides and halons. Emissions of sulphur dioxide and hydrogen sulphide can occur and will depend on the sulphur content of natural gas and diesel, particularly when used as a power source. In some cases, flaring and combustion can lead to odour production, and special consideration should be given to the sitting of flares and / or the treatment of waste gases.

Drilling operations are temporary phenomena and typically last about three months (the duration however, depends on a number of factors such as depth of well, complications encountered during drilling etc).

The emissions pose potential hazards to human health and environment of the drilling site and therefore there is a need for effective monitoring and timely action both by the drilling authority and the regulatory agencies to prevent any adverse effect on the environment.

In India, CPCB has set National Ambient Air Quality Standards (NAAQS) for three different categories namely Industrial, Domestic and Sensitive areas and accordingly, the emission levels need to comply with these standards.[6]

Oxides of Nitrogen

Nitric oxides are formed under high temperature combustion process. Among oxides of nitrogen (NOx), nitric oxide (NO) and nitrogen oxide (NO2) are important. NO2 in the range of about 120μg/ m3 over a six – month period is considered to produce adverse effects on the respiratory organs. The combined effect of NO2 and SO2 even at lower levels has adverse effects on plants. It has corrosive effect on material and is highly toxic to human beings. The residence time of NO2 in the atmosphere is about three days, while for NO the residence time is approximately four days.

Recent studies show that nitrogen dioxide adversely affects lung defense mechanism and severely damages lungs when found in doses greater than 50 ppm. Once inhaled, NO2 is retained in the lungs and is deposited in the lining of the trachea. In the presence of moisture, it is transformed to nitrous and nitric acids. These oxides, if transferred across the lung-blood barrier, produce inactive forms of hemoglobin known as 'meta-hemoglobin'. Eye and nasal irritation will arise after a brief exposure to 25 ppm of NO2 in ambient air. Exposure to 150 – 200 ppm of NO2 in the atmosphere may lead to the gradual development of fatal pulmonary fibrosis.[7]

Carbon Monoxide

The effect of carbon monoxide (CO) on the human body is dependent on its quantity in the body and upon the balance between intake and excretion by the human body. CO is also produced under natural conditions in the human body due to breaking down of haemoglobin- a process that permits recycling of iron in the blood. CO also strongly binds with the haemoglobin which means that a small fraction of CO when inhaled will combine more firmly in the lungs with the blood cells to form carboxyhemoglobin (COHb). When this happens, the capability of haemoglobin to carry oxygen to body tissue is reduced.

It has been observed that a CO level of 50 ppm leads to an equilibrium value of 7% COHb and 100 ppm of CO level

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6 *Environmental Economics Research Committee Report on "An Environmental Assessment of Oil and Gas Exploration", p. 55*

7 *http://www.onepetro.org/mslib/servlet/onepetropreview?id=00029745- last visited on 5th March 2012*

8 *Environmental Economics Research Committee Report on "An Environmental Assessment of Oil and Gas Exploration", p. 60*

9 *Environmental Impact Assessment (EIA) Study for Exploratory Drilling of Oil Exploration in the Block PEL of Kangra-Mandi, Himachal Pradesh, National Environmental Engineering Research Institute.*

to about 14% COHb. At levels greater than 5% of COHb, there are cardiac and pulmonary function changes. The results of the study conducted at the drilling sites indicate that the CO emissions were below detectable level (BDL).[8]

Noise Pollution

Noise generated during the drilling and exploration activities is mainly from the diesel engine, shale shaker, pumps, rig floor, compressor house, cellar pit, and movement of tracks, though most of the noise is generated during the short period of the drilling activity. This causes an impact on the human health and the fauna of the drilling area.

Scope of EIA

- To assess the existing quality of air, water and other environmental components.
- To identify the quality of technological equipments to be adopted.
- To evaluate environmental impacts of the proposed project.
- To prepare an environmental management programme for outline technologies available for mitigation measures.[9]

The assessment of such impact should be measured so that it can be less harmful to land, air, water and other ecological impacts. All mitigation measures must be adopted so that it can be least harmful to the environment.

Mitigation Measures

It is required that all equipments operate within precise devise parameter all through production and operational phases. This can be achieved by minimizing the length of trying through cautious preparation and using high ignition competence, smokeless flare/ burners. It is also recommended that while using high phase generator equipment, all working conditions should be checked so that it can generate less amount of noise. Noise barrier device should be used to protect from noise pollution. The waste generated should be accumulated at a single place in order to avoid even slight ground level pollution. Deployment of man power should be increased so that the work can be accomplished in less duration with higher efficiency. [10]

By using such kind of safety measures the level of pollution and degradation can be minimised.

Regulation of Oil and Sector Under International Law

Environment is one of the vital components for existence; it is not only a national concern but a global concern. This is why erga-omens status is accorded to the environmental responsibilities. Various countries of the world have passed legislations for Environmental Impact Assessment. Apart from this national legal framework, there are various regional and general international conventions on this issue.

The preceding historical review up to 1950 indicates that environmental regulation of oil and gas operations is relatively a recent phenomenon. Since approximately the mid of the twentieth century, there has been an increasing body of legal rules affecting oil and gas operations. The International Convention for the Prevention of Pollution of the Sea by Oil, 1954 was the first treaty for the reduction of oil pollution in the sea. In order to give effect to this Convention, the Merchant Shipping Act regulates and controls the discharge of oil or oil mixture by an Indian tanker or ship within any of the prohibited zones or by a foreign tanker or other ship within the prohibited zone adjoining the territories of India. Further, there is a prohibition on discharging any oil anywhere at sea from an Indian ship.

The legal framework for environmental regulation of petroleum transactions is a combination of both international law and national legislation, with the former as some elements and the latter the dominant component of the system.

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[10] *Environmental Impact Assessment (EIA) Study for Exploratory Drilling of Oil Exploration in the Block PEL of Kangra-Mandi, Himachal Pradesh, National Environmental Engineering Research Institute.*

[11] *1958 Geneva Convention on Law of the Seas, Geneva 29th April 1958.*
On 29 April 1958, as recorded in the Final Act (A/CONF.13/L.58, 1958, UNCLOS, Off. Rec. vol. 2, 146), the United Nations Conference on the Law of the Sea opened for signature four conventions and an optional protocol: the Convention on the Territorial Sea and the Contiguous Zone (CTS); the Convention on the High Seas (CHS); the Convention on Fishing and Conservation of the Living Resources of the High Seas (CFCLR); the Convention on the Continental Shelf (CCS); and the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes (OPSD).

[12] *Article 5(1), Convention on Continental Shelf, 1958*

[13] *Article 5(3), Convention on Continental Shelf, 1958*

[14] *Article 5(7), Convention on Continental Shelf, 1958*

[15] *Article 5(5), Convention on Continental Shelf, 1958*

1958 Geneva Conventions[11]

A good starting point to review contemporary international law in relation to petroleum operations is the 1958 Geneva Conventions, or more precisely, the Continental Shelf Convention and the High Seas Convention. The 1958 Continental Shelf Convention includes a number of provisions related to prevention of marine pollution from offshore exploration, which:

a) precludes offshore operations which cause unjustifiable interference with other marine activities including conservation efforts;[12]
b) Calls member states to establish 500 metres safety zones around all drilling platforms;[13]
c) Requires member states to undertake all appropriate measures for the protection of the living resources of the sea from all harmful agents;[14]
d) Stipulates that "any installations which are abandoned or unused must be entirely removed."[15]

The 1958, High Seas Convention also contained a broad article under which every state is required to draw up regulations to prevent pollution of the seas by discharge of oil from pipelines or resulting from oil exploration and exploitation. The majority of offshore producing states, including the major offshore producers such as the U.S.A. and the U.K., are parties to these conventions.

All of these provisions remain in force for the state parties, except for those that have ratified the 1982 United Nations Convention on the Law of the Sea (LOS Convention), which is designed to replace the 1958 Geneva Conventions. The implications of the LOS Convention will be discussed below. However, before that treaty was concluded there were a small number of developments within the framework of international law that affected the offshore industry.

1972 London Dumping Convention[16]

One of these attempts at environmental protection is the 1972 London Convention. It is a major environmental instrument of global application to all marine areas other than internal waters. Under this convention, dumping is defined as:

a. (i) any deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea;
(ii) any deliberate disposal at sea of vessels, aircraft, platforms or other man-made structures at sea; . . .

b. The disposal of wastes or other matter directly arising from, or related to the exploration, exploitation and associated off-shore processing of sea-bed mineral resources will not be covered by the provisions of this Convention.

By so providing, the London Dumping Convention[17] brings some of the offshore oil and gas activities under the umbrella of its regulation. This includes the disposal of offshore installations and structures.

In response to the increasing international concern in recent years over the issue of offshore abandonment of petroleum installations and facilities, a special meeting of the Contracting Parties to the London Dumping Convention adopted a new protocol on 7th November 1996 to clarify the treaty's position on the issue in question. The definition of "Dumping" in the convention was updated and expanded to include explicitly:[18]

"Any abandonment or toppling at site of platforms or other man-made structures at sea, for the purpose of deliberate disposal…"

By so providing, the London Dumping Convention further extends its jurisdiction to the particular activities of decommissioning and abandonment of petroleum installations and structures at sea, either totally or partially. This 1996 Protocol and its new definition of dumping will produce profound effect on the offshore oil and gas industry because of its direct relevance.

1973 MARPOL[19]

Another significant international act is the 1973 MARPOL, which is aimed at the shipping industry but has direct implications on the offshore petroleum operations.

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16 *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters*

17 *The Convention was adopted on 29 December 1972 in London, Mexico City, Moscow and Washington, D.C., and entered into force on 30 August 1975.*

18 *http://www.unep.ch/regionalseas/main/legal/llondon.html, last visited on 22nd March 2012*

19 *International Convention for the Prevention of Pollution From Ships, 1973 as modified by the Protocol of 1978. ("Marpol" is short for marine pollution and 73/78 short for the years 1973 and 1978.)*

20 *Annexure 1 deals with Oil. A State that becomes party to Marpol must accept Annex I and II. Annexes III-VI are voluntary annexes. Source-http://en.wikipedia.org/wiki/MARPOL_73/78, last visited on 21st March 2012.*

21 *United Nations Convention on the Law of the Sea (UNCLOS), 1982*

MARPOL defines "discharge" to exclude the "release of harmful substances directly arising from the exploration, exploitation and associated offshore processing of seabed miner resources."

By so providing, the convention excludes its application and jurisdiction over pollution caused by such activities as blowout, structural failure of installations, collision with structure, or accident of a pipeline. Interestingly, MARPOL does not stop here and its Annex I[20] goes on to provide that fixed and floating rigs, when engaged in the exploration and exploitation of seabed resources, must apply the rules applicable to ships of 400 tons and above. The effect of the application of these rules is the prohibition of the discharging of oil and oily mixtures into the marine environment, albeit with some specific exceptions.

1982 Law of the Sea Convention [21]

The LOS Convention is the deliberation of international community over a period of more than two decades. As mentioned earlier, it is designed to consolidate all relevant rules and principles, both customary and conventional, into a single framework convention.

For the first time in history, this global convention includes a separate chapter on marine environmental protection (Section XII), which specifies in a comprehensive manner that state must take measures to prevent, reduce, control the pollution of the marine environment.[22] As far as offshore operations are concerned, it calls upon member states to take measures to prevent, reduce and control pollution of the marine environment and, in particular the pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices. It further provides that states shall adopt laws and regulations, which are no less effective than international rules, standards and recommended practices and procedures, to deal with pollution from or in connection with offshore activities; and shall cooperate in the protection of the marine environment on a global and regional basis.[23]

All these provisions are clearly relevant to offshore petroleum and mineral operations. Nevertheless, it must be pointed out that what LOS Convention provides is an important framework for future legal development, rather than operational obligations.

Consequently, there is a need for developing a set of complementary working rules for offshore exploration and production activities. Both the substance of such rules and the manner of their actual application remain yet to be worked out at the international level.

1992 Biodiversity Convention

Apart from climate change, another concern of late by the international community is about the loss of biodiversity on the planet earth. It is reported that up to 8 percent of the planet's species may be extinct within 25 years, and as many as 17 million hectares of tropical rain forest - an area about the size of Japan and the home of many important and valuable species - are destroyed every year. It is against this general backdrop that a major instrument of the Biodiversity Conservation was adopted at the Rio Conference in 1992.[24]

Its relevance to the industry is also quite apparent since upstream operations will always introduce interference with biological sources such as land, vegetation and forests, and downstream operations cause various environmental problems ranging from air pollution to climate change. Among other things, the convention provides for state parties to identify and monitor the effects of such processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biodiversity; and establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity. All these provisions possess the potential of a direct impact on upstream operations once fully applied at the national level.[25]

The above discussion on international law relevant to oil and gas operations is by no means complete. The list could continue to include conventions such as the 1974 Offshore Pollution Liability Agreement (OPOL); the 1977 Convention on Civil Liability of Oil Pollution Damage Resulting From Exploration for and Exploitation of Seabed

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[22] *http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm, last visited on 22nd March 2012.*

[23] *Zhiguo Gao, Article on "Environmental Regulation of the Oil and Gas Industries", Kluwer law International*

[24] *https://www.cbd.int/doc/legal/cbd-en.pdf, site last visited on 10th March 2012.*

[25] *Bernard Tavern: "An introduction to the regulation of the petroleum industry: laws, contracts, and conventions", Klewer Law International*

[26] *Convention For The Prevention Of Marine Pollution By Dumping From Ships And Aircraft, Oslo, 15 February 1972*

Mineral Resources (CLEE), and the 1985 Vienna Convention on the Protection of the Ozone layer and its Protocols.

