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Research Papers

Essay

Case Comments

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Panel of Referees

From the Editor

Pragyaan –Journal of Law, started its journey in 2011, with the objectives of providing a sound and steady platform for contemporary research and development, to underline the dynamics of law, and to comment and participate in newer debates. Its role and quality of research is much appreciated from different quarters: the Judiciary, the Bar, the Academicians, and the Research scholars. This encourages and further convinces us to continue our work with more zeal and sincerity.

Our Editorial policy is governed by independent quality control. We are proud that it is guaranteed by an International Advisory Board which comprises of professors from reputed law schools: University of Birmingham, University of South Africa, etc. Our National Advisory Board is composed of legal luminaries including Member of Law Commission of India, renowned professors from Delhi University, National Law School of India University ,Chanakya National Law University, National University of Juridical Sciences, Ram MahoharLohiya National Law University are few among others.

This volume consists of scholarly articles written by the members of faculty, researchers as well as students all across India and abroad and contains critical analysis of diverse contemporary issues like transgender rights, empowering children through education, nurturing childhood against crimes, police encounters; need of speedy trials, contours of judicial review gender related violence, etc.

We are flexible in our editorial policies. Our object is to bring the Indian academic legal traditions closer to the international environment and make Indian legal scholarship more accessible to other scholars well-known worldwide. But at the same time, we also welcome articles from other countries. We want to take the journal to the platform of international comparative discussion on different legal and interdisciplinary subjects regardless of nationality. In the contemporary highly interactive and a cooperative world, national frontier in law has become very transparent. On the other hand national character has become much more glaring. As a result, law nowadays has two opposite trends: legislation becomes closer and similar, but there are many differences in actual judicial practice in the realization of these similar legislations. The rule of law in Europe, Asia and America differs from each other since centuries even though legislation has become similar. Thus nowadays we have a unique situation where legislation is similar but practice is different. In this new environment comparative law has crucial role. Our journal could be one of such platform to discuss the problems that occur in the realization of similar legal constructions in different societies.

The Editorial Board would like to facilitate and encourage inter and multi- disciplinary approaches to the articles from the contributors. With the process of globalization the interface between law on one hand, and science, technology, medicine, humanities and allied subjects on the other becomes increasingly relevant and important. The role played by the International and National Advisory panel, the Referees and the contributors is held in high esteem and deeply admired.

Thanking you.

Best Wishes

Dr. Saroj Bohra

Editor

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CONTENTS

Swept under the Carpet: Gender related Violence against Domestic Workers in India

*Ankita Chakraborty**
*Pritam Dey**

ABSTRACT

Even though domestic work has helped many women to gain economic autonomy and access into the labor market, but they are often subjected to physical and sexual violence, abuse by employers, long hours of work in return of low salaries, mal-nutrition, non-accessibility of employer's sanitary facilities and many other forms of discrimination and harassment. The UN Special Rapporteur in May, 2013 observed that there is prevalence of violence against domestic workers. There is absence of a comprehensive, uniform national legislation for domestic workers which would aim at the safety and well-being of these marginalized people. The ILO Office has been fundamental in bringing out a report on this issue prevailing in India. There are several labor legislations in India, but due to the nature of domestic work or employer-employee relationship, domestic workers are not covered under these Acts. The only Act which talks about the domestic workers is the Unorganized Workers Social Security Act, 2008. The paper focuses on the urgent need to formulate a comprehensive National legislation for the domestic workers in India. ILO Convention relating to the protection of the basic fundamental rights of the domestic workers must be ratified without further delay. In addition to it, the paper focuses on a number of Bills which are pending in the Parliament for consideration. An intervention by the criminal justice system is also called for. Penal provisions must be included in the existing Bills pertaining to the protection of the rights of domestic workers.

Key Words: Domestic Work, Economic Autonomy, Sexual Violence, Abuse, Criminal Law Intervention.

1. Introduction

In the early 20th century, domestic help was the largest employment sector in Britain. The British in India brought similar traditions, accentuating the lines between the nobility and the common people. It is said that in India today domestic help is still the largest sector of employment[1]. In India the population living below poverty line is forced to opt for domestic work as a profession. The main reason is that this profession does not require any educational qualification.

In the 21st century both husband and wife are working in order to run an economically sound family. Here question arises that who will take care of the household, children, etc. and who will make breakfast and lunch for them. Automatically they have to depend upon a maid servant. It will be better for them to hire a full time female maid servant who will serve as a governess for the child and side by side make food for them and maintain their family also. But to utter surprise in many cases they are being tortured and physically exploited. Mal-nutrition, ill-treatment, beating, sexual violence all these are very common phenomenon with female maid servants. Women are overly represented in household works where the mechanisms to prevent violence are still absent. Another important point that needs attention is that many of the women and girls who are working as maid servants are migrant and unregistered. Domestic work is an uncertain work and many of the domestic workers are not paid well. A large part of the unorganized sector consists of domestic workers. Apart from the problem of low income, many of these women face various forms of sexual and physical violence while working. They lead a life of bondage. They work for long hours in return of low salaries; they do not have access to employer's sanitary facilities and face other forms of discrimination.

Domestic work has helped many marginalized women to gain access to market and helped them to be economically independent. But domestic work takes place at home and it is the most unconventional of all places. It is difficult to maintain a record of what is happening inside the closed walls of a home. Hence, crimes against domestic workers remain largely unreported. Domestic workers face a lot of violence and since they are not a part of the organized sector, they are not identified easily and they are denied access to the resources provided by the State. Also, many of these domestic workers dwell in slum areas and are not even aware of the fact that they can lodge F.I.R.s with the police.

In a study carried out in south Kolkata among migrant child labor, the authors found that 11.0% of girl children working as maid servants are subjected to victims of sexual abuse and/or harassment[2]. The UN Special Rapporteur in

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1 Wajahat Latif ,*The horrid lives of domestic servants*, THE EXPRESS TRIBUNE, INTERNATIONAL NEW YORK TIMES (November 10, 2010), http://tribune.com.pk/story/75175/the-horrid-lives-of-domestic-servants (last visited on March 10, 2014).

2 Sibnath Deb and Aparna Mukherjee, IMPACT OF SEXUAL ABUSE ON MENTAL HEALTH OF CHILDREN, 140 (Concept Publishing Company)

May, 2013 observed that there is prevalence of numerous violence against domestic workers, mainly women and girls. Because of their poverty they dropped out from school and parents thought that at least they are safe in their malik's house. But, the practical reality reveals something else.

The word "domestic" pertains to household and it relates to household uses. According to the International Labour Organization, Domestic workers take up a huge portion of the work force and it is a feminized sector. 83% of the domestic workers are women and one out of every 13 female wage earners is employed in domestic work. A domestic worker may work in full time basis or part time basis and their work includes cleaning the house, washing clothes and utensils, taking care of the children and aged people, cooking food etc. However, even though they work for long hours, their wages are very low and the employers put certain restrictions on them: like restriction on freedom of movement, restriction on the use of bathrooms, restriction on a weekly holiday[3]. They are also discriminated on the basis of race and caste. Physical, sexual and mental abuses are their everyday reality. In India, the National legislation which talks about the safety and well-being of the domestic workers is the Domestic Workers Welfare and Social Security Act, 2010. In addition to regulation of the working conditions of the domestic workers, their registration and creation of a welfare fund, what is actually needed is an intervention by the criminal justice system. This is to punish the perpetrators and create a deterrent effect so that the contemporary slavery is ended and the human rights of these workers are protected. Along with that, with the recently added CSR provision and the rising concept of business foundations, awareness can be created regarding the issue relating to violence against the domestic workers in India.

2. Definition of Domestic Worker

The term domestic is related to house or home. Thus, a domestic worker is a person who is employed to perform various servant duties. A domestic servant is a household servant like a maid or butler[4].

In the Black Laws Dictionary, the word domestic worker means a domestic servant i.e. a servant who resides in the same house with his or her master. Thus, the word does not consider employees employed out of the doors[5].

It stands for a person who is employed for remuneration whether in cash or kind, in any house hold 'or similar Establishments' through any agency or directly, either on a temporary or contract basis or permanent, part time or full time to do the household or allied work and includes a "Replacement worker" who is working as a replacement for the main workers for a short and specific period of time as agreed with the main worker. Household and allied work includes but is not limited to activities such as cooking or a part of it, washing clothes or utensils, cleaning or dusting of the house, driving , caring/nursing of the children/sick/old/mentally challenged or disabled persons[6].

According to Art-1 of the Domestic Workers Convention, 2011[7], Domestic work means work performed in or for a household or households and Domestic Worker means any person engaged in domestic work within an employment relationship. However, it is mentioned here that a person who performs domestic work occasionally is not a domestic worker.

The Draft National Policy on Domestic Workers was recommended by the Taskforce on domestic workers. The Policy gave a definition of domestic worker. It said that a domestic worker is a person who is employed for remuneration in cash or kind, in any household, whether directly or through agency. Such a worker can be temporary or permanent, part time or full time on the basis of the household work. However, it does not include any member from the family of the employer[8].

3. Types of Violence faced by Domestic Workers

One of the forms of violence is ill-treatment of servants and maids in households. In many of the affluent homes, servants are deprived of their salary and basic necessities. They are harassed and beaten and forced to work without even taking adequate rest. Similarly maids are molested by males in the family. Atrocities against small children working as servants are common and increasing[9].

Domestic workers, in particular women domestic workers, are a constantly growing section of workers in the informal sector of urban India. The employer-employee relationship is a complex one and is viewed as one of domination, dependency and inequality. Also, this is an area of work where the employer and the employee are mostly females. Besides the respect that the worker gives to

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3 *Who are domestic workers-ILO, available at:* http://www.ilo.org/global/docs/WCMS_209773/lang--en/index.htm, (last visited on August 21, 2016).

4 *Domestic workers legal definition of domestic workers,* available at:legal dictionary.thefreedictionary.com/domestic+workers, (last visited on August 21, 2016).

5 Garner, B.A and Black,BLACK'S LAW DICTIONARY (West Group, 1999).

6 Domestic workers Welfare and Social Security Act, 2010

7 C189 - Domestic Workers Convention, 2011 (No. 189)

8 *Domestic Workers in India-Women in informal employment: Globalizing and organizing, available at:* http://wiego.org/informal_economy_law/domestic-workers-india, (last visited on August 22, 2016).

9 Ankur Kumar, *Domestic Violence in India: Causes, Consequences and Remedies, Youth Ki Awaaz; Mouthpiece for the Youth* (February7, 2010)*available at:* http://www.youthkiawaaz.com/2010/02/domestic-violence-in-india-causes-consequences-and-remedies-2 , (last visited on February 16, 2014).

her own work and that she receives from her own family, the respect that they get from their employer is critical. In some households, employers spent some time talking with them while in others the conversation with them was limited only to work. Two and a half percent workers reported facing verbal abuse while 0.3 percent workers had faced physical violence. They shared similar experiences in the course of the interviews as well[10].

It is widely recognized that women find it very difficult to report sexual harassment at workplaces and are forced to remain silent. This could be because women are often blamed for the harassment. The power dynamics between employers and employees and fear of discrimination or dismissal also ensure they keep silent. Lack of awareness of laws, little confidence in complaint mechanisms or stigma due to breach in confidentiality can also be responsible for the silence. Their economic vulnerability further forces them into silence. The sexual harassment faced was subtle. Another kind of sexual harassment faced is in form of suggestive comments[11].

Poor treatment is another deterrent. Even progressive families have an unwritten rule that servants should not sit on the same furniture or use the same crockery as their employers. Servants are vulnerable to violence and sexual abuse[12].

The ILO has identified a number of hazards to which domestic workers are particularly vulnerable and the reason it may be considered in some cases a worst form of child labour. Some of the most common risks children face in domestic service include: long and tiring working days; use of toxic chemicals; carrying heavy loads; handling dangerous items such as knives, axes and hot pans; insufficient or inadequate food and accommodation, and humiliating or degrading treatment including physical and verbal violence, and sexual abuse[13].