Major Regional Agreements

The second level of the international law elements is an increasing amount of environmental agreements concluded at the regional level since approximately the early 1970s. Some of the major ones are briefly discussed as the following:

The 1972 OSLO Convention

The Oslo Convention [26] is a regional treaty covering only the North East Atlantic, the North Sea and parts of the Arctic Ocean. The Convention provides that the bulky wastes, which may present a serious obstacle to fishing or navigation, shall be dumped at water depths of not less than 2,000 metres and at a distance of not less than 150 nautical miles from the nearest land; and prohibits the dumping of certain listed materials from "ships and aircraft" including fixed or floating platforms. The contracting parties remain divided as to whether the treaty covers dumping of platforms themselves.

The 1992 OSPAR Convention

In order to avoid ambiguity and update the existing provisions, the Oslo and Paris Commission adopted in 1992 the OSPAR Convention[27], which is designed to consolidate the previous regional conventions and to complement, rather than replace, the multilateral treaties such as the 1958 Geneva Convention and the 1972 London Convention. As far as offshore oil and gas operations are concerned, the convention prohibits the dumping of wastes or other matter from offshore installations; Discharge or emission from offshore sources are not included in the prohibition, but they are strictly subject to authorization, regulation and monitoring. The convention places an emphasis on disposal of installations by providing:

1. No disused offshore installation or disused offshore pipeline shall be dumped and no disused offshore installation shall be left wholly or partly in place in the maritime area without a permit issued by the competent authority of the relevant Contracting Party on a case by case basis.[28]

2. No such permit shall be issued if the disused offshore installation or disused offshore pipeline contains substances which result or are likely to result in hazards to human health, harm to living resources and marine ecosystems, damage to amenities or interference with other legitimate uses of the sea.[29]

At the meeting of the OSPAR Commission in June 1995, the majority of the contracting parties put forward and agreed upon a draft proposal on the disposal of offshore installations, aimed at: first, a moratorium on the disposal of decommissioned offshore installations at sea; second, a draft decision to be prepared by the OSPAR working group for consideration at the next meeting for implementation in the next two years.

1994 Energy Charter Treaty (ECT)

The Energy Charter Treaty[30] is the first one of its kind to limit its scope specifically to the energy sector. It is a super-regional treaty in the sense that its scope covers the whole of Europe and the members of Commonwealth of Independent States (CIS), plus Japan and Australia. In its Preamble, the treaty explicitly recognizes "the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and waste disposal, and for internationally agreed objectives and criteria for these purposes". It also includes a separate article to address the environmental aspects of investment and trade in energy. The environmental article contains a number of vague provisions: first, it spells out three general principles of sustainable development, prevention and polluter pays[31] for parties to observe in implementing their environmental obligations; second, it sets forth a general environmental obligation on contracting parties to strive to minimize harmful environmental impacts from all

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[27] *Convention For The Protection Of The Marine Environment Of The North-East Atlantic, 1992*

[28] *Article 5(1), OSPAR Convention 1992*

[29] *Article 5(2), OSPAR Convention 1992*

[30] *The Energy Charter Treaty was signed in December 1994 and entered into legal force in April 1998*

[31] *The Polluter Pays Principle (PPP) is an environmental policy principle which requires that the costs of pollution be borne by those who cause it. In its original emergence the Polluter Pays Principle aims at determining how the costs of pollution prevention and control must be allocated: the polluter must pay.- http://www.eoearth.org/article/Polluter_pays_principle- site last visited on 5th March 2012*

[32] *Zhiguo Gao, Article on "Environmental Regulation of the Oil and Gas Industries", Kluwer law International*

[33] *The Regional Seas Programme, launched in 1974 in the wake of the 1972 United Nations Conference on the human Environment held in Stockholm, is one of UNEP's most significant achievements in the past 35 years.*

[34] *www.unep.org/regionalseas/- site last visited on 10th March 2012*

operations within the energy cycle; third, it provides for 11 action points for state parties to comply with, which include environmental integration in energy policy; reflection of environmental costs in energy price; harmonization of environmental standards; energy efficiency and renewable energy sources; promoting cooperation and development of environmentally sound technologies, etc.[32]

Like some other environmental treaties, the environmental provisions of the ECT employ quite a few permissive rather than formative terminologies such as "take account of", "promote", "encourage", and "upon request". These provisions, therefore, "do not create enforceable commitments but function rather as indicators of good practices."

The UNEP Regional Seas Programme [33]

Another component of the regional treaties is the Regional Seas Programme developed under the auspices of the United Nations Environment Programme (UNEP). It is an ambitious programme aimed at developing treaties and other rules and standards to protect marine environment of marginal seas of the world. The programme now extends to more than 13 regional areas and has a total of 29 conventions and protocols.[34] Many of them affect offshore oil and gas exploration and production activities. Two such agreements are the 1994 Offshore Exploration Protocol under the 1976 Barcelona Convention and the 1989 Offshore Exploration Protocol under the 1978 Kuwait Convention, respectively. Despite their different geographical scopes of operation, the common issues addressed in the Barcelona and Kuwait Offshore Protocols include: authorization and license for drilling activities, disposal of wastes and harmful substances, and safety and contingency planning. Both Protocols place an emphasis on removal of installations.[35]

Under the Barcelona Protocol, the operator must "remove any installation which is abandoned or disused, in order to ensure safety of navigation"; while under the Kuwait Protocol, platforms and structures may be removed "in whole or in part", but they must not be disposed of at sea. Moreover, the Barcelona Protocol is more aggressive in the sense that it also includes provisions on liability and compensation, and requirement for environmental impact assessment.

The UNEP Regional Seas Programme is characterized by its unique approach of a series of framework conventions at the regional level, and substantive progress has been achieved through additional protocols which transform an otherwise broad treaty into effective working obligations.[36]

Environmental Directives of EC

Last but not the least, the European Community (EC) environmental directives must be mentioned as another component of the regional treaties relevant to petroleum operations. The last 25 years have seen the development of an extensive body of EC environmental law that now comprises more than 250 environmental directives, regulations and decisions, which address virtually all the media of the environment and sectors of the economy. Many of these directives affect the oil and gas industry, either directly or indirectly.

The 1985 Environmental Impact Assessment Directive as amended by the Council Directive 97/11/EC of 3 March 1997 is one of such environmental directives[37].

The objective of the EIA Directive is to assess certain public and private projects "which are likely to have significant effects on the environment". The directive divides projects into two categories: those projects presumed to have significant effects on the environment are subject to mandatory assessment (Annex I projects); and other projects for which assessment is not necessary but will be required if they are likely to cause significant environmental effects (Annex II projects). As far as oil and gas projects are concerned, it suffices to say that both up- and down-stream operations such as petroleum E&P, crude oil refineries, large thermal power stations, storage installations, integrated chemical installations, trading ports and waste disposal installations are listed in Annex I and therefore, subject to mandatory assessment.

More specifically, the mandatory list includes among other things: extraction of petroleum and natural gas with capacity exceeding 500 tonnes/day in the case of petroleum and 500,000 m3/day in the case of gas; pipelines for the transportation of gas, oil or chemical with a diameter of more than 800 mm and a length of more than 40 km; installations for storage of petroleum, petrochemical, or chemical products with a capacity of 200,000 tonnes or more. Smaller projects of the oil and

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[35] *Fernandes, J., (2000), EIA procedure, Landscape ecology and conservation management - Evaluation of alternatives in a highway EIA process, Environmental Impact Assessment Review, 20, pp. 665-680.*

[36] *http://www.unep.org/regionalseas/issues/default.asp- site last visited on 10th March, 2012*

[37] *http://en.wikipedia.org/wiki/List_of_European_Union_directives- last visited on 7th March, 2012*

[38] *http://en.wikipedia.org/wiki/European_Union_law- last visited on 13th March, 2012*

[39] *Zhiguo Gao, Article on "Environmental Regulation of the Oil and Gas Industries", Kluwer law International*

gas industry not subject to the mandatory requirement are listed in Annex II and it is up to member states to decide whether or not they should require an EIA through:

(a) case-by-case examination; or
(b) Threshold or criteria set by the member states.

These projects include surface installations for the extraction of petroleum and natural gas, surface storage of natural gas and fossil fuels, and oil and gas pipeline installations. The EIA Directive as amended in 1997 also requires that the information gathered in the process and determinations made by the national authority be made available to the public within a reasonable time in order to give them the opportunity to express an opinion before the consent is granted.[38] It must be commended that the new EIA directive brings back the mining and petroleum exploration and exploitation to the mandatory EIA requirement, which had been excluded under the original directive from the procedure for more than a decade. This provides another firm example that EIA should be a mandatory requirement for oil and gas E&P before a licence is granted since these development activities are always likely to cause various environmental concerns and consequences.[39]

ESPOO CONVENTION

Espoo Convention deals with the environmental impact assessment in a transboundary context. It is of high value because the environmental components are not restricted within the political boundary of a state. In the age of globalization, transboundary impacts of a variety of projects are increasing day by day. Transboundary impacts are generated by an industrial unit in one nation and affect the local environment of other nations as well. A variety of projects like plan pubela panama 2008, Gas pipeline project could generate a high degree of transboundary impact. If communication between these countries is not adequate it may also lead to tension. Another example is the Nord stream gas pipeline project.

Today EIA is applied in more than 100 nations including European Union. Various international agreements have also been entered into, to effectuate the transboundary application of EIA. The European Union has also made a regional arrangement for transboundary EIA, known as the convention in Environment Impact Assessment in Transboundary Context- ESPOO CONVENTION 1991. The convention was adopted with the help of United Nations Economic commission for Europe (UNECE) and came into force in 1997. The aim of this convention is to ensure environmentally sound and sustainable development[40]. The convention is signed and ratified by 41 countries. Espoo convention also generates certain requirements, like to undertake EIA, consultation between countries, and the facilitation for public participation for all the stakeholders[41].

The initial phase of these conventions began in 1970 when transboundary impacts came into observation. The first formal concern was with Stockholm declaration in 1972 in which principle 21 lays down that state parties must ensure that activities within one's jurisdiction do not affect others. Although these impacts led to certain controversies, Warsaw seminar 1987 drew a framework for EIA in a transboundary context. This was the beginning of negotiation which developed the framework to deal with transboundary projects and their EIA. From 1988 to 1990 UNECE applied various effort plans, policies and programmes for these impacts which finally resulted into the ESPOO Convention.

The basic purpose of this convention is to ensure environmentally sound and sustainable development by control, prevention and ratification of adverse transboundary impacts of the proposed activities. More specific objectives are to "enhance international co-operation in assessing environmental impacts in particular, in a transboundary context", and "to give explicit consideration to environmental factors at an early stage in the decision-making process"[42] Besides this, it also lays an objective to motivate the eastern and western countries in relation to EIA. This was so called a change from a stage of Cold War and by this it also led to integrate different nations for a mutually beneficial purpose.

In order to achieve this, there must be certain regulations for effectuating this convention. They also presented certain norms and guidelines of UNECE 2006 and other documents for the meetings. It has certain stages like initiation of proposal, Process of documentation and final decision. The basic idea behind this convention is to harmonize the international relations through a mutual concern about environment which led to protect, control, and prevent environmental degradation. The convention covers:

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[40] *Francisco M. Hernández, Analysis of the Espoo Convention as applied to mega projects:The case of Nord Stream, Lund University Center for Sustainability Studies*

[41] *Ibid*

[42] *Francisco M. Hernández, Analysis of the Espoo Convention as applied to mega projects:The case of Nord Stream, Lund University Center for Sustainability Studies*

- Obligation of the state parties to lay down EIA norms
- Carrying out EIA for transboundary impacts
- Mutual consultation and exchange of information
- Public participation
- Bilateral and Multilateral agreement
- Settlement of disputes.

Case studies on EIA in Oil and Gas Sector

The Nord Stream Case:

Nord Stream (former names: North Transgas and North European Gas Pipeline); is an off-shore natural gas pipeline from Vyborg in Russia to Greifswald in Germany. It is owned and operated by Nord Stream AG. The name occasionally has a wider meaning, including the feeding onshore pipeline in Russia, and further connections in Western Europe.

The project, which was promoted by the government of Russia and agreed to by the government of Germany, was seen as controversial for various reasons, including increasing European energy dependence on Russia and potential environmental damage. The Main environmental concerns due to the construction of the Nord Stream pipeline are

- The physical damage to the sea bed would lead to a large amount of disturbance in the sea bed. In its physical structure as well as it would increase the water turbidity which would lead to harm to the underwater flora and fauna. Also, the release of nutrients and hazardous substances would impact the environment and would cause irreversible damage to the sea. There would also be a large impact on bottom currents.

- Dumped munitions and barrels which can leak are a major environmental threat, such leakage could lead to poising of the deep sea bed and would also destroy the flora and fauna underwater as well the whole natural environment around.

- There would also be major sediment disturbance, and harm would be caused to fishes, seals, birds etc.

The Nord stream pipeline passes the territorial waters or EEZ of Russia, Finland, Sweden, Denmark and Germany. The Espoo Convention requires:

- Contracting Parties to notify and consult each other on all major projects that might have adverse environmental impact across borders

- Individual Parties to integrate environmental Parties to integrate environmental assessment into the plans and programs at the earliest stage

- Russia is not a Contracting Party to Espoo Convention

The issue of the Nord Stream Pipeline is nothing else than a classic example of a difficult case, the solution of which necessitates an analysis exceeding the canons of thinking in the categories of legal positivism.

The Trail Smelter Case

The drawn-out dispute between the United States and Canada, concerning the damage caused to property in the former state, by air pollution originating in the latter, has played an important role in the shaping and developing of international environmental law[43]

In this case 'it was damage caused by one State to the environment of the other that triggered the legal claim. Legally the issue was not viewed as different from damage caused to the public or private property, for instance by the inadvertent penetration of a foreign State's territory by armed forces. For the first time an International Tribunal propounded the principle that as State may not use, or allow its national's to use, its own territory in such a manner as to cause injury to a neighbouring country'[44].
John H. Knox, who has held a very critical view on the resolution of the Trail Smelter dispute, claimed that the Trail Smelter dispute would have been particularly suitable for private litigation:

"Trail Smelter was the kind of case that many scholars agree might usefully be addressed through privately enforced private rights: it involved only one polluter, a limited number of individuals alleging harm, and relatively clear causation. In the US and Canada, domestic cases like it were and still are subject to a private-rights approach."[45]

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[43] *It lasted 13 years, from 1928 to 1941*

[44] *Cassese Antonio, International Law, Oxford University Press, 2nd edition, 2005, New York, 484*

[45] *http://www.merkourios.org/index.php/mj/article/viewFile/34/40- site last visited on 18th March 2012*

[46] *Martijn van de Kerkhof , Article on: "The Trail Smelter Case Re-examined: Examining the Development of National Procedural Mechanisms to Resolve a Trail Smelter Type Dispute"*

[47] *S Hsu and AL Parrish, 'Litigating Canada-US Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial Reciprocity' (2007) 48 Virginia Journal of International Law 1, 18.*

Recent developments in the national courts' approach to some of the classical barriers, have made it more likely that in the contemporary time a Trail Smelter type dispute would indeed be resolved at the level of a private dispute. Particularly the US has made some strides in allowing for a private-rights approach. An increased willingness to exercise personal jurisdiction over a foreign national and the allowance of extra-territorial application of national laws based on the 'effects doctrine' has created an opening in the barrier blocking national jurisdiction in the Trail Smelter case[46]. The most convincing evidence of this was given in the Pakootas v Teck Cominco Metals Ltd case. Although, the court attempted to downplay the significance of its decision by claiming an extra-territorial application of national laws was not involved, the case has still set a groundbreaking precedent for future transboundary pollution cases. Some authors even go so far as may be the most important transboundary environmental case in decades'[47].

The Magurchara Gas Field Case

Magurchara gas field is situated in the State of Bangla Desh. The gas field caught fire in 1997 and was ablaze for three months, causing destruction to the betel-nut plantations and tea estates in the vicinity. Generally, in the petroleum sector major activities involved are seismic activities, drilling activities, exploration and production. During these activities the surrounding areas are affected in various ways[48].

Environmental impact assessment of the proposed drilling and pipeline activities had positively predicted for the Magurchara gas field exploration project. 100 experts from different fields related to oil and sector were interviewed and the evaluation was prepared. Checklist method of study was used in this assessment and a questionnaire was developed. The various impacts of the project were predicted to be within feasibility range. Effects on water, soil and other components of the environment were predicted to be low. The effects on wildlife and migratory birds were predicted to be low and medium. After all green signals the project proved to be environmentally hazardous. This shows that the impact assessment process needs to be more effectively conducted[49].

Since 1987, various international commissions and other researchers have strongly recommended that the countries of the world now need to shift from oil based economy to a renewable energy based economy. The conflict between environmental conservation and industrial growth will continue; but it is doubtless that we need to draw a better balance between the two which is the very purpose of environmental impact assessment.

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[48] *Alam J. B. , Ahmad A. A. M. & Munna G. M. , "Environmental Impact Assessment of oil and gas sector: A case study of Magurchara gas field" , Journal of soil science and environmental management, vol. 1(5), P 86-91, July 2010.*

[49] *ibid*

Corruption: Way Forward

*Arunima Jha**

''We need to deal with the cancer of corruption. We can give advice, encouragement, and support to governments that wish to cut corruption and it is these governments that, over time, will attract the larger volume of investment.'' (Emphasis added).

- James D. Wolfensohn, President, The World Bank

ABSTRACT

Necessity is the mother of invention may be good or bad. It may be in favor of mankind, society or otherwise, there are many means and ways for upliftment and destruction too. Corruption is also a way out for overall destruction but it is again a means of path - finding for a goal which may be unanimously not desired. Those who try to infringe over others rights and seek shortcut to their need follows the way of corruption. There are many preventive laws available but still corruption is rampant in our country and abroad

Corruption is posing to be a great challenge at the social front. If the money had been channelized properly, it would have been utilized for social and infrastructural development recent scams have sown the seeds of discontent among the younger demography of India who have cherished the dreams of riding the crest of the country's economic growth.

Corruption, perhaps is fast wearing down the belief in the state. Such a development would not only be dangerous for the society but also jeopardize the integrity of the nation

This problem requires a great thought. To satisfy this type of affair it is felt needed to invent such mechanism y which the requirement and the basic necessity is maintained without any practice of corruption may the dreams of the transforming India into a most developed and powerful nation be realized.

Keywords : Bribe, Gratification, Greed, Necessity, Corruption, Circumstances, Culprit and Victim

'Babudom' is a phenomena that is most pronounced in the IT department. While we all know that bribes are paid to get things accomplished attempts to quantify it have remained ambiguous. Governments have several options at hand to finance their activities and pursue their fiscal policy. These options include the imposition of taxes and the generation of non-tax revenues through fees, levies, cost recovery and user charges, property and investment income, domestic and foreign borrowing (including loans from multilateral institutions), seigniorage (rents generated from the government's monopoly power to print currency and coins), the sale of government assets (including the sale of public enterprises) and domestic and foreign grants.

However, in many countries, in addition to legally imposed taxes there are also arbitrary and irregular tax-like levies imposed by the authorities. These levies are a part of a larger phenomenon involving the need to make extra payments when interacting with government officials in many countries, particularly at the local level and at the lower levels of bureaucracy. These levies also form a part of the burden of taxation and have socio-economic consequences. Nevertheless, these irregular payments are not captured in the traditional economic databases, including those involving government finance. When such irregular levies arise in-lieu of legally imposed taxes, the tax revenue collection will fall below what can be collected on objective grounds. When they arise in addition to the legally imposed taxes, the tax burden increases in an arbitrary and capricious manner, with the detrimental effects on equity and efficiency in resource allocation.

Corruption in the tax system has been found rampant in many countries, resulting in reduction of tax revenues, increased income inequality and diminished capacity of the state to fulfill its obligations. Indicators of corruption in the tax system relate either to the institutional context or to staff related issues. Institutional factors such as excessive income tax, red tapism and inadequate enforcement of regulations are factors increasing the likelihood of corruption in the tax system. Complete tax regulations create opportunities for public officials to exercise discretionary powers while bribe payers resort to income tax evasion. Specific measures that have been promoted as likely to reduce 'public officials' opportunities for corruption include the standardization of procedures, simplification of the tax system, professionalism of tax

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services, reform of the incentive structure and establishment of semi-independent revenue authorities.

A review of modern literature indicates that corruption has a significant negative impact on the levels of tax revenue in the country. Wherever taxes are levied, there are agents who will try to avoid or evade them. In many developing countries, however, large-scale tax evasion is systemic. Economists (such as Allingham and Sandmo, 1972; Cowell, 1990; Usher, 1986; Yitzathki, 1987) have recognized the importance of this behavior in the design of optimal tax systems, and have paid increasing attention to the analysis of schemes for detecting and modifying such behavior (see, for example, Cremer, Marchand and Pestieau, 1988; Graetz, Reinganum and Wilde, 1986; Reinganum and Wilde, 1985; and Toma and Toma, 1992). Almost all of this literature, however, fails to take account of the role of dishonest tax collectors, thus ignoring the important phenomenon of administrative corruption, whereby taxpayers and tax collectors collude to avoid the payment of legal tax liabilities to the government. The purpose of this paper is to provide a simple framework for the analysis of such corruption, with special attention to some of the important features of the administration of developing country tax systems.

In discussions of customs enforcement in developing countries, one often hears of the distinction between physical smuggling and administrative smuggling. The former, in which the importer simply avoids dealing with the customs officer altogether, corresponds to the sort of evasion that is modelled in the traditional tax evasion literature. It is the latter, often much more prevalent, type of tax evasion, in which the taxpayers and the tax collectors collude, which is the subject of this paper. In order to avoid unnecessary complications, we simply rule out any form of tax evasion in which the tax collectors do not participate. The principal problem we address is the design of incentive systems to ensure that tax collectors perform their job at the least social cost. Is it possible to design an incentive scheme that would eliminate all administrative corruption? Is it desirable in all circumstances to attempt to minimize the scope of such corruption? In other words, Is corruption always an example of wasteful rent-seeking behavior, or are there circumstances in which it might be an efficiency-enhancing response to administrative or other constraints? What possible role might corruption play in the design of systems of taxation and other types of economic regulation?

This sort of corruption manifests itself in developing countries in a number of standard ways: there is considerable underpayment of taxes; tax revenue agents, despite low official incomes, are able to accumulate significant amounts of wealth while in office; and potential tax agents are often willing to make sizeable side-payments to secure employment in the revenue department.

Despite such widespread and widely acknowledged corruption, prosecutions of corrupt revenue agents are rare, and penalties are seldom more severe than job dismissal. Delinquent taxpayers are practically never prosecuted. And yet one occasionally runs through a sensational case in which an official is not only fired, but also penalized with heavy fines and a long term imprisonment for what seems to be the same sort of corrupt behavior. In other words, administrative corruption is systemic, and efforts to reduce it are erratic at best. Why is pervasive and widely known corruption tolerated? Why are the penalties for corrupt behavior so small and so infrequently imposed? And why are there occasional high profile prosecutions, in which much heavier penalties are imposed for the same kind of behavior?

Most economists accept that a positive connection exists between investment and growth. Therefore, if corruption affects investment, it must also affect growth. Corruption may affect investment in different ways. It may affect the amount of total investment, the amount of foreign direct investment, the size of public investment, and, of course, the quality of investment decisions. In several papers, Paolo Mauro of the IMF has shown that corruption can have a significant negative impact on the ratio of total investment to GDP (Mauro 1997). Regressing the investment ratio in relation to the corruption index, GDP per capita in 1960, secondary education in 1960, and population growth, he showed that a reduction in corruption could significantly increase the investment/GDP ratio. On the other hand, a drop in the investment/GDP ratio as a result of corruption was shown to have an important effect on growth. Mauro estimated that a reduction in corruption equivalent to two points in the corruption index would raise the annual growth rate by about 0.5 percent through its positive effect on the investment/GDP ratio. In addition, as discussed later, corruption is likely to affect adversely the quality of investment.

Whether called ill-gotten or unexplained wealth, a public officer found guilty of owning such properties may suffer the penalty of dismissal from office, forfeiture of benefits, payment of fines and even imprisonment, depending on the gravity of the offence. What does not appear to be clear in the laws dealing with corruption is the tax consequence of these illegally acquired properties. Criminal charges or even mere investigations into alleged violations of the Anti-Graft Law are commonly followed by the filing of tax evasion cases.

Taxation of illegally acquired income is not without basis. Under the Tax Code and existing revenue regulations,

income in the broad sense means all wealth from whatever source which flows into the taxpayer other than mere return of capital. Such wealth forms part of a person's gross income and is subject to income tax. The premise, therefore, is that if any flow of wealth is income, it follows that even wealth that was acquired illegally constitutes taxable income. This principle applies not only to public officials but to private individuals as well.

However, although resorting to indirect methods of calculating taxable income is sanctioned by law, this is not without limitations. In another case, the Supreme Court allowed the net worth method in determining the undeclared income only because the taxpayer's non-declaration and acquisition of assets was deemed fraudulent or accompanied by fraudulent intent. This implies, therefore, that in the absence of any finding of fraud on the part of the taxpayer, resorting to indirect methods in determining alleged undeclared taxable income is not readily justified.

In other words, the tax evasion case has a basis if it is established that income was acquired or earned by the accused, whether legally or illegally, and said income was not properly reported for tax purposes. Stated otherwise, the success of the tax evasion case would still hinge on the result of the anti-graft case to the extent that there should be a finding in said case that income was actually acquired but was not reported. On the other hand, if it is established in the criminal case that no income was acquired or earned, it would be baseless to pursue the tax evasion case.

However, the success of these tax evasion cases still hinges on the criminal court being able to establish through concrete evidence that the accused, by whatever means, acquired or earned income and that the accused failed to properly report said income for tax purposes.

The complexity of tax laws and procedures increases the magnitude of corruption in the tax system. Tax evasion is more likely to occur in a highly corrupt environment. Lack of requisite information makes taxpayers unaware of their rights and more exposed to discretionary treatment and exploitation.