The callousness of the Indian middle-classes towards their 'servants' outdoes the worst excesses of feudalism. The polite term 'domestic help' that has replaced the word 'servant' in public usage is perniciously misleading. Make no mistake — these are servants. They are treated as less than human, less than pet animals. Apart from facing physical and sexual abuse which is common, domestic workers perform heavy unrelenting toil, for they have no specific work hours if live-in; no days off or yearly vacations if part-time[14].

In Indian context children below 18 years are considered as juvenile. Our Constitution also guarantees free and compulsory education for all children in the age group of six to fourteen years as a fundamental right (Article 21A of the Constitution)[15]. But see the fate of these children of slum area or from poor economic background. They are deprived of their fundamental rights. They have to engage in household works to maintain their livelihood. In one hand we are specifically categorizing them as juvenile who are below 18 years and on the other hand our Constitution provides free and compulsory education up to 14 years. What about the children who are in between 14 years to 18 years? This is the lacuna of the existing legal provision.

Poor families often sell their children to agents and dodgy placement agencies, which place them in households but which then charge a one-time fee as high as 25,000 rupees ($ 489) in addition to claiming their monthly payments over a certain period[16].

It is not a newer fact that in the market of domestic help women maids are on high demand, especially tender aged girl. Because it is very easy to exploit them; exploit in all terms mentally, physically, and sexually. In most of the cases generally the head of the family exploit them in the absence of their mistresses.

In addition to all these, most of them are not satisfied with their present salary. They have been given a nominal amount of money. Since in India human labour is huge, the domestic workers are exploited now and then. If any guests come to their master's house that day they are forced to do extra work for which they are not paid. Their salary is reduced if they remain absent due to ill health or any other reason. They are not allowed to weekly holiday. If they raise questions on these above issues they are forced to leave work or badly ill-treated[17].

If a maid is a full time domestic helper, the employer at times would provide her stale or waste food which again would be insufficient for her. It has also been seen that the employers would beat up the maids if they disagree to do something. Using slang words is very common

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10 Surabhi Tandon Mehrotra, *Domestic Workers: Conditions, Rights and Responsibilities; A Study of Part-Time Domestic Workers in Delhi, Jagori, New Delhi*, 28 (2010), *available at:* http://jagori.org/wp-content/uploads/2006/01/Final_DW_English_report_10-8-2011.pdf, (last visited on March 1, 2014).

11 *Id*

12 Staff Reporter, *Servants in India Can't get the help*, THE ECONOMIST, (Dec 22nd, 2012)*available at:* http://www.economist.com/news/asia/21568772-cheap-household-labour-no-longer-abundant-supply-cant-get-help(last visited on March 13, 2014).

13 *International Labour Organization; Promoting Jobs, protecting people, Domestic Work, available at:* http://www.ilo.org/ipec/areas/Childdomesticlabour/lang--en/index.html, (last visited on March 5, 2014).

14 Nivedita Menon, *I'd Rather Die than Clean Your House*, (June18,2011)8(24)*available at:* Tehelka.com, (last visited on February 26, 2014).

15 The Constitution (Eighty- Sixth Amendment) Act, 2002

16 Nirmala Ganapathy and Shakti Vahini, *India Horrified Over "Child Maid" Abuse, available at:* http://shaktivahini.org/shakti-vahini-2/india-horrified-over-child-maid-abuse, (last visited on August 20, 2015).

17 Bipul Hazarika *et. el.Their Life, Problem and Dream, available at:* http://amlan.co.in/yahoo_site_admin /assets/docs/Amlan_Group_Work_on_Women-amlancoin.15212417.pdf, (last visited on June 15, 2014).

phenomenon. Thus, the maids are passing their livelihoods in a miserable condition. They are treated like animals; or maybe in a more miserable way than an animal.

Many countries import domestic workers from abroad, usually poorer countries, through recruitment agencies and brokers because their own nationals are no longer obliged or inclined to do domestic work. Major sources of domestic workers include the Philippines, Thailand, Indonesia, India, Bangladesh, Pakistan, Sri Lanka, and Ethiopia.

Bharatiya Mazdoor Sangh (BMS) works with domestic workers in India towards achieving dignity for both domestic work and workers, at a national and international level. In India, the stigma for domestic work is heightened by the caste system, as tasks such as cleaning and sweeping are associated with low castes. Domestic Workers are referred to as 'servants' and 'maids', which has resulted in their feelings of insecurity and inferiority. Till date, many domestic workers are viewed as outcasts. Since many domestic workers are migrant women, they are viewed as a part of the lower caste communities leading to double victimization. This has further led to the indignity inflicted upon them and their work. Labor laws do not cover Domestic Workers. They are not recognized as workers; hence do not enjoy legal protection, rights and dignity. Domestic Workers are victims of suspicion. If anything is missing in the house, they are the first to be accused with threats, physical violence, police conviction and even dismissal. The employer restricts the liberty of the live-in domestic worker. She is prevented from leaving the building at will and her movements are greatly restricted within the house. Often they are not allowed to use the telephone and are prohibited from socializing with friends and relatives who are living and working in the same city. Their sleeping hours are irregular. Often they are underpaid or unpaid. They get no holidays or days off. They are illiterate and have no means to contact their families. Because of isolation, live-in Domestic Workers face an increased risk of verbal, physical and sexual abuse[18].

4. Legislations

The UN Special Rapporteur in May, 2013 observed that there is prevalence of violence against domestic workers. But there is absence of a comprehensive, uniform national legislation for domestic workers which would aim at the safety and well-being of these marginalized people.

4.1 International Perspective

Atrocities against the domestic workers are not merely confined within the reality of India. The problem is faced by a number of countries across the world. In a Report of ILO named "Domestic Workers across the World: global and regional statistics and the extent of legal protection" it was revealed that 19 nations across the world have laws or regulations pertaining to domestic work and among the 20.9 million victims of bonded labour worldwide, domestic work is one of the most frequently cited sector[19]. In the same report it was revealed that the labour legislations of maximum countries exclude protection of domestic workers or even if they cover domestic workers, the level of protection is very low. It became an international concern when it was discovered that for many years the domestic workers have been kept outside the arena of policy making. A large part of domestic workers consist of women and they are subjected to social injustice and vulnerability. To address the issues relating to domestic workers and to provide for an international standard to tackle the same, the Domestic Workers Convention was held in 2011 at Geneva and a number of recommendations were adopted by ILO in the 100th Session of the International Labour Conference on June 1st, 2011. The Domestic Workers Convention and the Recommendations are the first international documents which talked about the protection of domestic workers and Uruguay, Philippines and Mauritius were the first countries to ratify the documents.

The Domestic Workers Convention stresses upon the governments to provide National legislative protection to the domestic workers. More protection must be given to the domestic workers who are migrants, viz: the migrant workers must be employed on the basis of a contract which is enforceable in that country, they must be protected from retention of passports by the employers, clear provisions of repatriation must be there and specific conditions must be mentioned. Also, the domestic workers must be protected from all forms of violence, abuse and harassment.

The C-189 Domestic Workers Convention, 2011 consists of a Preamble and 27 Articles[20]. The Preamble of the Convention laid stress on the fact that domestic work is carried out under special circumstances and thus specific standards must be provided for the domestic workers. The Preamble recognized that even though there is a significant contribution of the Domestic workers in global economy but this work is undervalued and the workers are subjected to discrimination, violence, exploitation and other human rights abuses. The Convention specifically says that the member states must look upon the protection of human rights of all domestic workers and freedom of association, elimination of all forms of forced labour including child labour and elimination of discrimination was stressed upon. Provisions relating to collective bargaining, decent working conditions, information regarding their terms of employment, weekly rest, annual

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18 Report by BMS, *Decent Work For Domestic Workers,*(23rd July, 2012)*available at:* http://www.bms.org.in/Encyc/2012/7/23/DECENT-WORK-FOR-DOMESTIC-WORKERS,-Report-by-BMS.aspx?NB=&lang=3007&m1=&m2=&p1=&p2=&p3=&p4= (last visited on March 15, 2014).

19 *Domestic workers across the world: global and regional statistics and the extent of legal protection,*(2013) 146, *available at:* http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_173363.pdf, (last visited on August 20, 2016).

20 C189 - Domestic Workers Convention, 2011 (No. 189)

leave, minimum wage, safe and healthy environment, food and accommodation etc are covered under the Convention. The Convention also mentions that the domestic workers who are under the age of 18 and above the minimum age of employment must be provided with education[21].

More protection is given to the migrant workers and the Convention mentions that in case migrant workers are recruited in one country for domestic work in another, a written job offer must be provided for. Also, the conditions under which repatriation is to be provided when the termination of employment occurs must be specifically mentioned.

The R-201 Domestic Workers Recommendation, 2011 supplement and complement the Domestic Workers Convention, 2011. The recommendations talk about elimination of legislative or administrative restrictions to the Right of domestic workers to join worker's organizations and ask the member States to stick to the international labour standards. The recommendations talk about prohibition of child labour, regulation of working and living conditions of domestic workers, ensuring their rest and education, eliminating night shifts etc. The recommendations say that the terms and conditions of employment must include job description, sick leave, payments, detail of accommodation etc. and model contracts should be made available to the domestic workers, free of cost. The recommendations furthermore stated that the domestic workers must be given rest during the day and weekly rest should be at least 24 hours. In addition to these, the recommendations mentioned that to curb the incidents of violence against domestic workers, the member States must adopt to some mechanisms. There must be an accessible complaint mechanism and it must be ensured that all complaints of abuse and violence are prosecuted. Not only that, the member States must also provide for rehabilitation of the domestic workers who are subjected to such abuse[22].

4.2 Indian Perspective

There are several labour legislations in India like The Workman's Compensation Act of 1923, the Weekly Holiday Act of 1942, the provision of Minimum Wages Act of 1948, the Maternity Benefit Act of 1961,the Personal Injury Act of 1963, Gratuity Act of 1978, the Factories Act of 1948, the Industrial Disputes Act of 1947, etc. but they do not include domestic workers. This is because the nature of their work, the employee-employer relationship, the place of their work i.e. private households etc. which makes it impossible to bring them under the definitions provided under the existing labour laws. All other workers have their own labour unions, but domestic workers remain largely unorganized. Domestic workers do not work in the conventional sites of employment like factories, industries or construction sites. Their place of work is unconventional, within the four walls of a house. Even if they are approached by trade unions, the employers would never allow them to join such. Thus, forming a protective labour union is not easy for the domestic workers.

The Govt. of India in the recent years has taken some measures to provide legal protection to the domestic workers. The Unorganized Workers Social Security Act (2008), the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act (2013),the Child Labour Prohibition and Regulation Act, 1986 etc. are some attempts made by the Govt. However, till date there is no comprehensive legislation for regulating the working conditions and providing social security to the domestic workers.

The Unorganized Workers Social Security Act, 2008 provides for social security and welfare of unorganized workers. The unorganized workers can opt for benefits under Social Security Schemes framed under the Act. In this Act, terms like home-based worker, wage worker, self-employed worker and unorganized sector is defined. Under wage workers, the Act includes domestic workers. As per the Act, a wage worker is a person who is employed in an unorganized sector and is paid remuneration. A wage worker may be a casual worker, temporary worker, migrant worker or domestic worker[23].

A petition was filed by the National Domestic Workers Welfare Trust for the enactment of a comprehensive legislation to protect the rights of the domestic workers all over the country[24]. The main objectives behind the petition was a comprehensive legislation for the domestic workers, minimum wage for the domestic workers, safety and security of women and children domestic workers, different schemes for the domestic workers like weekly holidays, medical assistance, etc. A Public Interest Litigation was filed for seeking direction OF concerned authority for the implementation of the Unorganized Workers Social Security Act, 2008. It was contended that the purpose of the above mentioned Act was defeated due to its non-implementation. In this case it was pointed out that there is no public awareness regarding the benefits provided under the 2008 Act. It was held that steps must be taken by the State for proper and effective implementation of the welfare schemes so that the rights of the domestic workers are protected[25].

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 has included domestic workers in its provisions.

The Child Labour Prohibition and Regulation Act, 1986 does not specifically talk about domestic workers but it has prohibited a child below 14 years of age to be employed

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21 *Id.*

22 Recommendation R201 - Domestic Workers Recommendation (2011), available at: www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE(last visited on August 21, 2016).