Tax of?cers are allotted a particular geographical area of operations. For a particular taxpayer, the tax of?cer is the tax department. This monopoly power gives tax of?cers the opportunity to create circumstances that entice taxpayers to resort into corrupt practices.

A lack of clearly de?ned roles, functions, and duties of public of?cials creates an environment ripe for abusive behavior (Pashev 2005). A high degree of discretionary power and the lack of adequate monitoring and reporting mechanisms are vital in providing opportunities for corruption.

The greater the discretion, the greater the opportunity tax of?cials have to provide "favorable" interpretations of government rules and regulations to businesses in exchange for illegal payments.

In some developing countries, such as India, the extreme unwillingness of taxpayers to comply with the law—and hence their readiness to bribe tax collectors in order to reduce their tax liability—are important causes of corruption. Many taxpayers are willing to abet tax collectors if there is clear gain. This phenomenon is common in many middle-income countries.

Political leadership sustains and often creates and protects corruption. Corrupt political leadership makes the spread of corruption at lower levels relatively easy. A hierarchy of administrative levels is typically associated with different corrupt transactions. In the case of ?scal incentives, for example, relatively high-level officials and politicians are more likely to be involved in corrupt practices. In the case of foreign trade taxes and other routine activities, lower-level officials are also likely to be involved, sharing their illegal gains with those higher up in the chain of authority. It is these routine cases of lower-level corrupt tax practices that ultimately erode public con?dence in governmental institutions. For this reason, these practices are often seen as more corrosive than abuse of power at higher levels (Asher n.d.) As the power of a leader evolves into the political management of a service, the independence of officials is rapidly eroded by the interference of political leaders, and the risk of corruption increases. Political appointments not only reduce work efficiency, they also facilitate corruption, as they did in Tanzania, where entrance into the police or the legal profession required joining the party (Sedigh and Muganda 1999).

The objectives of a tax policy can be achieved only when the policy is properly administered. Most developing countries face various organizational and operational constraints to effective tax administration (box 9.2). In these countries, tax administration plays a crucial role in determining

the real (or effective) tax system: tax administration is tax policy (Casanegra de Jantscher 1990). Failure to properly administer the tax, therefore, defeats its purpose and threatens the canon of equity. It allows the government to collect taxes only from easy-to-tax sectors and people who cannot avoid paying. According to the business process model, the main factor causing corruption in tax administration is procedures. The greater the procedural interaction with the taxpayer, the greater the possibility of corruption.

Customs administration in India has been reformed over time. Some problems remain, however. One relates to the valuation of cargo. Taxpayers are often harassed on the grounds that the valuation is not correct; on this pretext, goods are detained. Importers usually compromise on the assessment in order to free the goods from detention. The imported cargo of regular importers is allowed to pass through a green channel, but the cargo of casual traders is subjected to a full check.

The system of domestic trade taxes in India is unique. Under India's constitution, the union government has the authority to impose a broad spectrum of excise duties on production or manufacture, while the states are assigned the power to levy sales tax on consumption.

As a result of this dichotomy of authority, India has adopted a dual (federal and state) VAT system. The federal VAT, known as CenVAT, has effectively replaced the system of union excise duty. CenVAT allows instant credit for taxes paid on inputs. Empirical studies of its impact show that it has reduced the transaction cost of business (NIPFP 1989).

All Indian states except Uttar Pradesh have adopted the VAT, replacing their age-old sales tax system. Most of the procedures prescribed for sales tax administration continue under the state VAT. Check posts at the borders of each state continue to monitor the ?ow of goods into the state through the main arteries of interstate trade. The use of road permits for administering the tax also continues. Under this system, the importing dealer receives these permits from the tax department of the importing state and sends them to his counterpart in another state before importing the goods. The trucks bringing the speci?ed goods into the state are expected to carry back these permits for scrutiny and veri?cation at the checkposts. One copy of the road permit is then sent to the checkpost to the concerned assessing of?cer. All imports are accounted for and therefore taxed.

Although these checkposts play an important role, the system does not work as effectively and smoothly as it was intended to. The checkposts interfere with the flow of trade and traffic within the state and harass a large number of dealers, the majority of whom are not liable for tax. The procedures allow for many points of interaction between taxpayers and of?cials, some of which could be eliminated.

Corruption drastically reduces tax revenues, forcing governments to ?nd other avenues for ?nancing government expenditure, including borrowing. Future ?scal ?exibility is reduced, because servicing of debt has to be given priority over other expenditures. This creates a vicious circle endangering ?scal sustainability. Corruption is particularly alarming because it breeds further corruption—"corruption may corrupt," as stated by Andvig and Moene (1990). Collusion between corrupt taxpayers and corrupt tax of?cials puts honest taxpayers at a disadvantage, encouraging them to evade taxes. If they do not, their pro?t margins are low, especially for small businesses.

The effect on tax officials is also important. Corrupt colleagues and friends weaken the will of honest officers and reduce the probability of being detected or losing one's reputation. As the number of corrupt tax collectors increases, the guilt feeling of indulging in wrongdoing decreases.

As Fjeldstad (2005) notes, when networks of corruption exist, ?ring some corrupt of?cials does not improve the situation, as the ?red of?cials become consultants and add to the network. Corruption affects the quality of governance. It forces of?cials to make decisions that do not serve the public interest but promote the interests of corrupt individuals. Administrative ef?ciency is at a low level because patronage and nepotism tend to encourage the recruitment of incompetent people.

Corruption adversely affects investment and growth (Mauro 1995). When growth is weak, the returns to entrepreneurship fall relative to those to rent seeking; the ensuing increase in the pace of rent-seeking activities further slows growth. Higher bribes imply declining pro?tability on productive investments relative to rent-seeking investments, crowding out productive investments. Innovators are particularly at the mercy of corrupt public of?cials, because new producers need government-supplied goods, such as permits and licenses, more than established producers (Murphy, Shleifer, and Vishny 1993).

Widespread corruption reduces both foreign and domestic investment, as investors look for locales in which there is less corruption, less red tapism, simpler laws and procedures, and transparent administration, all of which provide greater opportunities to grow. Corruption leads to economic waste and inefficiency, because it adversely affects the optimal allocation of funds, productivity, and consumption. When public resources meant for setting up productivity-enhancing infrastructure are diverted to politicians' private consumption, growth falls.[1] Pervasive corruption can also result in refusal by the donor

1 *The diversion of public resources, services, and assets to private use in Uganda resulted in deteriorating roads, poor medical facilities, dilapidated and ill-equipped schools, and falling educational standards (Ruzindana and Sedigh 1999).*

community to grant aid.

The cost of corruption to the society (in terms of both tangible and intangible costs) is extremely high. Intangible costs include the loss of trust in democracy, in leaders, in institutions, and in fellow citizens. Tangible costs include the impact on trade and investments, administrative ef?ciency, good governance, and equality of citizens.

Corruption has the potential to undermine the political stability of a country, by provoking social unrest and civil war that can threaten macroeconomic stabilization. In Tanzania corruption contributed to political instability and increased ethnic tension when a leader, for his own political purpose, claimed that some wealthy businesspeople from Asia, in collaboration with African leaders, were transferring the country's wealth abroad and impoverishing ordinary Tanzanians (Sedigh and Muganda 1999). He also insisted that the government was selling the country to Arabs and Zanzibaris. His comments not only intensi?ed racial tensions, which a number of politicians sought to exploit, they also caused enormous capital ?ight from Tanzania.

Which policy measures need to be adopted to combat corruption in tax administration depends on the social environment and the attitude about corruption held in the society—the factors that account for the degree of corruption in a country. What is regarded as corrupt practice in one country may be regarded as part of a routine transaction in another country. Social norms may be such that allegiance to their ethnic or religious group supersedes individuals' responsibility to act as honest bureaucrats.

Each country has to evolve the measures best suited to its own local requirements. Some policies that could be adopted by all developing countries plagued with corruption are described below.

An empirical study based on ?eldwork conducted in 1994–95 indicates that tax evasion in India occurs partly through collusion between taxpayers and tax of?cers. Of 5,840 offences detected, 87 percent were procedural. These offences included incomplete or insuf?cient documentation, inappropriate use of credit on capital goods, inadmissible deduction of inputs, taking of credit before the commencement of production, use of undeclared inputs, faulty interpretation of noti?cation issued by the department, use of unregistered dealer's invoices, extension of credit on endorsed invoices, declaration of invoices with incorrect address, and submission of invoices that were not in the name of the unit.

"Substantial" violations accounted for 7 percent of total revenue loss. These violations included irregular use of deemed credit, extension of credit on exempted ?nal products, rejected inputs sent back without reversal of credit, extension of credit on basic customs duty, misuse of the facility of "job work," excess credit taken, and the use of the CenVAT (the federal VAT) credit by small-scale units that had opted out of the system. Fraudulent violations accounted for 6 percent of total revenue lost.

These violations included extension of credit without producing the required documents, extension of credit on invoices without physical movement, duplicate extension credit on the same invoice, extension of credit without payment of duty, and use of fraudulent documents. These violations show a deliberate attempt on the part of the taxpayer to defraud the government.

The wide variety of anticorruption management structures suggests the diverse approaches for combating corruption in different countries. HongKong (China) established an Independent Commission against Corruption, which carries out investigative, preventive, and communications functions. It has enjoyed resounding success in ?ghting corruption: Hong Kong now ranks as one of the least corrupt jurisdictions in East Asia. India and Singapore established bodies devoted entirely to investigating corrupt acts and preparing evidence for prosecution. These bodies have also been successful in reducing corruption (Heilbrunn 2004; Vittal 2003). In New South Wales, commissions report to parliamentary committees; they are independent from the executive and judicial branches of state. These commissions have changed the norms of how business is conducted, preventing corruption from occurring (Heilbrunn 2004). The United States implemented a multiagency model that includes of?ces that are individually distinct but together form a web of agencies that ?ght corruption (Heilbrunn 2004).

The success of such organizations has encouraged governments else- where (in Argentina, Bosnia-Herzegovina, Guinea, the Republic of Korea, and Mauritius, for example) to create similar organizations. Mounting evidence suggests, however, that commissions have not been successful in countries where low levels of political commitment, lack of articulation among branches of state, and severe budgetary constraints have prevented the establishment of large and expensive anticorruption commissions (Heilbrunn 2004).

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tax evasion, in which the taxpayers and the tax collectors collude, which is the subject of this paper. In order to avoid unnecessary complications, we simply rule out any form of tax evasion in which the tax collectors do not participate.

The principal problem we address is the design of incentive systems to ensure that tax collectors perform their job at the least social cost. Is it possible to design an incentive scheme that would eliminate all administrative corruption? Is it desirable in all circumstances to attempt to minimize the scope of such corruption? In other words, is corruption always an example of wasteful rent-seeking behavior, or are there circumstances in which it might be an efficiency-enhancing response to administrative or other constraints? What possible role might corruption play in the design of systems of taxation and other types of economic regulation?

Administrative corruption in the tax system arises out of two reasons. First, in order to determine taxpayers' true tax liabilities, it is necessary for the government to delegate authority to tax officials who have the ability to obtain the information necessary to make this determination. Second, the government has imperfect ability to monitor the behavior of its tax officials. This problem arises everywhere, but is more serious in developing countries with poorly developed accounting and bookkeeping standards. Customs officers, for instance, are required to determine the classification and the values of imported goods. Income tax agents have to assess the "true" income of taxpayers and, in cases where rates differ according to income source, the proper classification of various income components. The basis for these determinations is generally much weaker than in more developed countries, as is the ability of the government to ascertain whether tax officials are making correct assessments and collecting the payments that correspond to the taxpayers' true tax liabilities.

The division of the surplus from administrative corruption can be thought of as a cooperative game among the Payers and the Collector. The issue we face is that of dividing the potential gains from cooperation between the tax collector and a large number of taxpayers. We would like to have a rule that reflects the maximum tax liabilities of each payer and the fact that the tax collector is an essential party in the corruption process. It should be pointed out that this cannot be solved as a simple bargaining problem between a single taxpayer and the tax collector. This is because there exists an aggregate revenue target, and therefore the current surplus available to be shared between the Collector and a Payer depends on the taxes that have already been collected elsewhere.

The desired objectives of tax policy can be achieved only when it is properly administered. In most developing countries, tax administration is tax policy. Failure to properly administer the tax, therefore, defeats its very purpose and threatens equity. Involved procedures cause deficiencies in tax operations, reduce overall tax collection, and cause corruption in tax administration.

When corruption becomes a way of life, it has far-reaching implications. It undercuts efficiency and equity, as well as the macroeconomic and institutional functions of government. It reduces revenue to government, endangering fiscal sustainability, and adversely affects investment and growth. The presence of corrupt officials encourages other officials to engage in corruption, because the probability of being detected or losing one's reputation declines. Likewise, the presence of corrupt taxpayers encourages other tax-payers to cheat.

Fighting corruption takes time. Power groups whose interests are threatened can scuttle efforts. But letting corruption fester can be even more dangerous. Which policy measures need to be adopted depends on the overall social environment and the attitude about corruption held by society.