23 The Unorganized Workers Social Security Act, 2008,

24 National Domestic Workers Welfare Trust v. The State of Jharkhand and ors 2014(1)AJR249

25 *Id.*

as a domestic worker. Sec-1 of the Act says that a child is a person who has not completed 14 years of age and Sec-3 of the Act says that a child shall not be employed in any occupation mentioned in Part-A of the schedule or in any workshop where any process is carried out which is given in Part-B of the schedule. In the 14th clause of Schedule-I, Part-A, "employment of child as domestic workers or servants" is mentioned.

In addition to that, the National Platform for Domestic Workers was created in 2012 which comprised of a number of Domestic Workers Unions and member based organizations. It is an adhoc co-ordination committee for domestic workers and is situated in New Delhi. Its main objective is to create a national platform for comprehensive legislation for domestic workers and to examine the national policies on domestic workers. The National Platform for Domestic Workers demanded a comprehensive legislation for protection of all domestic workers, including migrant workers within India as well as outside India[26].

In March, 2012, the International Domestic Workers Network organized a workshop in Chennai. One of the objectives of that workshop was to develop strategies so that the Domestic Workers Convention is ratified and to keep on pushing the government for a comprehensive legislation for domestic workers[27].

4.3 Proposed bills/Policy frameworks

The Domestic Workers (Regulation of employment, conditions of work, social security and welfare) Bill, 2008 was proposed by NirmalaNiketan and National Campaign Committee for unorganized sector workers. The Bill talks about minimum labour standards to be ensured for all domestic workers, domestic workers boards, dispute settlement bodies etc. The Bill includes imprisonment for 1 year or fine or both as punishment in case any person contravenes the provisions of the proposed Bill. The draft Bill aims at regulating the employment of domestic workers, ensuring their social security, ensuring the payment of contribution by employers and domestic workers to set up a social security fund etc[28].

The Domestic Workers (Registration, Social Security and Welfare) Bill, 2008 was drafted by the National Commission for Women. It is a comprehensive Bill which aims at establishing a registration procedure for domestic workers, setting up a welfare fund, regulating their working condition, etc.

The Domestic Workers (Conditions of Service) Bill, 2009 was a private member's Bill introduced in the Parliament. The Bill aimed at fixation of wages of domestic workers and improvement of their working conditions. It talks about fixed hours of work, period of rest and leave entitlement of domestic workers. In addition to this, the Bill talks about appointment of inspectors and says that if any employer contravenes the provisions, he shall be punished with a fine[29].

The Domestic Workers Welfare and Social Security Bill, 2010 is still pending for consideration. It was also drafted by the National Commission for Women. The Bill recognized that domestic workers are exploited mentally as well as sexually and only a comprehensive legislation and can attempt to end violence against domestic workers. The Bill defines domestic workers and talks about domestic workers welfare fund. The Bill talks about a Central Advisory Committee which shall review and monitor the implementation of the Act in the States. In addition to this the Bill talks about a State Advisory Committee which shall make regulations consistent with the Bill and gives responsibility on the State governments to establish District Boards in their States. The Bill provides for registration of the domestic workers, service providers and employers. Also, provisions are there relating to maximum hours of daily work, over time work and wages allowances[30].

The Policy Framework for Domestic Workers, 2011 was suggested by the Taskforce set up for evolving a policy framework for domestic workers. Under the Minimum Wages Act, 1948, both Centre and State can fix/revise the minimum wages for different employments mentioned in the schedule. Here, the State Governments are requested to take steps for inclusion of domestic work as employment in the schedule and to fix minimum rates of wages for them[31]. Many of these Bills have either lapsed or pending. The need for a comprehensive legislation still prevails.

5. Reports on Violence faced by female Domestic Workers

The term 'domestic' is already viewed as something related to feminity. However, domestic workers in India, over a very long period, have been both male and female. In 1971, there were 675878 domestic servants and among them 251479 were female. In 1981, there were 807410 domestic servants and among them 405023 were female. In recent times, the female domestic servants have increased in number because employment alternatives closed for women and people started viewing women as safer servants who can be trusted with their household and properties[32].

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26 *Rights for Domestic Workers-United Nations in India, available at: in.one.un.org/page/rights-for-*domestic-workers, (last visited on August 21, 2016).

27 International Domestic Workers Federation, available at: archive.idwfed.org/news.php?page=37, (last visited on August21, 2016).

28 Domestic Workers (regulation of employment, conditions of work, social security and welfare), 2008

29 Bill No. 88 of 2009 The domestic workers (Conditions of service) Bill, 2009, (*introduced in Lok Sabha on December 4, 2009*).

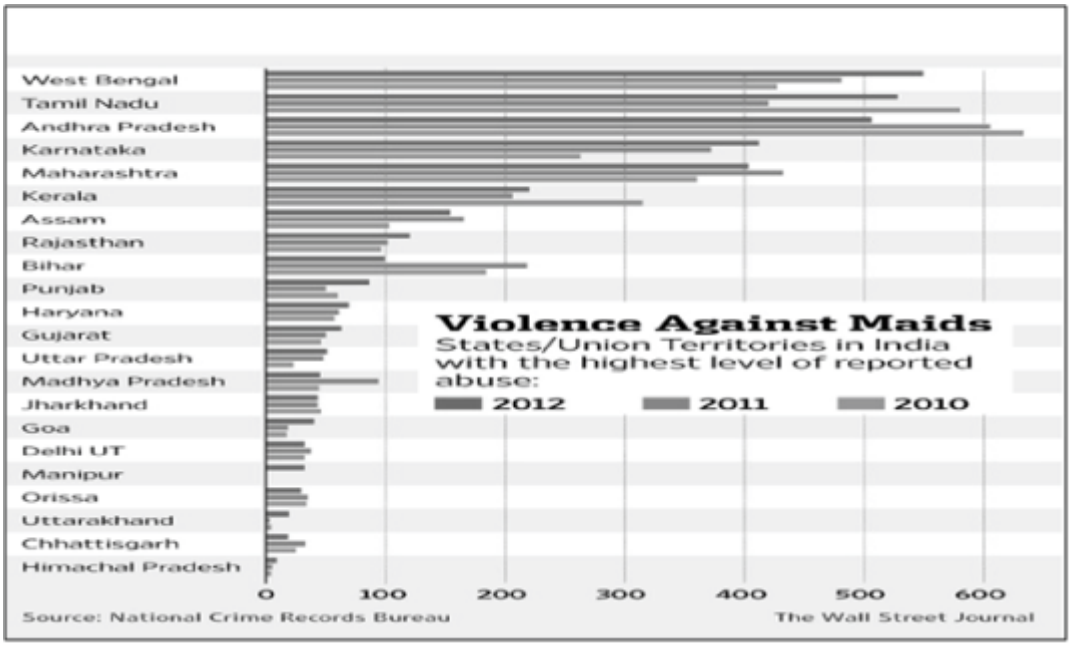
30 The Domestic Workers Welfare and Social Security Act, 2010,

31 Press Information Bureau, Govt. of India, *Policy Framework for Domestic Workers, available at:* http://wiego.org/sites/wiego.org/files/resources/files/dw_policy_framework_2011.pdf, (last visited on August 22, 2016).

32 Raka Ray, MASCULINITY, FEMININITY, AND SERVITUDE: DOMESTIC WORKERS IN CALCUTTA IN THE LATE TWENTIETH CENTURY-, *FEMINIST STUDIES*,Vol. 26(3), 691-718 (Points of Departure: India and the South Asian Diaspora, Autumn, 2000).

In the UN Special Rapporteur on its Report on Violence against women, its causes and consequences, Mission to India, (May, 2013) it was observed that numerous types of violence is faced by girls and women working in domestic households. They live a life of bondage and are denied access to the basic services provided by the State. Many of them are victims of sexual harassment and trafficking. Also, women who are migrant or unregistered are not easily identified. They live a life of peril[33]. The Report was submitted to UN General Assembly in April, 2014. It was furthermore observed in the Report that domestic workers become easy targets for abusive employers. They face a lot of harassment and violence. They are not allowed to use the employer's sanitary facilities and are forced to work for very long hours and for low salaries.

A Figure Showing Violence against female maid servants in India.



5.1 Recent Cases

In India's 28 states and 7 union territories, there were 3,564 cases of alleged violence against domestic workers reported in 2012, up slightly from 3,517 in 2011 and 3,422 in 2010[34].

BahujanSamaj Party (BSP) MP Dhananjay Singh and his wife were arrested for murdering their 35 years aged maid servant named Rakhi. Rakhi's body with brutal injuries on the chest, back, hands, legs and burn injuries on her stomach, was found in Singh's bungalow in New Delhi's South Avenue[35].

According to press reports, at least 21 child domestic workers (CDWs) were tortured to death in 2013, mostly in Punjab. Except two, all were girls. Another finding states that between January 2010 and June 2013, more than 41 cases of torture on child domestic workers were reported. Some were even poisoned[36].

A 15-year-old domestic maid rescued – beaten and semi-naked – from a South Delhi house on 30 September, 2013, told police that she was assaulted with hot pans, chains and knives by her employer, as well as being forced to drink urine and sleep inside the toilet[37].

An MBBS doctor and his wife, along with their servant, were arrested for allegedly harassing their 22-year-old domestic help for the past two months at Lucknow's Mahanagar area. Lalita, a resident of Bahraich, who worked as a domestic help in the doctor's resident, said in

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33 Special Rapporteur, *Violence against women, its causes, available at:* www.ohchr.org›OHCHR›English›NewsandEvents, (last visited on August 21, 2016).

34 Joanna Sugdenet. el. *India Real Time*, *available at:* http://blogs.wsj.com/indiarealtime/2014/02/12/the-worst-states-for-maid-abuse-in-india/, (last visited on August 13, 2014).

35 Staff Reporter, *Silent slaves behind closed doors: Cases of violence against domestic help,* INDIAN EXPRESS(New DelhiEdn., March12, 2014) available at: http://indianexpress.com/article/india/india-others/silent-slaves-behind-closed-doors-cases-of-violence-against-domestic-help/, (last visited on July 12, 2014).

36 Waqar Gillani, *The Maid Story*, THE NEWS(January 12, 2014)*available at:* http://tns.thenews.com.pk/maid-story/#.U-8xkPmSyWw, (last visited on July 23, 2014)

37 Sindhu Menon, *Ending the Scourge of Violence Against Domestic Workers in India,* EQUAL TIMES: NEWS AT WORK,(November 25, 2013); *available at:* http://www.equaltimes.org/ending-the-scourge-of-violence?lang=en#.U-8xkPmSyWw, (last visited on June 12, 2014).

her complaint to police, that the couple used to beat her, burn her with cigarette butts, and forcibly chop her hair. They also reportedly harassed her, saying she had mistreated their puppy[38].

Actor ShineyAhuja was convicted by Mumbai court for raping his domestic help. He was sentenced to seven years in prison[39].

Most of the cases remain unreported. Influential persons get away with their crimes because maids belong to lower and poor economic strata of the society. So they do not have much resources or strength to raise their voice against their employer because they have the fear of losing their jobs.

5.2 Intervention by Criminal Justice System

Concerns are expressed regarding the investigation of cases, prosecution and punishment for crimes committed against female domestic workers. Girls working as maid servants face a lot of obstacles while gaining access to mechanisms of redress or legal aid. Domestic workers in India are not even aware of the Unorganized Workers Social Security Act (2008). There is prevalence of child labor and trafficking for domestic work. The ILO Convention and Recommendations still lacks proper implementation in India. There are a number of Bills which are pending in the Parliament for consideration and many Bills have already lapsed. Though domestic workers are one of the prominent employees in unorganized sector, but their grievances remain unheard and unaddressed.

There are a number of instances of criminal abuses against domestic workers and can be categorized into psychological, physical and sexual abuse. Food deprivation, sexual harassment and assault, forced labor, trafficking, etc. are very common among maid servants in India. Women and girls who are recruited into domestic works are trafficked very often. Migration and trafficking are linked because the traffickers exploit the process through which a person migrates from one place to another. Many domestic workers work under forced labour. They work under such conditions where they are abused or restricted in a confined place or are not allowed to communicate. In addition to it, lack of privacy and personal security has lead to sexual assault and harassment of the domestic workers. The existing laws in the country fail to curtail violence against the domestic workers and in such a situation, a strong intervention by the Criminal Justice System is called for.