One of the most important policy prescriptions for curbing corruption is creating a tax system that is rational, equitable, and simple. Reducing the monopoly and discretionary power of tax of?cials is also very important. The tax structure should be as broad as possible in order to maximize equity. Bureaucrats should be given competing jurisdictions, so that competition among of?cers will drive the level of bribes to zero. Monitoring and auditing must be increased to prevent corruption. The system of recruitment of of?cers should be streamlined, and of?cers should be given intensive and repetitive training for promoting a code of conduct, with emphasis on ethical values, such as integrity, honesty, public service, justice, transparency, accountability, and rule of law. Salaries should be high enough that of?cials are able to support themselves and their dependents without accepting bribes. An anticorruption commission can be set up that maintains transparency in the system and makes political leaders and of?cers accountable for their actions. Decentralization can also help curb corruption. Its effectiveness depends on the design of decentralization and the institutional arrangements governing its implementation.

There are some specific measures to control increasing corruption.

1. The Right to Information Act (RTI) gives one all the required information about the Government, such as what the Government is doing with our tax payments. Under this act, one has the right to ask the Government on any problem which one faces. There is a Public Information Officer (PIO) appointed in

every Government department, who is responsible for collecting information wanted by the citizens and providing them with the relevant information on payment of a nominal fee to the PIO. If the PIO refuses to accept the application or if the applicant does not receive the required information on time then the applicant can make a complaint to the respective information commission, which has the power to impose a penalty up to Rs.25, 000 on the errant PIO.

2. Another potent check on corruption is Central Vigilance Commission (CVC). It was setup by the Government to advise and guide Central Government agencies in the areas of vigilance. If there are any cases of corruption or any complaints thereof, then that can be reported to the CVC. CVC also shoulders the responsibility of creating more awareness among people regarding the consequences of giving and taking of bribes and corruption.

3. Establishment of special courts for speedy justice can be a huge positive aspect. Much time should not elapse between the registration of a case and the delivery of judgment.

4. Strong and stringent laws need to be enacted which gives no room for the guilty to escape.

5. In many cases, the employees opt for corrupt means out of compulsion and not by choice. Some people are of the opinion that the wages paid are insufficient to feed their families. If they are paid better, they would not be forced to accept bribe.

The one thing that needs to be ensured is proper, impartial, and unbiased use of various anti-social regulations to take strong, deterrent, and timely legal action against the offenders, irrespective of their political influences or money power. Firm and strong steps are needed to curb the menace and an atmosphere has to created where the good, patriotic, intellectuals come forward to serve the country with pride, virtue, and honesty for the welfare of the people of India.

According to Global Integrity 2009, companies frequently interact with tax officials, who visit plants to carry out inspections. These officials enforce the complex tax rules and regulations relevant for business operations and enjoy considerable discretion in deciding which rules to enforce, to whom these rules should apply, and when and how they should be used. Moreover, companies report that inspection visits are often arbitrary and excessive, at times serving as avenues for demanding bribes. Many companies choose to pay off tax officials in order to avoid disruptions in production schedules and staff time. Consequently, the majority of companies surveyed in the World Bank & IFCEnterprise Surveys 2006 report that they give gifts in their meetings with tax inspectors.

Moreover, according to Global Integrity 2009, some groups, such as well-connected individuals or companies, may consistently avoid paying taxes due to their connections.

Tax evasion by politicians, bureaucrats and business people in India is common. According to a 2008 article by Merinews, a sum of more than USD 1.4 trillion has been deposited in Swiss banks into personal accounts belonging to Indians. Allegedly, most of this wealth is misappropriated public money and has been acquired through corrupt means, leading to demands for the money to be returned to India for debt and poverty relief. According to a January 2011 news article by Global post, in 2008, the Government of Germany offered its help to share information with India concerning some wealthy Indians who hold secret accounts in the tax haven of Liechtenstein, however, the Indian government was initially reluctant to accept the offer and only finally accepted the offer after public pressure. According to this article, the Supreme Court and the opposition parties have been heavily criticizing the government for keeping the list of the tax evaders' name secret from the public and failing to launch actions against them. A Supreme Court lawyer alleged that the government is either 'protecting their own party members or the corporations who have bribed them', according to the same article.

Amongst the many critical predicaments that the Indian economy suffers from, corruption has been one of the biggest monsters, and thankfully the most talked about in recent days. Needless to say, corruption has corroded every delivery system and has made it completely dysfunctional. The entire Indian public life is riddled with overriding rates of corruption – from the Adarsh land scam to Commonwealth Games misappropriations to the 2G spectrum scam – the list here has been endless, and the magnitude, obscene. In fact, India's public life was never clean – the infamous Bofors scandal, Harshad Mehta's nexus with senior politicians and Ketan Parekh's stock market manipulation – all had their own perilous impact on the economy! It requires no empirical study or statistical survey to exhibit that we comfortably are the top performers in all corruption related global indices.

The thumb-rule that set the pattern is that the developed countries mostly have high CPI scores, whereas at the bottom of the table are the countries mired by civil strife and oppressive regimes; and in-between are the emerging economies as well as former communist blocks. There is also a direct correlation between CPI rankings and Human Development Index (barring some aberration like Greece,

which, in spite of being a developed country is ranked below China at number 80; and South Korea, which is ranked 12th in HDI and is 43 in CPI). Most of the African as well as Asian nations have a combination of low CPI and low HDI scores and most of the European and North American countries have the opposite; thus reflecting a direct bearing between the two indices! On hindsight, it may appear that there is no impact of corruption on GDP growth and investments. China and India, both scored quite low on CPI, yet have been riding on decent economic growth and FDI inflow. Vietnam and Indonesia are even lower in ranks in CPI (2.9 and 3.0 respectively) are recipient of quantum investments with their economy kicking!

Amongst the many critical predicaments that the Indian economy suffers from, corruption has been one of the biggest and ugly monsters that is devouring the entire economic set up of the country. Needless to say, corruption has corroded every delivery system and has made it completely dysfunctional. The entire Indian public life is riddled with overriding rates of corruption – from the Adarsh land scam to Commonwealth Games misappropriations to the 2G spectrum scam – the list here has been endless, and the magnitude, obscene. In fact, India's public life was never clean – the infamous Bofors scandal, Harshad Mehta's nexus with senior politicians and Ketan Parekh's stock market manipulation – all had their own perilous impact on the economy. It requires no empirical study or statistical survey to exhibit that we comfortably are the top performers in all corruption related global indices.

Take for instance, Transparency International's Corruption Perception Index (CPI) where India's rank has been slipping consistently – languishing at the 95th position now with a score of 3.1 (on a scale of 10), a sizable 23 ranks down from 2007! We are far behind China that stands at 75th position with a score of 3.6. CPI score is not only about corruption but is more about the way corruption has got institutionalised in our system. Also, it is a fact that India's score could have been better had it not been battered with the monstrous 2G spectrum scam. Interestingly, all the least corrupt countries like New Zealand, Denmark and Finland with 9.5, 9.4, and 9.4 scores respectively are not just socially developed but also economically progressive. And that's why these are those nations that experience very few cases of crime, corruption and other forms of social malaise – unlike India.

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Another case in point of disconnect between GDP growth and corruption is Brazil with a score of 3.8 and Russia appallingly with 2.4, who are at the bottom half of the draw! However, there is an interesting catch here, particularly, with respect to India. We have an increasing income inequality with a dubious distinction of possessing the highest number of poor in the world. An OECD report reveals that the people belonging to the top 10 per cent of our income group are 12 times richer than the bottom 10 per cent. And this is increasing as the difference 20 years ago was only 6 times, that is, before the beginning of our magic potion of liberalization! Gini Coefficient another notable measure to evaluate inequality, is on a rise too – it has increased from 0.32 in 2000 to more than 0.37 now! There is no secret in the fact that the income inequality assuages the chances of employment to many, lowers purchasing power for consumption expenditure, halts the access to borrowing, and hinders the ability to save and invest! For the uninitiated, CPI also takes into account various parameters that have a higher social impact. India fares badly on almost all parameters considered under CPI – viz. bribery, extortion, nepotism, patronage, graft, embezzlement. The 2G spectrum scam, CWG scandal, cash-for-vote bribery case have set infamous benchmarks on all these parameters and surely are the reasons for such poor showing in the index.

More alarmingly, as India develops, there is an ascent of illicit money being stashed in foreign shores as well. There is no doubt that due to this corruption plaguing India, the fruits of development are certainly not reaching the desperately poorer sections of the society – a fact quite evident from the increasing gap between the rich and the poor. World Bank too has drawn a poor picture of India's achievements in curbing corruption! The report is one on Governance Indicators, where India has fared quite poorly and is below the half level on most parameters. In the parameter 'Rule of Law and Control of Corruption', which directly addresses corruption related issues like crime, tax evasion, black markets, and judicial independence – India

has scored a lowly 56th percentile! That said, India's low score is quite expected and obvious on this particular scale. India is probably the worst performer globally with respect to tax evasion as a humungous amount of black money gets stashed abroad (we top the global list with more than $1 trillion of Indian black money floating around the world). Added to that, the efficacy of the Indian judiciary has been in question too as even such a corrupt nation like ours can still hardly boast of any political or business leader who has ever been sentenced to long years of imprisonment.

Shamelessly, leaders like Kanimozhi and many others who were arrested on corruption charges are now roaming scot free. And a few who are still behind bars are leading a luxurious life inside the prison with all luxuries at their disposal. This speaks volumes on the credibility of the so-called 'Rule of Law'. Such lousy rules of law are the vital motivating factors for our political and business class to adhere to such corrupt practices.

Another research and advocacy organization, the Global Financial Integrity (GFI), released a report called 'The Drivers and Dynamics of Illicit Financial Flows from India: 1948-2008'. The report alluded to some jaw dropping facts! As a direct result of black money stashed abroad, India has lost a humungous sum. Tax evasion, bribery and kickbacks, cases of crime and other forms of corruption – all are listed between 1948 and 2008! The 2G spectrum is a classic case of a royal kickback scam by A Raja and it is intriguing how our system managed it to keep it off-the-hook, more so as this was done during the Bofors era. Notwithstanding, in our gigantic corruption saga, the present valuation of this illegal capital flight is more than double the US external debt! Even at the corporate level, the private sector always preferred overseas financial centers – the share of which (in terms of deposits), went up from 36.4 per cent in 1995 to 54.2 per cent in 2009.

Above all, such widespread corruption has a great opportunity cost attached to it, especially at the social front. If the money has been channelized properly, we would not have had such a shortage of schools or hospitals in India. Further, the quality of services in the existing institution would not have been compromised to such a low level. Such widespread corruption results in a loss of faith in the society and in its functioning to say the least. In other words, realizing that the society wasn't progressing towards a lesser corrupt situation, many would be encouraged to seek individual solutions and further discount the societal processes. But what about the people below the poverty line who can't afford to adopt such a practice? This ultimately has led to fragmentation and the loss of national spirit at large – which is beyond any calculation.

Worse, even the taxes generated from the common man are also not spared. Instead of using them for social and infrastructural development, they are being used to provide a luxurious lifestyle and five-star services to jailed politicians. The Tihar Jail incident, where a surprise visit exposed the luxurious lives of the 2G scam accused politicians, is a case in point.

What is more intriguing is the fact that corruption in India is not only elite but also centered around the common man – this is quite unlike in the US. Corruption in developed nations like the US only impacts the lives of the rich and powerful – through lobbying or financial manipulation and such practices. The scenario is completely opposite in India's case.

Coming back to the topic of black money, it is reported that India has more black money stashed in Swiss banks than all other countries combined! That's a truly mind boggling data! The number eclipses $1,500 billion, a figure that no one else can touch or even come close to. A distant second on this ignominious list is Russia with $470 billion black money, followed by UK with $390 billion and China at $96 billion.

In a country like India, with an increasingly younger demography having their dreams of riding the wave of India's economic growth... recent scams have only sowed seeds of discontent; a disgruntlement with the State and its apparatus. Corruption, perhaps, is fast wearing down the belief in the State. Such a development would not only be dangerous for the society but also threaten the very integrity of the nation at large. Our economic indicators reveal this social malaise and even these indicators, I feel, are actually understated, as no index in the world can calculate the actual social loss we incur through our shameless indulgences.

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BAIL and Judicial Discretion

*Bahul Kumar Shastri**

The following excerpt from a judgment[1] delivered by Justice Krishna Iyer regarding Bail and the judicial discretion is worthy of being quoted in the context of this paper.

"Bail or Jail?"- at the pre-trial or post- conviction stage-belongs to the blurred area of the criminal justice system and largely binges on the hunch of the bench, otherwise called judicial discretion. The Code is cryptic on this topic and the court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process.

ABSTRACT

Bail conceptually means to procure the release of the person awaiting trial or an appeal, by the deposit of security to ensure that the accused shall appear at the designated time and place and submit him to the jurisdiction and judgment of the court. The object behind arrest and detention of accused is to secure his appearance for trial and subsequently if he is found guilty, he shall be available to receive sentence. Hence if the presence of such accused could be reasonably ensured otherwise than by arrest and detention then it would be unjust to deprive him of his liberty during the pendency of criminal proceedings against him. The basic tenet of criminal law is presumption of innocence till the guilt is proved beyond all reasonable doubts. Thus the question of bail is of paramount importance because arrest and detention of an accused who is not yet being proved guilty curtails his liberty and compel him to suffer the hardships of jail life adversely affecting his physical and mental health, livelihood accompanied with reputational side effects

Bail is a key concept in criminal jurisprudence which fundamentally aims at balancing personal liberty and social security. Another side of the coin juxtaposing the personal liberty is social security. It is also to be ensured that the grant of bail shall not affect the fairness of trial or prejudice the larger public interest. Thus a huge amount of discretionary powers are vested in the hand of judicial officers while exercising jurisdiction on the question of Bail.