Justice Verma Committee in its report submitted on Jan 23, 2013, recommended the inclusion of domestic workers as one of the categories under employment in the Criminal Law Amendment Act, 2013 and the same was accepted in the said Act by the Parliament. Justice Verma Committee recommended that Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Bill, 2012 must include domestic workers within its purview. This is because every act of sexual harassment at workplace is a kind of sex discrimination where a woman is denied her basic fundamental rights. It was recommended that the term "workplace" under the above mentioned Act must include unorganized sector. It was proposed that domestic workers must fall within the sphere of the proposed legislation and this would protect them in such situations when their wages are discriminatorily withheld. Also, better protection and monetary compensation can be given to them in cases of sexual harassment or assault. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Bill, 2012 received the assent of the President in April, 2013 and it included the recommendations given by Justice Verma Committee[40].

In addition to it, the perpetrators of physical violence and sexual violence and people who unlawfully confine domestic workers must be strictly dealt with. The cases relating to atrocities against domestic workers must be properly investigated. Police officials must be trained in such a manner so as to respond swiftly to the complaints given by the domestic workers. Penal provisions must be included in the existing Bills pertaining to the protection of the rights of domestic workers. Proper rehabilitation must be provided to the domestic workers who have suffered any form of abuse.

6. Conclusion

From the above discussion it is evident that there is a genuine need for a comprehensive and effective central legislation to regulate the working conditions of the domestic workers, to protect their basic minimum human rights and to provide them with social security. Since protection from the incidents of sexual assault, harassment and trafficking are inter-linked with the demands put forward by the domestic workers; a strong criminal justice intervention is called for. Employers or any other persons who are involved in such heinous crimes against domestic workers must be punished in such a manner so as to create a deterrent effect. Domestic workers come from disadvantageous backgrounds where they lead a life of struggle and violence. At their own homes, the domestic maids face violence from their husbands and relatives. At their workplace, the situation is no better. Many domestic workers put up with the neglect and disrespect at their workplaces because they are the sole earning members of their family. Domestic workers form a large part of the unorganized sector and contribute a large amount in the economy. On one hand, domestic work has led to

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[38] *Silent Slaves behind Closed Doors: Cases of Violence against Domestic Help*, (March 12, 2014); *available at:* http://indianexpress.com/article/india/india-others/silent-slaves-behind-closed-doors-cases-of-violence-against-domestic-help/, (last visited on June 15, 2014).

[39] Jason Burke, *ShineyAhuja, fallen Bollywood star, jailed for raping maid,* THE GUARDIAN, (DelhiEdn., March 31, 2014; *available at:* http://www.theguardian.com/world/2011/mar/31/shiney-ahuja-bollywood-jailed-raping(Last visited on June 30,2014).

economic independence of many women and girls; but, on the other hand, the problems associated with the growing demand of domestic workers remain unattended. The Government should be responsible enough to regulate this sector by passing a suitable Central legislation. Along with that, the ILO Convention relating to the protection of the basic fundamental rights of the domestic workers must be ratified. Domestic workers must be provided with the basic rights of collective bargaining, protection against violence and abuse, freedom of association, right to form trade unions, etc. Some of the efforts taken by certain States for protection of the Rights of the domestic workers are: the inclusion of domestic workers in Tamil Nadu's Manual Workers Act, notification regarding the minimum wage of domestic workers by Kerala and Karnataka, introduction of a more comprehensive notification by Rajasthan for improving the condition of domestic workers. However, the constant demand for a comprehensive Central legislation still persists.

Urgent need of Speedy Trial Act in India

Dr. Dharminder Kumar*

ABSTRACT

Delay in disposal of cases is a normal feature in India and a number of efforts have been made to counter this evil practice. But the piling arrears and accumulated workload of various courts present a frightening scenario. As a matter of fact, the whole system is crumbling under the weight of pending cases which go on increasing every day. The crisis gripping the criminal justice system has serious implications for the Rule of Law and the protection of human rights. The Indian Constitution does not contain any express provision regarding the right to speedy trial but the same is implied under Article 21 of the Constitution. Article 21 provides that "no person shall be deprived of his life or personal liberty except according to procedure established by law". But unfortunately the empirical reality for defendants in India awaiting trial has failed to conform to these repeated judicial pronouncements. On the other hand United States of America is the first country which has enacted a legislation to implement the constitutional guarantee of speedy trial to all accused persons. The Act is known as the Speedy Trial Act which was passed in 1974 and it prescribes a set of time limit for carrying out major events in criminal proceedings. This paper makes efforts to discuss the urgent need of Speedy Trial Act in India, like in United States of America. The sooner it is framed, the better for all the parties concerned in particular and the society in general.

Key Words: Pending Cases, Article 21, Speedy Trial.

I. Introduction

India and USA are the biggest democratic countries in the world. US turned into a Federal Republic State by proclaiming its Constitution in the year 1789 and takes after presidential form of government; India turned into a Socialist, Sovereign, Secular, Democratic Republic by formally propelling its Constitution in the year 1950 and takes after parliamentary form of government. USA has an advanced judicial system; India has a rapidly developing judicial system.

The Indian Constitution does not contain any express provision regarding the right to speedy trial but the same is implied under Article 21 of the Constitution. Article 21 provides that "no person shall be deprived of his life or personal liberty except according to procedure established by law". In 1979 in HussainaraKhatoon v. Home Ministry the Supreme Court of India held that a speedy trial was a fundamental constitutional right (under Article 21) for criminal defendants. But unfortunately the empirical reality for defendants in India awaiting trial has failed to conform to these repeated judicial pronouncements.

On the other hand United States of America is the first country which has enacted a legislation to implement the constitutional guarantee of speedy trial to all accused persons. The Act is known as the Speedy Trial Act which was passed in 1974. This Act prescribes a set of time limit for carrying out major events in criminal proceedings.

2. Legal position of Right to Speedy Trial in India

Speedy trial is a fundamental right under the Constitution of India. However, Constitution of India does not specifically guarantee the fundamental right to speedy trial but it has been included implicitly in Article 21 due to judicial activism shown in respect of Article 21 which deals with fundamental right to life and personal liberty. There are catenas of judgments of the Supreme Court of India and High Courts on the subject of trial wherein the Courts have questioned the delays and discharged the accused.

2.1 Pendency of Cases in India

Huge pendency in our Courts and long delays are the common trend in India because of lengthy procedure. It is sometimes said that only those can afford to approach the Courts who have arms of silver, who have no dearth of money in spending, and legs of steel which do not tire of coming again and again to courts. Our justice system is terribly cumbersome, exorbitantly expensive, time consuming, dilatory, complex, cumulatively disastrous and also stressful, on account of variety of reasons. The poor cannot reach the court because of heavy fee and other expenditure and mystique legal procedure. Our judiciary is creaking under the seemingly impossible load of cases awaiting disposal needs urgent attention to avoid collapse of the system, which could put in jeopardy the whole state of orderly society.

The data, as of April 30, 2016 highlights the glaring problem of the huge pendency across states and Union territories. Over 2.18 crore cases remain pending, of which more than 22.5 lakh cases have failed to be decided in the last 10 years-10.3 per cent of total pendency.[1] Around 38.3 lakh cases are pending for over five years but less than 10 yrs.[2]

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[1] Utkarsh Anand, *More than 2 crore cases pending in District Court,* THE INDIAN EXPRESS, (New Delhi Edn., June 9, 2016)

[2] *Id*.

2.1.1 Pendency in the Supreme Court

The pendency of cases which was 1,04,936 as on 31 December, 1997 came down to 58, 794 in 2004 and further down to 46,926 as on 31 December 2007[3], in 2015 to 61,300 and 59,468 in Feb. 2016.

2.1.2 Pendency in High Courts

The pendency of cases in the High Courts which was 33.65 lakh as on 31December, 1999 increased to 35, 54, 687 on 31 December, 2001. The figures of pendency in the High Courts as on 31 December, 2007 was 37, 00,223 and pendency in the High Courts as on June, 2015 was 40, 05,704.

2.1.3 Pendency of cases in Subordinate Courts

The situation of the pendency of cases is worst in the Subordinate Courts. Over two crore cases are pending in the country's lower judiciary, out of which more than 10 per cent have remained unsettled for over 10 years, latest Law Ministry data says. As per available data on the National Judicial Data Grid website as on December 31, 2015, there are a total of 2,00,60,998 cases pending across the district Courts in the different states. Out of these, 83,00,462 or 41.38 per cent cases are pending for less than two years. At the same time, 21,72,411 or 10.83 per cent cases are pending for over 10 years, a note prepared by the Department of Justice for a high-level meeting on Justice Delivery and Legal Reforms says.[4]

The figures shown above do not include the cases pending in various tribunals and other quasi-judicial bodies. If those were also added to the grant total, the arrears in lower courts would well cross the figure of 3 crore, which is quite alarming and if not checked at the earliest, the system will crumble beneath its load.[5]

3. Judicial Responses on Right to Speedy Trial in India

Every individual in a democratic set up wants freedom. Without freedom no individual can lead a life as a free citizen of a country. The Indian judiciary plays a significant role in protecting the rights of the people and it has tried to give certain rights like right to speedy trial, right to fair trial, etc. a constitutional status by including all these rights within the purview of Article 21 of the Constitution. The judiciary in India has played a dynamic role in the dispensation of justice by providing fair and just trial to all its citizens.

There are catenas of pronouncements of the Supreme Court and High Courts on the subject of trial wherein the Courts have questioned the delays and discharged the accused. The most glaring malady which has afflicted the judicial concern is the tardy process and inordinate delay that takes place in the disposal of cases. The piling arrears and accumulated workload of different Courts present a frightening scenario. As a matter of fact, the whole system is crumbling down under the weight of pending cases which go on increasing every day.

However, judicial delays in India are endemic. No person can hope to get justice in a fairly reasonable period. Proceedings in criminal cases go on for years, sometimes decades. Civil cases are delayed even longer. This is despite the legal position strongly favouring Speedy Trial Act in India. The Court's concern about problem of delay in trial finds reflection in the following judgments.

In State of West Bengal v. Anwar Ali Sarkar,[6] a Bench of seven judges of the Supreme Court held that "the necessity of a speedy trial is too vague and uncertain to form the basis of valid and reasonable classification .It is too indefinite as there can hardly be any definite objective test to determine it. It is no classification at all in the real sense of the term as it is not based on any characteristics which are peculiar to persons or to cases which are to be subjected to the special procedure prescribed by the Act."

In Machander v. State of Hyderabad,[7] the Supreme Court refused to remand the case back to the trial court for fresh trial because of delay of five years between the commission of the offence and the final judgment of the Supreme Court. The Supreme Court has categorically observed:

> "We are not prepared to keep persons on trial for their life and under indefinite suspense because trial judges omit to do their duty …….. We have to draw a nice balance between conflicting rights and duties ……. While it is incumbent on us to see that the guilty do not escape, it is even more necessary to see that the person accused of crimes are not indefinitely harassed …. While reasonable latitude must be given to those concerned with the detection of crime and entrusted with administration of justice, but limits must be placed on the lengths to which they may go."

In State of Uttar Pradesh v. KapilDeoShukla,[8] though the Court found the acquittal of the accused unsustainable, it refused to order a remand or direct a trial after a lapse of 20 years.