The paper broadly discusses the basic concept of bail, its origin and evolution. In the light of various judicial pronouncements and legal principles an attempt is made by the author to analyse the manner in which the judicial discretion ought to be exercised while determining the question that whether the accused deserves *Bail or Jail.*

Keywords: Arrest, Bail or Jail, Concept of bail its origin and evolution, Detention, Discretionary powers, Fair trial, Judicial Officers, Judicial pronouncements Liberty, Presumption of innocence, Public Interest, Social Security.

Meaning of Bail

Bail means to procure the release of the person awaiting trial or an appeal, by the deposit of security to ensure that the accused shall appear at the designated time and place and submit himself to the jurisdiction and judgment of the court. The monetary value of the security is known as the bail bond which is fixed by the court having jurisdiction over the accused. The security may be cash, the papers giving title to property, or the bond of private persons of means or of a professional bondsman or bonding company. Failure of the person released on bail to surrender himself at the appointed time results in forfeiture of the security.

The English Dictionary[2] defines it as "Security, usually a sum of money, exchanged for the release of an arrested person as a guarantee of that person's appearance for trial"

The law dictionary[3] defines bail as " The security for the appearance of the accused person on which he is released pending trial or investigation."

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1 *Gudikanti Narasimhulu vs Public Prosecutor, AIR 1978 SC 430*

2 *The American heritage dictionary, fourth Edn.*

3 *Law lexicon by Ramanth Iyer, third Edn.*

4 *Moti Ram vs State of MP (1978) 4 SCC 47*

5 *Vide Art.19,20,21 and 22*

6 *In its Article 9,10,11(1)*

Object of Bail

The primary object of arrest and detention of the accused is to secure his appearance at the time of trial and if subsequently he is found guilty he shall be available to receive the sentence. The fundamental principle on which the concept of bail is based argues that if the presence of such accused could be reasonably ensured otherwise then by arrest and detention, it would be unjust to deprive the accused of his liberty during the pendency of criminal proceedings against him. Moreover as it's a fundamental principle of criminal law jurisprudence that very accused shall be presumed innocent till the guilt is proved beyond reasonable doubt, it would be unfair to afflict the person with hardships of jail life which adversely affects his mental and physical health along with reputational side effects. Detention also deprives the accused to prepare effectively for his defence. The jailed accused loses his livelihood and the burden of his detention frequently falls heavily on the innocent members of his family.[4] The constitutional provisions[5] and other relevant provisions of Universal Declaration of Human Rights[6] to which India is a signatory also substantiates the claim of accused for the grant of bail.

On the other hand there is other side of the same coin as well. There are certain justifiable grounds which are reasonable enough to reject the bail application. The three most crucial grounds inter alia can be enumerated as

1. Probability that the person may abscond: It is highly probable that a person who is accused of a serious offence and is likely to be convicted may abscond or jump bail to avoid trial and consequential sentence

2. Probability of manipulating or destroying evidence: It is highly probable that the accused if released on bail may obstruct the fair trial by destroying evidence or by tampering prosecution witness.

3. Probability that the person if released is likely to commit more offences during the period of his release on bail.

Thus there are wide discretionary powers vested in the courts to determine the question as to the grant of bail, with a view to balance individual liberty with social security. The same has been better explained as under[7]:

"The law of bails has to be dovetail two conflicting demands, namely, on one hand, the requirements of society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz., the presumption of innocence of an accused till he is found guilty"

History of Bail

The present Indian law pertaining to this subject matter is a concept borrowed from English law in accordance with which the Code of Criminal Procedure was drafted and enacted in India. Thus it is relevant to quote the historical development and jurisprudential evolution of bail in England.

The oldest traces of the concept of bail can be found in 399 BC, when Plato tried to create a bond for the release of Socrates. The modern bail system evolved from a series of laws originating in the middle ages in England.

The evolution of bail system in England [8]

In Britain during medieval times the concept of circuit courts existed where Judges used to periodically go on circuit to various parts of the country for deciding cases. The terms Sessions and Quarter Sessions are thus derived from the intervals at which such courts were held. In the meanwhile, the accused were kept in prison awaiting their trials. These prisoners were kept in very unhygienic and inhumane conditions which caused the spread of a lot of diseases. This led to agitation and consequently resulted in their release on a condition that they shall secure a surety. The purpose was to ensure the presence of such person on the designated date of hearing. In case of his non appearance the surety was to be held liable and was made to face trial. With a passage of time the concept of

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7 *In re, Supdt. & Remembrancer of legal Affairs v Amiya Kumar Roy Chowdhary,(1974) 78 Cal WN 320,325*

8 *Article titled "Indian system of Bail - Anti Poor" authored by Urvashi Saikumar retrived from http://www.legalserviceindia.com on February 09, 2012 was referred in this context.*

9 *The Habeas Corpus Act, 1679 states, "A Magistrate shall discharge prisoners from their Imprisonment taking their Recognizance, with one or more Surety or Sureties, in any Sum according to the Magistrate's discretion, unless it shall appear that the Party is committed for such Matter offenses for which by law the Prisoner is not bailable."*

10 *It states that "excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects. Excessive bail ought not to be required."*

11 *Section 5(3) of the Bail Act 1976*

12 *A Legislation has recently been enacted which require magistrates, courts and the Crown Court to give reasons for their decisions where they grant bail after hearing representations from the prosecutor in favour of withholding bail (Criminal Justice and Police Act 2001, s 129). Such a requirement has the potential to promote thoughtful decision-making and the proper consideration of the risks that a defendant might pose if granted bail.*

monetary bail had evolved and the accused were asked to give a monetary bond, which was liable to get forfeited on non-appearance.

Statutory Evolution

1. The Magna Carta 1215, conferring rights upon its citizens stated that no man could be taken or imprisoned without being judged by his peers or the law of the land.

2. The Statute of Westminster 1275, for the first time classified crimes as bailable and non bailable. It also provided for competent authorities to make decisions on bail matters.

3. The Habeas Corpus Act, 1677 was added to the Right Of Petition of 1628, which conferred two rights on accused namely, the right to be informed about the charges against him and the right to know if the charges against him were bailable or not.[9]

4. The English Bill Of Rights, 1689 provided safeguards against judges setting bail too high.[10]

Present Position in England

The Bail Act, 1976 sets out the current and the basic legal position of bail in England. It lays out that there is a general right to bail, except as provided for under the First Schedule of the Act. But there are different grounds for refusing the right to bail depending on the nature of the offence. In addition to the grounds for refusal of bail refusal laid down in various case laws, if the court is satisfied that there are "substantial grounds for believing" that the defendant if released on bail will commit an offence while on bail, the bail may be refused. This confers discretionary powers upon the courts. In order to regulate this discretionary power the statute[11] provides that the court which withholds bail is required to give reasons, so that the defendant can consider making an application[12].

Position in India

The procedural law of crimes in India[13] clearly classifies the offences into two categories namely the offences which are bailable and the offences which are not bailable. Bailable offences are those offences which are shown as bailable in the first schedule to the code or are made bailable by any other law in force. The schedule categorises all the offences under the Indian Penal Code as bailable and non bailable offences. The general principle for this categorization is that if the offence is of serious nature and is punishable with imprisonment for three years or more, it is considered as non bailable offence. But there are exceptions to this general rule as well.[14]

Law is clear on the point that bail is a matter of right where the person is accused of a bailable offence[15] subject to the conditions prescribed in the provision. Thus bail is a matter of discretion if the person is accused of non bailable offence.

Considerations before exercising discretion:

1. "Discretion when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful, but legal and regular" [16]

2. The scope of discretion varies in inverse proportion to the gravity of crime. As the gravity of the offence increases the discretion to release offender on bail decreases.

3. As between Police Officers and judicial officers, wider discretion to grant bail has been given to judicial officer.

4. Amongst judicial officers and courts, High courts or sessions court has wider discretion than that given to other courts and judicial officers.

Discretion, how to be exercised ?

It is noteworthy to quote Benjamin Cardozo[17] in this context

"The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined. by system, and subordinated to 'the primordial necessity of order in the social life. Wide enough in all

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[13] *The Code of Criminal Procedure,1973*

[14] *SC. Observation, "…on this basis it may not be easy to explain why, for instance offences under Sec 477,477-A,475 and 506 of the IPC should be regarded as bailable whereas offences under Sec.379 should be bailable" AIR 1958 SC 376:*

[15] *Under Sec.436 Cr.P.C*

[16] *Mansfield quoted in (1978) 1SCC 240:*

[17] *The Nature of the Judicial Process-Yale University Press, (1921)].*

[18] *Rao Hara Narayan Singh v State, AIR 1958 Punj 123 :*

[19] *AIR 1977 SC 2447*

conscience is the, fieldof discretion that remains."

There are certain principles which guide exercise of this discretion.

It should be noticed at the outset that the object of detention pending criminal proceedings, is not punishment and the law favours allowance of bail, which is rule and refusal is exception.[18] Based upon various judicial pronouncements and findings, the following points are to be considered while exercising such discretion:

1. The enormity of charge
2. The nature of the accusation
3. The severity of the punishment which the conviction will entail
4. The nature of evidence in support of the accusation
5. The danger of accused person's absconding, if released on bail
6. The danger of witnessed being tampered with
7. The protracted nature of the trial
8. Opportunity to the applicant for preparation of his defence.
9. The health, age and sex of accused
10. The nature and gravity of circumstances in which the offence was committed
11. The position and status of accused with reference to victim and witnesses
12. The probability of accused committing more offences if released on bail
13. Interest of society

Important Case Laws

1. In the State of Rajasthan v Balchand [19], the accused was convicted by the trial court. When he went on appeal the High Court, it acquitted him. The State went on appeal to the Hon'ble Supreme Court under Art. 136 of the Constitution through a special leave petition. The accused was directed to surrender by the court. He then filed for bail. It was then for the first time that Justice Krishna Iyer raised his voice against this unfair system of bail administration. He said that though while the system of pecuniary bail has a tradition behind it, a time for rethinking has come. It may well be that in most cases an undertaking would serve the purpose.

2. In re Moti Ram and Ors. v State of M.P [20], the accused who was a poor mason was convicted. The apex court had passed a sketchy order, referring it to the Chief Judicial Magistrate to enlarge him on bail, without making any specifications as to sureties, bonds etc. The CJM assumed full authority on the matter and fixed Rs. 10,000 as surety and bond and further refused to allow his brother to become a surety as his property was in the adjoining village. MR went on appeal once more to the apex court and Justice Krishna Iyer condemned the act of the CJM, and said that the judges should be more inclined towards bail and not jail.

3. In re Hussainara Khatoon and others v. Home Sec,State of Bihar [21] the Apex Court, inter alia, held that pre-trial release on personal bond (i.e. without surety) should be allowed where the person to be released on bail is poor and there is no substantial risk of his absconding. It was also observed by the Court that the undertrials suffering in jail were in such a position where no action or application for bail was made, either, because, they were not aware of their right to obtain release on bail or on account of their poverty they were unable to furnish bail.

4. In re Shankuntala Devi v. State of U.P [22] it was held in accordance with statutory provision [23] that the court may direct any person under the age of sixteen years or any woman or any sick or any infirm person accused of such offence which is punishable with death or life imprisonment for life to be released on bail. The reason for it was further explained in Nirmal Banerjee v. State [24] wherein it was observed that a female or a person below the age of sixteen years or sick or infirm person because of their physical handicaps and/or immaturity, is not likely to interfere with investigation or to delay the trial by abscondence or interference.

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[20] *AIR 1978 SC 1594*

[21] *AIR 1979 SC 1360*

[22] *Cr.LJ 365 (All.)*

[23] *First Proviso to Sec. 437(1)*

[24] *1972 Cri LJ 1582 (Cal)*

[25] *On October 24,2011*

[26] *On January 19, 2012*

[27] *WRIT PETITION (CIVIL) NO. 423 OF 2010 Centre for Public Interest Litigation and others versus Union of India and others With WRIT PETITION (CIVIL) NO. 10 OF 2011 Dr. Subramanian Swamy versus Union of India and others*

[28] *namely Sanjay Chandra, Vinod Goenka , Hari Nair, Gautam Doshi and Surrendra Pipar*

[29] *Supra*

[30] *From April 20, 2011 to November 23, 2011*

[31] *Namely Cineyug founder Karim Morani, Kalaignar TV's MD Sharath Kumar, Kusegaon directors Asif Balwa and Rajeev Agarwal.*

[32] *May 20,2011 to November 28,2011*

Most recently [25] the Member of Parliament - Rajya Sabha, Mr. Amar Singh who is accused in connection with cash for vote was granted bail on the health grounds (renal problems) under the same provision wherein he was directed to furnish a bond and a surety of Rs.50 lakh each by the Delhi high court

But in the 2G scam case the special CBI judge dismissed the bail application of Kanimozhi and refused to grant her advantage of being women under Sec.437(1) of the Cr. P.C on the ground of gravity of offence and likelihood of tampering with the evidence.

Another Member of Parliament and ex chairperson of organizing committee of the common wealth games, Mr. Suresh. Kalmadi who is accused in connection with the common wealth games scam was granted bail by the Delhi high court [26] on the ground that court believed that there is no likelihood of him fleeing from justice or tampering evidence. Moreover the bail was granted after nine months in jail. The learned judge of the high court quoted and relied upon the apex court's order in 2G spectrum case [27] wherein bail was granted to five corporate executives [28].