The Supreme Court in Maneka Gandhi v. Union of India[9] has stated clearly that Article 21 of the Constitution of India confers a fundamental right on every individual not to be deprived of his life or personal liberty except according to procedure established by law and such procedure as required under Article 21 has to be "fair, just and reasonable" and not "arbitrary, fanciful or oppressive". The court has further stated that, "If a person is deprived of his liberty under a procedure which is not 'reasonable', 'fair' or 'just', such deprivation would be violative of his fundamental right under Article 21 and he would be entitled to enforce such fundamental right and secure his release." The apex Court has observed that in the broad

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3 Figure was given by Chief Justice K G Balakrishnan while inaugurating the "ALL INDIA SEMINAR ON JUDICIAL REFORM" held from February 23rd - 25th, 2008 in New Delhi

4 The Arunachal Times, Feb. 10, 2016,*Over two crore cases pending in lower judiciary.* (Last accessed on 12.6.2016)

5 R.D. Sharma, JUSTICE BARRED, The Tribune, March 13, 2012 at 9.

6 State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75

7 Machander v. State of Hyderabad, AIR 1955 SC 792

8 State of Uttar Pradesh v. Kapil Deo Shukla , (1972) 3 SCC 504

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

sweep and content of Article 21 right to speedy trial is implicit.

The apex Court's decision in Hussainara Khatoon(iv) v. Home Secretary, State of Bihar[10] is a land mark in the development of speedy trial jurisprudence. In the instant case, a writ of habeas corpus was filed on behalf of men and women languishing in jails in the State of Bihar awaiting trial. Some of them had been in jail for a period much beyond what they would have spent had maximum sentence been imposed on them for the offence of which they were accused. Alarmed by the shocking revelations made in the writ petition and concerned about the denial of the basic human rights to those "victims of callousness of the legal and judicial system", Supreme Court went on to give a new direction to the Constitutional jurisprudence. In doing so, the Court heavily relied on its decision in an earlier case in which the Court gave a very progressive interpretation to Article 21 of the Constitution. Taking this interpretation to its logical end, P.N. Bhagwati J., in Hussainara Khatoon's case said:

> "…Procedure prescribed by law for depriving a person of his liberty cannot be reasonable, fair or just unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21."

The law laid down in Hussainara Khatoon's case was followed in a number of subsequent decisions of the Supreme Court. In State of Bihar v. Uma Shankar Ketriwal,[11] the High Court quashed the proceedings on the ground that the prosecution which commenced 16 years ago and was still in progress, is an abuse of the process of the Court and should not be allowed to go further. Refusing to interfere with the decision of the High Court in the appeal, the Supreme Court said with regard to the delay that such protraction itself means considerable harassment to the accused and that there has to be a limit to the period for which criminal litigation is allowed to go on at the trial stage. The Court further observed that,

> "We cannot lose sight of the fact that the trial has not made much headway even though no less than 20 years have gone by, such protection itself means considerable harassment to the accused not only monetarily but also by way of constant attention to the case and repeated appearances in Court, apart from anxiety. It may be said that the respondents themselves were responsible in a large manner for the slow pace of the case in as much as quite a few orders made by the trial Magistrate were challenged in higher Courts, but then there has to be a limit to the period for which criminal litigation is allowed to go on at the trial stage."

The Court again considered the applicability of the right to speedy trial in State of Maharashtra v. Champalal Punjaji Shah[12] and observed that while deciding the question whether there has been a denial of the right to a speedy trial, the Court is entitled to take into consideration whether the delay was unintentional, caused by over-crowding of the court's docket or under-staffing of the prosecutors and whether the accused contributed a fair part to the time taken. This decision was severely criticized by Prof. Upendra Bakshi,[13] who said that even if the accused prefers interlocutory appeals it cannot be inferred that he contributed to delay, as by doing so he merely avails the opportunity provided by the law of the land. Moreover, legal strategies are determined by the accused person's counsel and not by the accused himself as he cannot be expected to understand subtleties of law and its procedures. He further added that delay caused by failure on the part of the courts to assign priority to the organization of day to day work cannot be said to be unintentional.

In Kadra Pahadiya v. State of Bihar,[14] P.N. Bhagwati, J. observed:

"8 more years have passed, but they are still rotting in jail, not knowing what is happening to their case. They have perhaps reconciled to their fate, living in a small world of their own cribbed, cabined and confined within the four walls of the prison. The outside world just does not exist for them. The Constitution of India has no meaning and significance, and human rights no relevance for them. It is a crying shame upon our adjudicatory system which keeps a man in jail for years on end without a trial."

The Court further observed that: "….. any accused who is denied this right of speedy trial is entitled to approach this Court for the purpose of enforcing such right and this court in discharge of its constitutional obligation has the power to give necessary directions to the state governments and other appropriate authorities for securing this right to the accused."

Mantoo Majumdar v. State of Bihar[15] is another case on under trials. In this case Justice Krishna Iyer found that two petitioners had spent seven years in jail without trial. He found further that the Government of Bihar was unwilling to furnish the facts sought by the Court and was insensitive to the plight of the under trials rotting in jails for long years. He found that even Magistrates "have bidden farewell to their primary obligation, perhaps fatigued by over work and uninterested in freedom of other." He said that under Section 167 Criminal Procedure Code: "The Magistrate concerned have been mechanically authorizing repeated detentions, unconscious of the provisions which obligated them to monitor the proceedings which warrant such detention." He drew the attention to the failure of the police to investigate promptly and the prison staff to find out how long these under trials should languish in jail. In the fact of this failure of the limbs of law and justice, the judge wondered like any of us: "If the salt hath lost its savour, wherewith shall it be salted?" He ordered the

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10 Hussainara Khatoon(iv) v. Home Secretary, State of Bihar , (1980) 1 SCC 81 [*Hussainarakhatoon's case]*

11 State of Bihar v. Uma Shankar Ketriwal , (1981) 1 SCC 85

12 State of Maharashtra v. Champalal Punjaji Shah , (1981) 3 SCC 610

13 Upendra Bakshi; *"Right to Speedy Trial: Geese , Gender And Judicial Sauce"* ;2nd ed.1986; p. 243

14 Kadra Pahadiya v. State of Bihar , (1983)2 SCC 104

15 Mantoo Majumdar v. State of Bihar, AIR 1980 SC 847

release of the two petitioners on their own bonds and without sureties.

Salim Khan v. State of Uttar Pradesh[16] shows that in Uttar Pradesh too, under trials face similar trials and tribulations. The Court found in this case that the respondent was in jail since November 1978 awaiting trial. The counsel for the respondent alleged that there were serious charges against the petitioner, but when directed by the court to produce a single case in which charge sheet was submitted against the petitioner, he was unable to do so. On the contrary the counsel informed the Court that in some cases the petitioners had been tried and acquitted. The Court, therefore, ordered his release on a personal bond of Rs. 500, deploring the government's cavalier attitude towards the petitioner's freedom.

In Raghubir Singh v. State of Bihar,[17] a Bench of two judges of the Supreme Court held that the right to speedy trial is one of the dimensions of the fundamental right to life and liberty guaranteed by Article 21. The question whether the right to speedy trial has been infringed depends upon various factors. A host of question may arise for consideration: Was there delay? Was the delay inevitable having regard to the nature of the case? Was the delay unreasonable? Was the delay caused by the tactics of the defence? There may be other questions as well. But ultimately the question of infringement of the right to speedy justice is one of fairness in the administration of criminal justice even as 'acting fairly' is the essence of the principle of natural justice and "a fair and reasonable procedure" is what is contemplated by the expression "procedure established by law" in Article 21.

In T.V. Vatheeswaran v. State Tamil Nadu,[18] the Court again reiterated the significance of the right to speedy trial. In this case, the accused persons were acquitted by the trial court whereupon an appeal was filed before the High Court which allowed it after a period of six years and remanded the case for retrial. Reversing the decision of the High Court, the Supreme Court held that the pendency of criminal appeal for six years before the High Court is itself a regrettable feature of this case and a fresh trial nearly seven years after the alleged incident is bound to result in harassment and abuse of judicial process.

The Supreme Court in Sheela Barse v. Union of India[19] addressed the question left unanswered in Hussainara Khatoon's case[20] anddealtspecifically with the procedure to be followed in matters where accused was less than 16 years of age. The Court held that where a juvenile is accused of an offence punishable with imprisonment of 7 years or less, investigation was to be completed within 3 months of the filing of F.I.R. or else the case was to be closed. Further, all proceedings in respect of the matter had to be completed within further six months of filing of the chargesheet. The apex Court observed: "The right to speedy trial is a right implicit in Article 21 of the Constitution and the consequence of violation of this right could be that the prosecution itself would be liable to be quashed on the ground that it is in breach of the fundamental right."

In Mihir Kumar v. State of West Bengal,[21] where a criminal proceeding had been pending for 15 years from the date of the offence, the Supreme Court held that it amounted to violation of the constitutional right to speedy trial of a 'fair, just and reasonable' procedure, hence the accused was entitled to be set free.

The Supreme Court in Abdul Rahman Antulay v. R.S. Nayak,[22] gave a landmark decision and finally adjudicated upon the questions left open in Hussainarakhatoon's case, like the scope of the right, the circumstances in which it could be invoked, its consequences and limits etc. The salient features of the decision are as follows:

(a) Right to speedy trial flowing from Article 21 encompasses all the stages namely, the stage of investigation, inquiry, trial, appeal, revision and retrial.

(b) In every case, where right to speedy trial is alleged to have been infringed, the first question to be put and answered is who is responsible for the delay? Proceedings taken by either party in good faith, to vindicate their rights and interests, as perceived by them, cannot be taken as delaying tactic nor can the time taken in pursuing such proceedings be counted towards delay.

(c) While determining whether undue delay has occurred one must have regard to all the circumstances, including nature of offence, number of accused and witnesses, the workload of the Court concerned, prevailing local conditions and so on.

(d) Each and every delay does not necessarily prejudice the accused. However, inordinately long delay may be taken as presumptive proof of prejudice. Prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, depends upon the facts of a given case.

(e) Accused's plea of denial of speedy trial cannot be defeated by saying that the accused didn't demand a speedy trial.

(f) The Court has to balance and weigh the several relevant factors- 'balancing test' and 'balancing processes – and determine in each case whether the right to speedy trial has been denied in a given case.

(g) Charge or conviction is to be quashed if the Court comes to the conclusion that right to speedy trial of an accused has been infringed. But this is not the only course open; it is open to the Court to make such other appropriate order – including an order to conclude the trial within a fixed time where the

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16 Salim Khan v. State of Uttar Pradesh, (1983) 2 SCC 347
17 Raghubir Singh v. State of Bihar, AIR 1987 SC 149
18 T.V. Vatheeswaran v. State Tamil Nadu, (1983) 2 SCC 68
19 Sheela Barse v. Union of India , (1986) 3 SCC 632
20 *Supra* n. 10
21 Mihir Kumar v. State of West Bengal, 1990 Cr. LJ 26 (Cal)
22 Abdul Rahman Antulay v. R.S. Nayak, (1992) 1 SCC 225 *[Antulay's Case]*

trial is not concluded or the sentence where the trial has concluded, as may be deemed just and equitable in the circumstances of the case.

(h) It is neither advisable nor practicable to fix any time limit for trial of offences because time required to complete trial of a case depends on the nature of the case.

(i) An objection based on denial of right to speedy trial and for relief on that account should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in High Court must be disposed of on a priority basis.

After the decision of Abdul Rehman Antulay v. R.S. Naik[23] there is no need to elaborate on this aspect of personal liberty, the Constitution Bench speaking through Jeevan Reddy, J., has traversed the entire ground. The judgment is illuminating and exhaustive. All the aspects of the matter which have any relevance to speedy trial were canvassed before the Court and the Bench did full justice to the submissions. The petitioners A.R. Antulay and Ranjan submitted before the Court that the right to speedy trial be made meaningful, enforceable and effective and there ought to be an outer limit beyond which continuance of proceedings would be violative of Article 21. In this connection, it was submitted that having regard to the prevailing circumstances, a delay of more than 7 years ought to be considered as unreasonable and unfair –this period of 7 years must be counted from the registration of the crime till the conduct of the trial; retrial ought not to be ordered beyond this period and the proceeding should be quashed.

The Supreme Court has emphasized the above propositions again and again. In Kartar Singh v. State of Punjab,[24] the Supreme Court has observed:

> "The concept of speedy trial is read into Article 21 as essential part of the Fundamental Right to Life and Liberty guaranteed and preserved in our Constitution. This right to speedy trial begins with the actual restraint imposed by arrest and consequent incarceration and continues at all the stages of investigation, enquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality, can be averred."