Bail in 2G Spectrum Case [29]

The apex court granted bail to five corporate executives relying upon their contention that as charges have already been framed in the case and there is no chance of them tampering with evidence and hence they may be granted bail. They had been in jail for six months [30] before the grant of bail.

Kanimozhi along with four others [31] was granted bail by the Delhi High court placing reliance upon the apex court order where bail was granted to five corporate executives who were also accused in the same matter. She had been in judicial custody for more than six months. [32]

Conclusion

There is an imperative shift in the judicial approach in grant of bail from lax and liberal approach to somewhat harsh regimen now. The indications are clear that judiciary should not be taken lightly on the issue of the grant of bail. Moreover it is noteworthy to quote Lord Russel of Killowen C.J. when he charged the grand jury at Salisbury Assizes, 1899 :

"It was the duty of magistrates to admit accused persons to bail, wherever practicable, unless there were strong grounds for supposing that such persons would not appear to take their trial. It was not the poorer classes who did not appear, for their circumstances were such as to tie them to the place where they carried on their work. They had not the golden wings with which to fly from justice."

Thus it is an obligation upon the bodies administering justice to tighten the judicial rein over the unruly horses in the form of power holders. While exercising the discretionary power in bail matters the judiciary has to balance two conflicting interests namely personal liberty and social security after evaluation of pros and cons of the relevant facts to subserve the best interest of justice. If the persons in power who are in dominant position to manipulate evidence and tamper prosecution witness and are granted bail there is a great likelihood that the quality of justice will be adversely affected. Moreover in absence of witness protection programs it would be difficult to ensure the credibility of prosecution witness who may be threatened by such power holders to depose in their favour.

Ours is a democratic regime and it's the obligation upon judiciary to inspire faith and trust amongst the common masses so that the dream of fearless civilized society can be achieved and the rule of law could be transformed from a dead letter word to reality.

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[33] *(1899) 63 J.P. 193,Mod. Law, Rev. p. 49*

Legal Interpretation: A Thorough Understanding

*Gargi Sharma**

ABSTRACT

Legal scholars talk and write about "interpretation" in terms of the meaning of words, phrases, maxims, concepts etc, and for many legal philosophers "Legal interpretation" involves subsuming particular situations/facts/circumstances in context to "Rules or Laws.

However, trying to Interpret and elucidate in course of understanding, "interpretation" leads to confusion instead of clarification.

The aim of this article is to use different rules of interpretation to make sense of this disorderly state of affairs. This article focuses on textual interpretation of Law. All Law needs to be interpreted, and there are many ways to do it. This article covers the dominant methods of legal interpretation.

Keywords- Statutory interpretation, rules of interpretation, external aid, internal aid of interpretation, "Mimansa" rules of interpretation" General Clauses Act 1897.

Introduction

The Interpretation of Laws, a very important branch of law lays down how Acts and other statutory provisions are to be interpreted. In layman's understanding "interpretation is the process of determining the intended meaning of a written document, such as a Constitution, Statute, Contract, Deed, or any other legal document."As per Law Lexicon Dictionary, "The various methods and tests used by the Courts for determining the meaning of a Law is known as Interpretation".

According to Black's Law Dictionary, Legal Interpretation is the process of determining what specially the Law or Legal document means, ascertaining of meaning. Interpretation of facts, circumstances and provision/s of Statutes leading to findings and or judgement could also be considered as a matter of interpretation.

Interpretation in Law has different meanings. Instead the word 'Interpretation' itself must be interpreted. For the purposes of interpretation, many rules and aids are needed.

Object/purpose of Legal Interpretation

The object/purpose of interpretation is to ascertain the true intention of the maker of Statute/writing and to give effect to it. The function is controlled by various guiding principles.

To refer to some of such statutory principles at this juncture, would be worthy, such as, that the writing is to be construed as a whole, that words are to be given their plain, ordinary, meaning unless this leads to absurdity, but may be given a technical meaning if used in a technical context. Technical legal terms must have their technical legal import.

Interpretation as an Art/Science and as a Creative Function

Interpretation ought not to be considered as a mechanical processes or a game of language. It ought to be a dynamic and creative process. That is why it could be considered as not only an art but also as a science by itself, a science to satisfy social needs, a science to disentangle social riddles. Interpretation is, therefore, such an important creative function of Court that it has been termed as a science and an art through which the Courts can keep abreast of time. By this means the Courts can adjudicate and do Justice to suit to needs and expectations on changing social circumstances as propagated by Roscoe Pound. The best example in this context would be the interpretation of Article 21 of the Indian Constitution by the Supreme Court of India.

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The Need for a Proper Theory of Interpretation

Renewed scholarly interest in the matter of interpretation has produced many opposing essays, few of which, however, have attempted to construct a general theory. Most works have discussed the interpretation of Constitution and Statutes, but not Contracts and Wills. Courts in various countries have also begun paying special attention to interpretive theory.

The result has been an extensive literature on the specific aspects of interpretation, without significant progress on overcharging issues. We still lack a theory that is general enough to apply to all legal texts (Constitution, Statute, Contract, and Will) yet flexible enough to distinguish among the different texts, in order to interpret them. We need a theory of interpretation that is not based on contradictions and dyads of contrasting rules. We need a theory of interpretation that reflects the complexity of the interpretive process, on the one hand, and its operation in daily life, on other hand.

Types of Legal Interpretation

i) Judicial Interpretation- It refers to how a judge interprets the laws of their state or the country in different ways. Some judges are said to interpret laws in ways that cannot be sustained by the plain meaning of law, at other times, some judges are said to "legislate from the bench". These judicial behaviours are sometimes referred to as "Judicial Activism".

ii) Authentic Interpretation- It is an official interpretation of a Statute issued by the Statute's Legislators. In Civil law and Common Law, an authentic interpretation carries the force of Law.

iii) Statutory Interpretation- It is the process by which Courts interprets and apply the legislative provisions. Some amount of interpretation is always necessary in the matter of deciding a case in context of relevant provisions of the Legislation. Sometimes the word in a Statute may have a plain and literal meaning. But it may also happen that there is some ambiguity or vagueness in the words used in the Statute that has to be interpreted in the manner to resolve the ambiguity/ vagueness an advance justice by the judge. To find the meanings of Statues, judges use various tools and methods of statutory interpretation, including traditional canons of statutory interpretation, legislative history, and purpose. In Common Law jurisdictions, the judiciary may apply rules of statutory interpretation to Legislation enacted by the Legislature or to delegated Legislation such as administrative agency regulations.

Rules of Statutory Interpretation

Primary Rule

Literal Rule- "The object of all interpretation is to discover the intention of Legislature, but the intention of Legislature must be deduced from the language used". It is also known as "Plain Meaning Rule". The principle of this kind of interpretation is that the judge should not go beyond the letters of the law i.e. litera legis. The literal rule is what law says instead of what the Law had intended to say.

Grammatical Construction- It is the test of common parlance. The words used in a section are to be given their ordinary, natural basic and full grammatical meaning. If the language is clear and unambiguous and if two interpretations are not reasonably possible, it would be wrong to discard the plain and grammatical meaning of the words used in the Statute. However, for grammatical meaning of the words adherence to dictionaries is not essential instead the test of common parlance shall be applied.

Purposive Interpretation- Statutes are meant to implement some policy, to curb some public evil or to give benefit to a person or class of persons either in present or in future. The duty of judiciary is to explain, ascertain and expound the statute but not to make Law. In this process, however, while interpreting Legislation, creativity of a judge cannot be curtailed. In order to gather the intention of the Legislature two things have to be keep in mind, first what is the natural meaning of the words used in the Statute and second what are the purpose or object and reasons of making the Statute. Both the aspects are equally important. The modern method of interpretation is purposive or functional rather than the strict adherence to the words.

The Golden Rule- In Law, the Golden rule, or British rule is a form of statutory construction traditionally applied by the English Courts. The Golden rule allows a judge to depart from a word's normal meaning in order to avoid an absurd result. Maxwell on the Interpretation of Statutes deals with the Golden rule in the following words, "The so-called 'Golden Rule' is really a modification of the Literal Rule".

The Mischief Rule- The main aim of this rule is to determine the "Mischief and Defect" that the Statute in question has set out to remedy, and what ruling would effectively implement this remedy. The Mischief rule is contained in Heydon's case (1584)3 co Rep 7, where it was stated that for the true interpretation of all statutes four things are to be considered:

i) Content of the common law before the making of the Act.
ii) The mischieves and defects for which the common law

did not provide.

iii) Remedial measures taken by Parliament.

iv) The true reason of the remedy: and the function of the judge is to make such construction as shall suppress the mischief and advance the remedy.

Rules of Language

1) Ejusdem generis- Words of the same kind or nature.
2) Noscitur a sociis- This tag refers to the fact that words "derive colour from those which surround them".
3) Expressio unius est exclusio alterius- "Mention of one or more things of a particular class may be regarded as silently excluding all other members of the class".

Aids to the Interpretation

Internal Aids to Interpretation

1) Other Enacting Words- An examination of at least those parts which deal with the subject matter of the provision to be interpreted should give some indication of overall purpose of the legislation.
2) Long title- It should be read as part of the context "As the plainest of all guides to the general objectives of a statute".
3) Preamble- When there is a preamble it is generally in its recitals that the mischief to be remedied.
4) Headings, Side- Notes and Punctuations- They may be considered as part of context for interpretation.
5) Marginal Notes- Notes which are inserted at the side of the section in an Act and express the effect of the sections are called Marginal Notes.
6) Schedules- Schedules attached to an act may be considered as aid to the interpretation.

External Aids to Interpretation

1) Historical Setting- A judge may consider the historical setting of the provision that is being interpreted.
2) Dictionaries and Other Literary Sources.
3) Practice- The practice followed in the past may be a guide to interpretation.
4) Other Statutes in Pari Materia- Related statutes dealing with the same subject matter as the provision in question may be considered both as part of the context and to resolve ambiguities.
5) Official Reports
6) Treaties and International Conventions
7) Foreign Decisions
8) Foreign Statute Law
9) Websites as source
10) Parliamentary Debates, etc.

Interpretation in India

Rules of Interpretation in Ancient India

Mimansa rules of Interpretation- While tracing the ancient laws of Bharat, we cannot forget the Mimansakars, who were the most efficient and clever scholars in interpreting works, chapters and sentences. According to them, there are certain rules for the purpose of interpreting any article, chapter, or work.

The first rule is about the "preamble" and the "epilogue" of the work. Any work or article begins with a particular purpose, which is noted in the "preamble" and ends in epilogue when that purpose is achieved.

The other rule is of that of "Abhyas" that is the repetitive process, meaning thereby that what has been repeatedly said for achieving the goal.

For interpreting a work it is also to be seen whether there is something new to be achieved keeping in mind the changed circumstances. The result achieved is also to be carefully considered while interpreting so as to do justice in the matter under consideration.

Interpretation of the Preamble of the Constitution

The Preamble cannot override the provisions of the Constitution.

In Re berubari union1, the Supreme Court held that the Preamble was not a part of the Constitution and therefore it could not be regarded as a source of any substantive power of the constitution.

But in Kesavananda Bharti V. state of Kerala, the Supreme Court rejected the above view and held the Preamble to be a part of the Constitution. The Constitution must be read in the light of Preamble. The Preamble could be used for the amendment power of the Parliament under Article 368 but basic elements cannot be amended.

Conclusion

Now in India, the law is tending towards codification. Therefore, there must be a comprehensive, flexible, and progressive body of Rules of Interpretation. Most of the rules have been adopted from the English law. Apart from the juristic works on the subject, there is a General Clauses Act, 1897, which also guides in matter of interpretation. Some of the more important of these rules are-

1) Words used in the plural include the singular and vice versa.

2) Words suggesting the masculine gender will the feminine gender and vice versa.
3) If the Act confers power, it can be exercised from time to time.
4) The power conferred under an act to appoint includes the power to appoint ex officio, and to suspend or dismiss.
5) The power conferred by an act to make a rule includes the power to vary, amend or rescind the rule.
6) Words and phrases in a rule or notification issued under an Act have the same meaning as in the Act itself.

In matter of Interpretation, it would not be inappropriate to generally state that it is based on time, place, circumstances & may vary from Judge to judge.

Some important case laws based on interpretation.

- P. Rathinam v. Union of India

GianKaur v. State of Punjab

It is the case of widest possible interpretation of Right to Life under Article 21 of the Indian Constitution. Though there is no precise definition for the word 'suicide', it is regarded as the intentional taking of one's own life.

The Constitutionality of Section 309 under IPC came up for consideration before the Supreme Court in P. Rathinam v. Union of India. (hereinafter 'Rathinam case'). The apex court, struck down the section as violative of Article 21. It was observed that this was done in view of advancing the cause of humanization as well as attuning our law to the global wavelength .Later, the Supreme Court, in Gian Kaur v. State of Punjab overruled the Rathinam case. While the Rathinam case operated on the premise that a Right to Life , inevitably includes a Right to Die as well, in the Gian Kaur case, the reasoning to overrule the above logic, on the ground that a right to die, if any, is inherently inconsistent with the Right to life as is Death with life.