In Union of India v. Ashok K. Mehta,[25] there was delay in trial but it was not attributable only to the prosecution and the respondent himself had contributed to the delay. Refusing to quash the prosecution in the instant case, the Court observed that the respondent could not be allowed to take advantage of his own wrong and take shelter under speedy trial to escape from prosecution.

The guidelines laid down in Antulay's case[26] were adhered to in a number of cases which came to be considered by the Court subsequently. But a different note was struck in "Common Cause" a Registered Society through its Director v. Union of India.[27] In this case, the Court directed release of under-trials on bail if the trial is going on for a certain period and the accused has been in prison for a certain period of time.

The Supreme Court has stated in Common Cause Case[28] that even persons accused of minor offences have to wait for their trials for long periods. If they are poor and helpless, they languish in jails as there is no one to bail them out. The very pendency of criminal proceedings for long periods by itself operates as an engine of oppression. Accordingly, to protect and effectuate the right to life and liberty of the citizens guaranteed by Article 21, the Court issued certain general directions for releasing the under-trials on bail or personal bonds where trials had been pending for one year or more.

These directions are as follows:

(i) Where the offence under IPC or any other law for the time being in force for which the accused are charged before any Criminal Court are punishable with imprisonment not exceeding three years with or without fine and if the trial for such offences are pending for one year or more and the accused concerned haven't been released on bail but are in jail for a period of six month or more, the Court shall release such accused on bail or on personal bond to be executed by the accused on such conditions as may be found necessary.

(ii) Where the offence under Indian Penal Code or any other law for the time being in force for which the accused are charged before any Criminal Court are punishable with imprisonment not exceeding five years with or without fine and if the trial for such offences are pending for two years or more and the accused concerned haven't been released on bail but are in jail for a period of six month or more, the Court shall release such accused on bail or on personal bond to be executed by the accused and subject to such conditions as may be found necessary.

(iii) Where the offence under Indian Penal Code or any other law for the time being in force for which the accused are charged before any Criminal Court are punishable with imprisonment not exceeding seven years with or without fine and if the trial for such offences are pending for two years or more and the accused concerned haven't been released on bail but are in jail for a period of six month or more, the Court shall release such accused on bail or on personal bond to be executed by the accused and subject to such conditions as may be suitable in the light of Section 437 of Code of Criminal Procedure.

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[23] *Id.*

[24] Kartar Singh v. State of Punjab, (1994) 3 SCC 569: 1994 SCC (Cri) 899

[25] Union of India v. Ashok K. Mehta, AIR 1995 SC 1976

[26] *Supra* n. 22

[27] Registered Society through its Director v. Union of India, (1996) 4 SCC 33 [*Common Cause Case*]

[28] *Id.*

(iv) Where criminal proceedings are pending regarding traffic offences in any criminal Court for more than two years on account of non-serving of Summons to the accused or for any other reason whatsoever, the Court may discharge the accused and close the case.

(v) Where the cases pending in Criminal courts for more than two years under Indian Penal Code or any other law for the time being in force are compoundable with the permission of the Court and if in such a case trials have still not commenced, the Criminal Court shall, after hearing the public Prosecutor and other parties or their representatives before it, discharge or acquit the accused, as the case may be, and close the case.

It also directed acquittal or discharge of an accused where for an offence punishable with imprisonment for a certain period, the trial had not begun even after a lapse of the whole or two third of the period. But the Court excluded certain economic and other offences from the application of these guidelines. In a subsequent case, the Supreme Court clarified its order inCommon Cause Case[29] and excluded from its application those cases where the pendency of criminal proceedings was wholly or partly attributable to the dilatory tactics adopted by the accused or on account of any other action on the part of the accused which resulted in prolonging the trial. The Court also explained the expressions, "pendency of trial" and "non-commencement of trial."

In M.V Chauhan v. State of Gujrat,[30] the facts of the case were that a government employee was prosecuted and convicted on certain charges of corruption. The incident was of 1983 and the prosecution started in 1985. In an appeal against the conviction in 1997, the Supreme Court found that the sanction given by the government for this prosecution was invalid. The Court barred initiation of fresh prosecution against the appellant. The apex Court observed:

> "Normally when the sanction order is held to be bad, the case is remitted back to the authority for reconsideration of the matter and to pass a fresh order of sanction in accordance with law. But, in the instant case, the incident is of 1983 and, therefore, after a lapse of fourteen years, it will not, in our opinion, be fair and just to direct that the proceedings may again be initiated from the stage of sanction so as to expose the appellant to another innings of litigation and keep him on trial for an indefinitely long period contrary to the mandate of Article 21 of the Constitution which, as part of Right to Life, philosophizes early end of criminal proceedings through a speedy trial."

Another attempt was made to concretize the right to speedy trial in Raj Deo Sharma v. State of Bihar.[31] In this case, the Court issued certain directions for effective enforcement of the right to speedy trial as recognized in Antulay case and prescribed time limits for completion of prosecution evidence on completion of two years in cases of offences punishable with imprisonment for period not exceeding 7 years and on completion of 3 years in cases of offences punishable with imprisonment for period exceeding 7 years. But again the effect of this judgment was whittled down in the subsequent clarification order. In the clarification order it was laid down that the following periods could be excluded from the limit prescribed for completion of prosecution evidence in Raj Deo Sharma's case[32]:

(a) Period of pendency of appeal or revision against interim orders, if any, preferred by the accused to protract the trial;

(b) Period of absence of presiding officer in the trial court;

(c) Period of three months, in case the office of public prosecutor falls vacant (for any reason other than expiry of tenure).

The Supreme Court in Rang Bahadur Singh v. State of U.P.[33] has held as follows: "The time tested rule is that acquittal of a guilty person should be preferred to conviction of an innocent person. Unless the prosecution establishes the guilty of the accused beyond reasonable doubt a conviction cannot be passed on the accused."

In Rajiv Gupta v. State of Himachal Pradesh,[34] the apex Court held that if the trial of a case for an offence which is punishable with imprisonment up to three years has been pending for more than two years and if the trial is not commenced, then the criminal court is required to discharge and acquit the accused.

In All India Judges' Association v. Union of India,[35] the apex Court held that it is a constitutional obligation of this Court to ensure that the backlog of cases is decreased and efforts are made to increase the disposal of cases. Apart from the steps which may be necessary for increasing the efficiency of the judicial officers, it appears that the time has come for protecting one of the pillars of the Constitution, namely, the judicial system, by directing increase in the judges strength from the existing ratio of judge-population ratio.

In N.S Sahni v. Union of India,[36] the Supreme Court held that the right of an accused to have a speedy trial is now recognized as a right under Article 21. The procedural fairness required by Article 21 including the right to speedy trial has, therefore, to be observed throughout and to be borne in mind.

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29 *Id*.
30 M.V Chauhan v. State of Gujrat , AIR 1997 SC 3400
31 Raj Deo Sharma v. State of Bihar, AIR 1998 SC 3281 [*Raj DeoSharma'sCase*]
32 *Id*.
33 Rang Bahadur Singh v. State of U.P., AIR 2000 SC 1209
34 Rajiv Gupta v. State of Himachal Pradesh, (2000) 10 SCC 68
35 All India Judges' Association v. Union of India, (2002)4 SCC 247
36 N.S Sahni v. Union of India, (2002) 2 SCC 210

In Durga Datta Sharma v. State,[37] the prosecution under the Prevention of Corruption Act has not commenced after a period of 25 years. No charges had been framed and chances of commencing and concluding the trial in near future were not strong. Observing that the accused persons had already suffered a lot both mentally and physically during the last 25 years, the Court dropped all charges against the accused.

In MotiLalSaraf v. State of Jammu and Kashmir,[38] the court has clearly stated that no general guidelines could be fixed. Each case must be examined on its facts and circumstances. During the criminal prosecution, no single witness was examined in last 26 years without there being any lapse on part of accused. Its continuation further would be total abuse of process of law and was liable to be quashed.

In Puransingh v. State of Uttaranchal,[39] the apex Court acquitted Puran Singh in a murder case that had run for 29 years. The most important is that the court heard his appeal out of turn. But for this, the case would have lingered on much longer.

In Pankaj Kumar v. State of Maharastra and others,[40] the Court came to the conclusion that the right to speedy trial of the accused has been infringed, the charges or the conviction, as the case may be, may be quashed unless the court feels that having regard to the nature of offence and other elegant circumstances, quashing of proceedings may not be in the interest of justice. In such a situation, it is open to the court to make an appropriate order as it may deem just and equitable including fixation of time for conclusion of trial.

In another case of Vakil Prasad Singh v. State of Bihar,[41] the appellant an Assistant Engineer in BSEB was alleged to have demanded illegal gratification for release of payment for civil work executed by a civil contractor. Investigation conducted by an officer having no jurisdiction to do so, were successfully challenged by the appellant. Further, the prosecution was found to have slept over the matter for almost 17 years, without any explanation. The stated delay was held to be a clear violation of constitutional guarantee of a speedy investigation and trial under Article 21. Any further continuance of criminal proceedings was said to be unwarranted. Despite the fact that allegations against him were quite serious, the apex Court referring to their earlier decisions quashed the proceedings pending against the appellant.

In the case of Bhawna Karir v. the State and Anr,[42] where the right to speedy trial was alleged to have been infringed, the first question to be put and answered was which person is to be held liable for the delay. Proceedings taken by either party in good faith, to indicate their rights and interest, as perceived by them, cannot be treated as delaying tactics nor can the time taken in pursuing such proceedings be counted towards delay. Hence, an accuser's pleas of denial of speedy trial cannot be defeated by saying that the accused has delayed the proceedings.

In a recent case,[43] the Supreme Court has said that it was apprehensive about fixing a time limit for completion of a criminal trial as it could be misused by intelligent criminals. A Division Bench consisting of Justices H.L. Dattu and C. K. Prasad during the hearing on a petition by advocate RanjanDwivedi, who has sought quashing of the trial proceedings against him in the L.N. Mishra murder case on the ground of inordinate delay of 37 years – long trial has blighted him personally, physically and socially. The apex Court has declared that right to speedy trial was a requirement under Article 21 guaranteeing right to life. But, the trial has dragged on for 37 years. In 1992, the Supreme Court had directed day-to-day trial in this case for speedy conclusion. Two decades later, we are nowhere near the end. The bench said there was no denying that delays are frequent in the judicial system in India. "Delay will continue to happen given the system we have. Delay definitely effects the trial but can the Supreme Court fix a time limit for completion of a criminal trial. The Supreme Court had earlier in a judgment specifically struck down fixation of a time limit for completion of trial," it said.

The Court further stated that "it is a unique case. But if we quash the proceedings, we may be sending a wrong signal, which may be used by an intelligent accused at a later date. We do not want this to happen because of our order." The bench said since the trial has reached the fag end after dragging for nearly four decades, it could ask the trial court to complete it in the next three months by holding proceedings on a day-to-day basis refusing adjournment on any ground to the accused and prosecution.

4. Speedy Trial Act in United States of America

Under the Constitution of United States of America "Speedy Trial" is a mandate of the Sixth Amendment: Constitution "In all criminal prosecutions, the accused shall enjoy a right to speedy and public trial." The United States of America is the country which has enacted a legislation to implement the constitutional guarantee of speedy trial to all accused persons and the law on this point is the Speedy Trial Act, 1974 as amended on August 2, 1979. The Act establishes time limits for completing various stages of a Federal criminal prosecution.