This decision thereby overruling P.Rathinam's case establishes that the "Right to Life"not only precludes the "Right to Die"but also the "Right to Kill".

We can see that interpretation changes according to time & probably as per deciding Judge.

- In Maneka Gandhi v. Union of India,

A.K. Gopalan v. The State,

The concept of 'personal liberty' first came up for consideration of the Supreme Court in A.K. Gopalan's case. But it was restrictive interpretation of the expression 'personal liberty' . In Maneka Gandhi's case, the meaning and content of the words 'personal liberty' again came up for the consideration of the Supreme Court. Here, the Supreme Court not only overruled A.K. Gopalan's case but also widened the scope of words 'personal liberty' considerably. Bhagwati, J. interpreted:

"The expression 'personal liberty' in Article 21 is of widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have raised to the status of distinct fundamental rights and given additional protection under Article 19."

Hence, it may be said that Maneka Gandhi's case, gave the term 'personal liberty' widest possible interpretation and gave effect to the intention of the drafters of the Constitution. This case, while adding a whole new dimension to the concept of 'personal liberty', extended the protection of Art. 14 to the personal liberty of every person and additional protection of Art. 19 to the personal liberty of every citizen.

- There is another case of interpretation, in which it is shown that how a case was interpreted in High Court and then how Supreme Court interpret the same case. It was the case of ADM Jabalpur popularly known as Habeas Corpus case. At the time of Emergency, on 28 April,1976, the Habeas Corpus case was entertain before the Supreme Court, filed by a person challenging his detention. The High Court already interpreted that the writ should be issued but the Supreme Court went against the decision of all the High Courts and upheld the right of Indira Gandhi's government to suspend all the Fundamental Rights during the Emergency. It was a bench of four judges, one of them was Justice P N Bhagwati.

Now after 30 years, Justice Bhagwati says in an interview with Mylaw.net that his judgement was "an act of weakness". He also says, "it was against my conscience. That judgement is not Justice Bhagwati's".

But as pointed out earlier, it is necessary to arrange, systematize and make improvements in the principles of interpretation.

References

1) (1960) 3 SCR 250

2) (1973) 4 SCC 225

3) (1994) 3 SCC 394, para 110

4) AIR 1996 SC 946

5) (1978) 2 S.C.R. 621, ('78) A.S.C. 597

Clinical Trials: A Challenge to Human Rights

*Amardeep U. Garje**
*Rajeev Kumar Singh***

Introduction

Life the very crux of human existence, needs to be guaranteed through a constitutional mandate. Ergo, the Supreme Court in various cases has held that right to health is enshrined in the Article 21 of the Constitution.[1]

A person to be healthy must be free from any infirmity or any physical or mental ailment which means that he should not suffer from any disease. But, today with changed lifestyles, there has been an increase in number of diseases for which there is no proper treatment and availability of drugs. In order to provide new treatment and invention of new drug one must conduct extensive research and once there is invention of drugs, the next step involved is testing of its efficiency and safety for the consumption by the patients. In order to check its efficiency and safety the drug has to be first tested upon animals and then on human beings. So, clinical trials are inevitable but the important matter to be considered is that it must not be misused and in the name of clinical trial innocent persons must not be treated as guinea pigs. But, the persistent allegations that most the pharmaceuticals companies are not following all the regulations laid by the Government of India, which has led to this discussion.

In the present scenario, the concept of clinical trials have posed a great threat to mankind because in the name of clinical trials many innocent persons are being treated as guinea pigs and there is a gross violation of human rights. There are many instances which give the clear picture of how clinical trials are being conducted all over the globe. As per rules clinical trial can be conducted only after it has been successfully tested on animals and there is no further threat to carry the trial on human beings but this rule is not strictly adhered to by many companies. The trials on human beings are carried even when it is not safe to do so.

The aim of this paper is to highlight ongoing trials on guinea pigs. Further to show that unethical clinical trials violate Article 21 of the Constitution and it is a challenge to human rights regime. The paper more specifically in nutshell explains the following:

- What are clinical trials?
- What are unethical clinical trials?
- Whether consent taken from patients is formed consent or informed consent?
- Whether or not there any procedure adopted by the Government to rehabilitate guinea pigs of clinical experiments?

Clinical Trial

A clinical trial is a research study to answer specific questions about vaccines or new therapies or new ways of using known treatments.

The clinical trials directive defines clinical trial as any investigation in human subjects intended to discover or verify the clinical, pharmacological and/or other pharmaco-dynamic effects of one or more investigational medicinal products and/ or to study absorption, distribution, metabolism and excretion of one or more investigational medicinal products with the object of ascertaining its safety or efficacy .[2]

History

Though the historical background of the clinical trials is not necessary, but for our better understanding of this terminology it is discussed here. In the ancient period, there were certain traces of use of human beings in medical research as is mentioned in ancient Greek, Roman and Arab medical treaties. It took grip only in 18th century when English physician Edward Jenner experimented vaccine of small pox on his son and neighborhood boy. Later in 19th century, Louis Pasture conducted clinical trial on a nine year old boy for rabies, but with his mother's consent.[3]

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1 *CERC v. Union of India, AIR 1995 SC 922; Kirloskar Brothers Ltd. v. Employees' State Insurance Corporation, (1996) 2 SCC 682; State of Punjab v. Mohinder Singh Chawla, AIR 1997 SC 1225.*

2 *Montgomcey Jonathan, Health CARE Law, 2ndedn., (New York, Oxford University Press, 2003), p. 358.*

3 *Branningan C. Michael, Health care Ethics in a Diverse Society, (London,Mayfield Publishing Co., 2000) p. 329.*

In 19th century, clinical trial became rampant on prisoners. Especially it caught hold its grip during World War I and World War II. At the same time trials were carried on orphan children.[4] These incidents gave rise to Nuremberg Code and Helsinki Code.

Indian Regulations Relating to Clinical Ttrials

India has been chosen by many multinational pharmaceutical companies as a clinical research hub; following are the reasons for choosing India as hot destination:

Developing country with large population;
Large population with different types of illness;
Comparatively low cost;
Availability of human resources for operations;
Most of the population is illiterate and poor;
High enrolment rates comparatively;
Most importantly, most of the Indian population is not ideally in a position for treatment of various diseases. This is one of the hidden issues which made India a internationally clinical hub.

In order to protect rights of the citizens and supervise the clinical trials and make them to conduct properly in territory of India various laws have been legislated like:

Drugs and Cosmetics Act, 1940,
Drugs and Cosmetics Rules, 1945,
Medical Council of India Act, 1956, (amended in the year2002),
Central Council for Indian Medicine Act, 1970,
Guidelines for Exchange of Biological Material (MOH order, 1997)
Right to Information Act, 2005,
The Biomedical Research on Human Subjects (regulation, control and safeguards) Bill, 2005.

Challenges to Human Rights

Unethical Drug Trials: Although we have more than five legislations but still we are unable to curb unethical conduct of clinical trials. The fundamental rights are guaranteed against the State. But the State itself is keeping mum against unethical conduct of pharma companies, which is in itself violation of human rights enshrined under Article 21. Recently, there have been many instances of violation in relation to clinical trial.[5] The Supreme Court while elaborating Article 21 of the Constitution in Francis Coralie v. Union Territory of Delhi[6] said that the right to live is not restricted to mere animal existence. It means something more than just physical survival. The right to 'live' is not confined to the protection of any faculty or limb through which is enjoyed or the soul communicates with the outside world but it also includes "the right to live with human dignity"…. These instances of unethical drug trials are violating Article 21. The patients are treated as guinea pigs and in certain cases there will be always threat to life or possibility of suffering from disablement of body or catching new diseases from the side effects.

Informed Consent: In most of the cases consent is taken by concealing nature of the treatment. In some cases the

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4 *Ibid p. 331*

5 *On 7th August 2011 in the Tribune daily paper reported that, "tribal girls from Gujarat and Andhra Pradesh involved in the clinical trials of anti-cervical cancer HPV vaccine died, the government has admitted that 1,725 persons have lost their lives to drug trials in the last four years." The number of deaths has risen from 132 in 2007 and 288 in 2008 to 637 in 2009 and 668 last year, indicating the complete ineffectiveness of regulatory controls over the $400 million sector. Last year, the government gave compensation in just 22 cases out of the 668 that resulted in deaths due to "serious adverse events" during drug trials, Health Minister Ghulam Nabi Azad told Parliament this week. Available at http://www.tribuneindia.com/2011/20110808/main1.htm visited on 22nd September 2011.*
The National Human Rights Commission, NHRC, has taken suo motu cognizance of a media report (the Tribune) alleging that 1,725 persons have lost their lives to drug trials in the last four years in the country which indicate complete ineffectiveness of regulatory controls over the $400 million sector. Available at http://www.nhrc.nic.in/disparchive.asp?fno=2364 visited on 22nd September 2011.
In June 2011 the National Human Rights Commission has probed in the Andhra Pradesh drug trial scandal. Headlines Today had exposed how several unsuspecting women were used as guinea pigs for an illegal clinical trial for a breast cancer drug in Andhra Pradesh. Available at http://indiatoday.intoday.in/story/nhrc-probes-andhra-pradesh-drug-trial-scandal/1/142285.html visited on 22nd September 2011.

6 *AIR 1981 SC 746*

7 *Recently, the parents of two engineering college students, 19-year-old Ajay Kumar and 20-year-old M Naresh Reddy, in Vishakhapatnam, filed complaints with the police accusing the pharma company Actimus Bio Private Ltd of conducting drug trials illegally on the two men. Following the complaint, the Drug Control Administration raided the Actimus office and seized documents available at the office to verify if the company had permission to conduct drug trials. It claims it did. The students say they were offered Rs 6,000 per day to ostensibly "attend lectures" by the company's representatives. They were then kept in illegal confinement by the company for two days and forced to take some medicines. Reports say, Ajay, a student of the Sanketika Vidya Parishad Engineering College, told the media: "We were attracted by the money offered. He (the pharma co. rep.) took us to the laboratory and told us that we would have to undergo some medical tests. As soon as we entered the laboratory, the staff seized our bags and switched off our mobiles. We were asked to sign some papers stating that they were essential for medical tests. They gave us a few tablets and thereafter started taking our blood samples every 30- 40 minutes. In all, they took 20 blood samples from each student." Papri Sri Raman, Drug Trials: Giant Pharma Cos Rush To India For 'Gold', Available at http://currentnews.in/2011/07/25/giant-pharma-cos-rush-to-india-for-%E2%80%98gold%E2%80%99/ visited on 22nd September 2011*

trials carried out by offering money to the guinea pigs.[7] By doing so the pharma companies are violating right to life enshrined under Article 21 of the Constitution. The Constitution states, every person has the right to life, this right is not just against the State, but also private citizens, such as the cases of bonded labourers or environmental pollution. So when such illegal clinical trials take place and cause damage to volunteers, their human rights are being violated.

Compensation: In most of the drug trial cases the pharma companies try to escape from the liability. In one of such instances. The, nine pharmaceutical companies provided compensation ranging from Rs. 1.5 lakh to Rs 3 lakh.[8] In an other instance, Pfizer company paid a compensation ranging between Rs. 1, 50,000/- and Rs. 2, 25,000/- for three trial related deaths. The same company paid a compensation of Rs. 84 lakh to each kin of the victims in Nigeria. It shows that price of life in India is much cheaper as compared to other countries.[9] Like this, there are many instances where the companies don t provide sufficient compensation.

By not providing sufficient compensation to victims of guinea pigs the companies are violating right to compensation which is included in Article 21.[10] In same way the State is violating rights of its people by not strengthening law regulating drug trials and compensation for victims.

Conclusion and Suggestions

Clinical trials are indispensable to the society, because day-by-day, we come across a alien new disease. To tackle those diseases one must do research on the treatment of such diseases. There is no wrong in conducting clinical trials on human subjects. But it s an offence when it is carried out in unethical manner. In present scenario, there have been many incidents of unethical conduct of clinical trials. The reason for these instances is India s weak legislation. Although Schedule Y of the Drugs and Cosmetics Rules, 1945, regulates drug trials but which is insufficient to tackle unethical trials.

The unethical conduct of drug trials on human are gross violation of basic human rights. Further these unethical trials violate fundamental rights enshrined under Article 21, those are right to live with human dignity, right to compensation and right to life. In most of the cases the unethical trials lead to death of the guinea pig. From this it is evident that these unethical trials are dangers to life.

If we want that these should not happen in future, then we should regularize with strong law. Following are the suggestion to tackle unethical conduct of clinical trials:

- There should be a stringent law to regularize unethical conduct of clinical trials.
- There should be separate authority to investigate matters relating to trials.
- The concept of informed consent in clinical trials must be given due importance in every trial i.e. if informed consent is not obtained from the volunteers then the permission for trial must not be given.
- Research ethics committee must be established under proper legal framework and it must be vested with certain powers.
- Impose criminal penalty on practitioners of unethical trials.
- The volunteers should be provided with sufficient compensation.
- Before undergoing drug trial, the participant must be insured for life.

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[8] *Kounteya Sinha, Clinical trials claimed 25 lives in 2010, only 5 Paid Compensation, available at http://articles.timesofindia.indiatimes.com/2011-06-06/india/29624892_1_clinical-trials-drug-controller-general-dcgivisited on 25th September 2011.*

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[10] *Nilabati Behara v. State of Orissa AIR 1993 SC 1990*

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