This Act explicitly prescribes a set of time limit for carrying out major events in criminal proceedings. This Act requires the trial of a defendant should commence within 70 days from the date of filing of the indictment or from the date on which the defendant appears before a judicial officer of the Court, whichever is later. The indictment must be filed within 30 days from the date of arrest or service of

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37 Durga Datta Sharma v. State, 2004(1) Crimes 171

38 MotiLal Saraf v. State of Jammu and Kashmir, 2006 Cr. LJ 4765 (SC)

39 Puransingh v. State of Uttaranchal, Appeal (Crl.) 437 of 2006

40 Pankaj Kumar v. State of Maharastra and others , Decided on July 2008

41 Vakil Prasad Singh v. State of Bihar , AIR 2009 SC 1822

42 Bhawna Karir v. the State and Anr, Decided on 20 March, 2012

43 Dhananjay Mahapatra, *Fixing Time Limit for Speedy Trial will prove Harmful: SC*, The Times of India, 26 July, 2012. (Decided on 17 August, 2012)

summons. If there is a violation of the provisions of the Speedy Trial Act the indictment against the defendant must be dismissed. The District Court, however, retains the discretion to dismiss the indictment either with or without prejudice. In the case of United States v. Taylor[44] the question was of determining whether a dismissal of an indictment for non-compliance with the Speedy Trial Act should be with or without prejudice. The Court observed that the District Court must at least consider the seriousness of the offence, the facts and circumstances of the cases, which can lead to the dismissal and the impact of a re-prosecution on the administration of the Speedy Trial Act as well as on the administration of justice.

Mechanism to check the cause of delay should also come in picture and victim or defendant can approach the court and allege violation of Fundamental right. Thereafter Court would see the other factors to decide on whether the right has been violated or not. If court comes to the conclusion that accused's right has been violated, it should ordinarily dismiss the charges with prejudice, provided that after affording the parties an opportunity to be heard, the court may in the interests of justice extend the time limit. In determining whether and for what period to order such an extension, the court should consider the totality of the circumstances, including:

i. The gravity of the offense;

ii. The reasons for the failure to bring the defendant to trial within the previously established time limit;

iii. The extent to which the prosecution or the defense is responsible for the delay; and

iv. The extent of the prejudice to the interests of the defense, the prosecution, or the public that may result from the extension of time or the dismissal of the charges.

If the court finds that victim's right is violated, it should make an order of compensation with expeditious disposal of case.

5. Conclusion

The State as a guardian of the fundamental rights of its people is duty bound to ensure speedy trial and avoid any excessive delay in trial of criminal cases that could result in grave miscarriage of justice. Speedy trial is in public interest as it serves societal interest also. It is in the interest of all concerned that the guilt or innocence of the accused is determined as early as possible. Once an accused person is able to establish that this basic and fundamental right under Article 21 has been violated, it is upto the State to justify that this infringement of fundamental right has not taken place, that the restrictions or provisions of law are reasonable and that the procedure followed in the case is not arbitrary but is just, fair, without delay, expeditious and reasonable.There is an urgent need of Speedy Trial Act in India like in United States of America. Moreover the word speedy trial should be inserted in Indian Constitution as one of the fundamental rights.

[44] United States v.Taylor, 487 US 326(1988)

Empowering Children through Education: A Human Rights-Based Approach

Dr. Saroj Bohra*

ABSTRACT

The goal of a human rights-based approach to education is simple. It has to assure for every child quality education that respects and promotes her or his right to dignity and optimum development. Achieving this goal is, however, enormously more complex. The right to education is high on the agenda of the international community. While the right to education like all human rights is universal and inalienable, several conventions have enshrined it in international law, thereby placing binding commitments on ratifying States. Provisions on the right to quality education inclusive of human rights values appear in such treaties as the United Nations Educational, Scientific and Cultural Organization's Convention against Discrimination in Education,1960, the International Covenant on Economic, Social and Cultural Rights, 1966 and the United Nations Convention on the Rights of the Child ,1989. The right to education can be fully realized only if it is implemented with a concerted rights-based approach to education. The paper takes a look at Indian education laws and analyses whether the requirements of a human rights based approach have been met. Secondly, the paper briefly analyzes the present status of right to education in India to understand the drawbacks at policy level and identify the factors responsible.

Key Words: Children, Human Rights, Education, Right-based approach

1. Introduction

"The hall mark of culture and advance of civilization consists in the fulfillment of our obligations to the young generation by opening up all opportunities for every right to unfold its personality and rise to its full stature, physical, mental, moral and spiritual. It is birth right of all children that cries for justice from the world as a whole."

Justice V.R. Krishna Iyer[1]

The importance of child welfare cannot be underestimated because the welfare of entire community, its growth and development depends on the well-being of its children. Education enables and motivates better participation in social, political and cultural life of the community. It helps to overcome exploitations and the traditional inequalities of caste, class and gender. Learning liberates from ignorance, superstition and prejudice that blinds the vision of truth[2]. Education is a key to the civilization standards, to the process of social transformation and strivings towards perfection. Value addition in human quality and lifestyle or vision takes place with early education. Education is not a static commodity to be considered in isolation from its greater context; it is an ongoing process and holds its own inherent value as a human right. Not only do people have the right to receive quality education now, they also have the right to be equipped with the skills and knowledge that will ensure long-term recognition of and respect for all human rights.

2. Education as a Human Right

Education is an important human right as education is the essence of human development. It is important to transfigure the human personality in to a pattern of perfection through a synthetic process of the development of the body, the enrichment of mind, the sublimation of the emotions and the illumination of the spirit. Education has been formally recognized as a human right since the adoption of the Universal Declaration of Human Rights in 1948. The importance of education for the development of child's personality, talents and mental and physical abilities to their fullest potential and for preparation of the child for responsible life in a free society has been reiterated in International covenants also, including the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention against Discrimination in Education, 1960, and the International Covenant on Economic, Social and Cultural Rights, 1966. These treaties establish an entitlement to free, compulsory primary education for all children; an obligation to develop secondary education, supported by measures to render it accessible to all children, as well as equitable

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[1] "Jurisprudence of Juvenile Justice: A Preambular Perspective"

[2] Bhartihari cited in Unni Krishnan, J.P. v. State of A.P. (1993) 1SCC 645:AIR 1993 SC 2178

access to higher education; and a responsibility to provide basic education for individuals who have not completed primary education.

The right to education has long been recognized as encompassing not only access to educational provision, but also the obligation to eliminate discrimination at all levels of the educational system, to set minimum standards and to improve quality. Children's right to education is not only human right by itself, but is also instrumental for realizing other human rights. Education opens up opportunities of access to good things of life. In addition, education is necessary for the fulfillment of any other civil, political, economic or social right. The right to education is an internationally recognized right in its interrelationship with the right to development, and that the legal and constitutional protection of this right is indispensable to its full realization[3]. To ensure the realization of the right to education for all children, State has three levels of obligations:

a) To fulfill the right to education by ensuring that education is available for all children and that positive measures are taken to enable children to benefit from it, for example, by tackling poverty, adapting the curriculum to the needs of all children or engaging parents to enable them to provide effective support to their children's education.

b) To respect the right to education by avoiding any action that would serve to prevent children accessing education, for example, legislation that categorizes certain groups of children with disabilities as uneducable.

c) To protect the right to education by taking the necessary measures to remove the barriers to education posed by individuals or communities, for example, cultural barriers to education or violence and abuse in the school environment[4].

3. International Scenario

The international community realized the importance of education from the days of League of Nations and it has been projected in various international treaties and declarations. The first impression of international concern over the 'situation of children' came in 1923 when the council of the newly established non- governmental organization, "Save the Children International Union", adopted a five- point declaration on the rights of the child. This Geneva Declaration was endorsed in 1924 by fifth Assembly of League of Nations. It recognizes the need for giving necessary means for the physical and spiritual development of the child.

The United Nations Convention on the Rights of the Child, 1989 further strengthens and broadens the concept of the right to education. It is recognized as the most complete statement of children's rights with the force of international law as it demands an active decision on individual States ratifying it. In particular, through the obligation to consider in its implementation the Convention's four core principles i.e. non-discrimination; the best interests of the child; the right to life, survival and development of the child to the maximum extent possible; and the right of children to express their views in all matters affecting them and for their views to be given due weight in accordance with their age and maturity[5]. Article 26 of Universal Declaration of Human Rights 1948 recognizes the right to compulsory free education at least in the elementary and fundamental stages. Principle 7 of Declaration on the Rights of the Child, 1959 entitles the child to receive education, which shall be free and compulsory, at least in the elementary stages and it shall promote his general culture and enable him on a basis of equal opportunity, to develop his abilities, his individual judgment and his sense of moral and social responsibility and to become useful member of society. These underlying principles make clear a strong commitment to ensuring that children are recognized as active agents in their own learning and that education is designed to promote and respect their rights and needs. The Convention elaborates an understanding of the right to education in terms of universality, participation, respect and inclusion.

4. Human Rights-based approach

The equal and inalienable rights of all human beings provide the foundation for freedom, justice and peace in the world, according to the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948.

4.1 Rights v. Needs

Before 1997, most UN development agencies pursued a 'basic needs' approach; they identified basic requirements of beneficiaries and either supported initiatives to improve service delivery or advocated for their fulfillment. UNFPA and its partners now work to fulfill the rights of people,

3 "'International Conference on the Right to Basic Education as a Fundamental Human Right and the Legal Framework for Its Financing' (Jakarta, Indonesia, 2–4 December 2005) adopted the Jakarta Declaration.

4 Committee on Economic, Social and Cultural Rights, 'General Comment No. 13: The right to education (Article 13)', E/C.12/1999/10, December 1999, paras. 43, 44, 50.

5 Santos Pais, Marta, 'The Convention on the Rights of the Child', in Office of the High Commissioner for Human Rights, United Nations Institute for Training and Research, and United Nations Staff College Project, Manual on Human Rights Reporting under Six Major International Human Rights Instruments, United Nations, Geneva, 1997, p. 427.

rather than the needs of beneficiaries. It is an important distinction, because an unfulfilled need leads to dissatisfaction, while a right that is not respected leads to violation. Redress or reparation can be legally and legitimately claimed. A human rights-based approach also seeks to reinforce the capacities of duty bearers, usually governments to respect, protect and guarantee these rights. It aims to address development complexities holistically, taking into consideration the connections between individuals and the systems of power or influence. And it endeavours to create dynamics of accountability[6].

4.2 Applying Human Rights Based Approach to Education

Human rights based approach to education and learning uses the commitments made by the state towards its citizens as a point of departure. It analyses the reasons why girls, boys, women and men are not accessing education or reaching learning targets despite these commitments and focus the support on addressing these barriers. The barriers are often many and complex, such as lack of political priority, low expectations on the benefits of education, lack of accessible toilets and school buildings, discriminatory attitudes, inflexibility in organization and curriculum, unsafe and long school roads, lack of competence and capacity of teachers and school authorities to meet the variation of learners needs etc. Girls, minority children, working children and children with disabilities are often the most excluded and disadvantaged in education.

4.3 A Conceptual Framework for Promoting the Right to Education

The development of a human rights-based approach to education requires a framework that addresses the right of access to education, the right to quality education and respect for human rights in education. These dimensions are interdependent and interlinked and a rights-based education necessitates the realization of all three. The right to education requires a commitment to ensuring universal access, including taking all necessary measures to reach the most marginalized children. But getting children into schools is not enough; it is no guarantee of an education that enables individuals to achieve their economic and social objectives and to acquire the skills, knowledge, values and attitudes that bring about responsible and active citizenship. Achieving a quality education is also a challenge in industrialized nations.

To ensure quality education attention must be paid to the relevance of the curriculum, the role of teachers and the nature and ethos of the learning environment. A rights-based approach necessitates a commitment to recognizing and respecting the human rights of children while they are in school – including respect for their identity, agency and integrity. This will contribute to increased retention rates and also makes the process of education empowering, participatory, transparent and accountable. In addition, children will continue to be excluded from education unless measures are taken to address their rights to freedom from discrimination, to an adequate standard of living and to meaningful participation. A quality education cannot be achieved without regard to children's right to health and well-being. Children cannot achieve their optimum development when they are subjected to humiliating punishment or physical abuse. The conceptual framework highlights the need for a holistic approach to education, reflecting the universality and indivisibility of all human rights.

5. Constitutional development: Education and Children

The Constitution makers, considering the fact that India is a welfare State, recognized the importance of the rights of the child in a nation's development. The Indian Constitution in its original enactment defined education as state subject. Under Article 42 of the Constitution, an amendment was added in 1976 and education became a concurrent list subject which enables the central government to legislate it in the manner suited to it. Besides India is signatory to a number of international covenants i.e. Jomtien declaration, UNCRC, MDG goals, Dakar declaration SAARC SDG charter for children which is binding on its commitment for making education a reality for all children. Thus, Right to education as such had not been granted as a fundamental right under Part III of the Constitution but reading of the Preamble and provisions of Part III & IV cumulatively makes it clear that the Constitution makers made it obligatory for the State to provide education for its citizens. The Preamble promises to secure justice "social, economic and political" for the citizens, which has been specifically enjoined as an object of the State under Article 38 of Constitution. The Preamble further assures dignity of the individual and to achieve this objective fundamental rights are guaranteed to individuals. An individual cannot be assured of human dignity unless his personality is developed and the only way to do that is to educate individuals.

The Constitution (Amendment) Act, 2002[7] inserted Article 21-A in the Constitution of India to provide free and compulsory education of all children in the age group of six to fourteen years as a Fundamental Right in such a

[6] http://www.unfpa.org/human-rights-based-approach#sthash.M7sAOf51.dpuf (last visited on December 2, 2016)

[7] The Constitution (Eighty-sixth Amendment) Act, 2002

manner as the State may, by law, determine. The Right of Children to Free and Compulsory Education (RTE) Act, 2009, which represents the consequential legislation envisaged under Article 21-A, means that every child has a right to full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards. Article 21-A and the RTE Act came into effect on 1 April 2010. The title of the RTE Act incorporates the words "free and compulsory". "Free education' means that no child, other than a child who has been admitted by his or her parents to a school which is not supported by the appropriate Government, shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education. "Compulsory education" casts an obligation on the appropriate Government and local authorities to provide and ensure admission, attendance and completion of elementary education by all children in the 6-14 years age groups. With this, India has moved forward to a rights based framework that casts a legal obligation on the Central and State Governments to implement this fundamental child right as enshrined in the Article 21A of the Constitution, in accordance with the provisions of the RTE Act[8].

The Right to Education Act 2009 did not initially talk about "Physically disabled" children. To enable such provisions, the Right of Children to Free & Compulsory Education (Amendment) Bill 2010 was introduced in the RajyaSabha on April 16, 2010. This bill was later referred to a standing committee on Human Resource Development. The bill was passed in both the Houses of the Parliament in May 2012, thus expanding the definition of "Child belonging to disadvantaged group". Now this group shall also include the children with disability. Disability means blind, leprosy cured, hearing impaired, loco motor disabled and mentally ill. It also includes autism, cerebral palsy, mental retardation and multiple disabilities. These children have the same right as of other children. It's to be noted that Right to Education of persons with disabilities until 18 years of age is laid down under a separate legislation - Persons with Disabilities Act.

Thus, there are five articles in the Constitution of India which have children as their special focus. These articles are Article 21A, 24, 39 & 45 and 51A (k). Thus special provisions for children find place in our Constitution in Fundamental Rights, Directive Principles as well as Fundamental Duties. Article 21A[9] states, "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine". Article 24 states that no child below the age of 14 years shall be employed to work in any factory or mine or engaged in hazardous employment. Article 39 (f) states that the State shall, in particular, direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. Article 45[10] states that, "The State shall endeavor to provide early childhood care and education for all children until they complete the age of six years." Article 51A(k)[11] states, "who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years."

Education is a fundamental right of every child in India now. The RTE Act came but was unable to put all children in school. Or, it took birth with shortcomings. It speaks about free and compulsory education from the age of six. But what about children who are below six? The demon named child labour induction starts quite early, putting the gullible children on a one-way path to suffering. Children should begin the process of learning quite early if they ever have to embrace the path of education.

With child labour in prevalence, there will always be children outside school. A zero-tolerance approach to the practice of child labour can only enable the children to get a chance at education.

There must be preparatory education for those children who are first generation learners. Without such preparation and special attention, they might drop out even after getting mainstreamed into schools.

Like learning, effective teaching is necessary for children from disadvantaged backgrounds to benefit from staying in school. It can be achieved by proper training of the teachers with the right methodologies. Prior to that, the shortfall of teachers in both primary and upper primary levels across India must be met. Besides the required number of teachers and proper training, upgrading infrastructure in schools is another factor in making the RTE a success. The RTE act can bring home the change of the century provided an identified agency or authority is put in place, as is the case with the Right to Information (RTI) Act. There is need for sensitizing the teachers, un/privileged children and their parents. There are still issues of larger proportion for ensuring proper

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8 http://mhrd.gov.in/rte (last visited on December 20, 2016)

9 The Right to Education inserted in Constitution with 86th Amendment Act

10 Amended by 86th Amendment Act 2002

11 *Id.*

implementation of the RTE Act in empowering children through education, including provision of huge resources. Resolving them is necessary, but one cannot wait till all issues are taken care of. Smart NGOs must make efforts to achieve the outcome in their own way and must be been able to leverage the Act.

6. Conclusion

Education is not a static commodity to be considered in isolation from its greater context; it is an ongoing process and holds its own inherent value as a human right. Not only do people have the right to receive quality education now, they also have the right to be equipped with the skills and knowledge that will ensure long-term recognition of and respect for all human rights. As the Committee on Economic, Social and Cultural Rights observes in the opening lines of its General Comment No. 13, "…education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities."[12] A rights-based approach to education is imperative.

Schooling that is respectful of human rights both in words and in action, in schoolbooks and the schoolyard is integral to the realization of quality education for all. Complex barriers can impede the goals of Education for All; a rights-based approach to education plays a key role in overcoming such obstacles.

Education does not exist in a vacuum. Ensuring that every child has access to quality and respectful learning environments throughout his or her childhood necessitates action far beyond ministries of education. The right to education can only be realized in a political and economic environment that acknowledges the importance of transparent, participatory and accountable processes, as well as broad-based collaboration both across government and in the wider society. It needs a long-term strategic commitment to the provision of adequate resources, development of cross departmental structures, engagement with the energies and capacities of parents and local communities, and partnership with non-governmental organizations.

[12] Committee on Economic, Social and Cultural Rights, 'General Comment No. 13: The Right to education (Article 13)', E/C.12/1999/10, December 1999, para. 1.

Dissipation under the Colour of Office: Police Encounters

Aditi Malhotra*

ABSTRACT

The killing of eight SIMI alleged terrorists in an encounter in Bhopal after they escaped from judicial custody is the latest episode that brings into light various ambiguities relating to extra judicial killings. The video clips of the episode ostensibly capture the policemen shooting at the injured deserters who were purportedly shooting at them. However, the genuineness of these tapes IS yet to be ascertained. Further, it is difficult to ascertain how these police personnel miraculously escaped unharmed. The National Human Rights Commission has taken suo-moto cognizance and sought reports detailing the occurrence. The paper aims to delve into the police encounters to determine whether the police personnel exceed their right to private defence while staging such incidents to hide their own missteps.

Key Words: Encounter, Retaliation, Rule of Law, Human Rights

1. Introduction

"In a country governed by the Rule of law, police excesses whether inside or outside the jail cannot be countenanced in the name of maintaining discipline or dealing with anti-national elements. Accountability is one of the facets of the Rule of law. If anyone is found to have acted in breach of law or abused his position while exercising powers that must be exercised only within the parameters of law, the breach and the abuse can be punished. That is especially so when the abuse is alleged to have been committed under the cover of authority exercised by people in uniform. Any such action is also open to critical scrutiny and examination by the courts."[1]

While in judicial custody, the accused TulsiramPrajapati addressed a letter to the Collector, Udaipur and the Chairman, National Human Rights Commission apprising them of the fact that his life was in danger given that he was a prime witness in the eminent murder case of Sohrabuddin and his wife Kausarbi[2]. His letter related the incident of him being beaten up by co-prisoners on several occasions. He mentioned of a conspiracy by the Gujrat, Rajasthan and Maharashtra police officials to eliminate him by means of a fake encounter[3]. This accused involved in more than twenty criminal cases was in fact shot dead in a police firing while trying to escape. The Apex Court while hearing the petition under Article 32,[4] presented by the deceased's mother instructed the Gujrat Police Authorities to handover the records to the Central Bureau of Investigation and ordered the probe to be completed within a period of six months[5].

Similarly in the recent case of Extra Judicial Execution Victim Families Association v. Union of India,[6] the petitioners alleged that 1528 extra judicial killings had been organized by the Manipur security forces after extreme torture upon the victims. Some of the encounters were not even in documents, while in some others; the identity of the accused was kept under wraps.[7] The witness' accounts substantiated the contention that these were cold blooded murders; nonetheless the security forces justified them as true encounters.[8] Not a single First Information Report was lodged by the Manipur Police

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1 State of Maharashtra v. SaeedSohail Sheikh, (2012) 13 SCC 192

2 Narmada Bai v. State of Gujarat, AIR 2011 SC 1804

3 *Id.*

4 Article 32, THE CONSTITUTION OF INDIA, 1950 states that:
1. The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed
2. The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part
3. Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction ill or any of the powers exercisable by the Supreme Court under clause (2)
4. The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution

5 *Supra note 2.*

6 Extra Judicial Execution Victim Families Association v. Union of India, AIR 2016 SC 3400

7 *Id.*

8 *Id.*

despite several complaints languishing away. The demand was to establish a Special Investigation Team to probe the matter in accordance with law. A Bench of Madan B. Lokur and U. U. Lalit, (JJ.) decided with the petitioners that the killings were in fact illegal and that compensation to the next of kin should have been given.[9] These episodes herald several questions.

1. Was this a legitimate encounter or a made-up incident by the men in uniform?

2. How does one determine whether such act was malicious or vindictive?

2. Judicial stance

India, despite being a party to the Universal Declaration of Human Rights, 1948 is faced with a situation where torture and custodial misconduct are rampant. A complete overhaul in the Police Administration System is the need of the hour. In Prakash Singh v. Union of India,[10] the Supreme Court realized this lacuna and reiterated the measures recommended by the National Police Commission, set up so as to review and examine the role and performance of the police as a law enforcing mechanism and protector of Constitutional Rights. The main objectives of this set of directives were twofold, viz., providing tenure to and streamlining the appointment or transfer processes of policemen, and increasing the accountability of the police.[11]

In Matajog Dobey v. H.C. Bhari,[12] the Supreme Court laid down a prudent step by step approach in the matters governing sanction under the provisions of the Code of Criminal Procedure, 1973. The same principle may be applicable while enquiring into a fake encounter: "The first step is to ascertain whether the act complained of is an offence and the second step is to determine whether it was committed in the discharge of official duty. There must be a reasonable connection between the act and the official duty…….What we must find out is whether the act and the official duty are so inter-related that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation."[13]

The duty of the police personnel is to safeguard life and property. For this purpose they may use necessary force where the perpetrator resists.[14] However, the one on the receiving end of aggression has a clear right of private defence which is retaliatory in nature and may extend to the causing of death only under exceptional circumstances.[15] In Rohtash Kumar v. State of Haryana,[16] the Supreme Court has elucidated upon that fact that retaliation shall be the last resort even when faced with a vicious criminal. It was held that: "It also appears that he [the Appellant] was declared absconder. But merely because a person is a dreaded criminal or a proclaimed offender, he cannot be killed in cold blood. The police must make an effort to arrest such accused. In a given

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9 *Id*.

10 Prakash Singh v. Union of India,(2006) 8 SCC 1

11 R.N. Mangoli, Ganapati M. Tarase, *A Study of Human Rights Violation by Police in India,* Vol.3 (2) INTERNATIONAL JOURNAL OF CRIMINOLOGY AND SOCIOLOGICAL THEORY401-418 (2010).

12 Matajog Dobey v. H.C. Bhari, (1955) 2 SCR 925

13 *Id*.

14 Sec. 46, The Code of Criminal Procedure, 1973, states that:
1. In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action
Provided that where a woman is to be arrested, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer is a female, the police officer shall not touch the person of the woman for making her arrest.
2. If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest
3. Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life
4. Save in exceptional circumstances, no women shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made

15 Sec. 100,The Indian Penal Code, 1860, states that:
The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:-
First- Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;
Secondly-Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;
Thirdly- An assault with the intention of committing rape;
Fourthly-An assault with the intention of gratifying unnatural lust;
Fifthly- An assault with the intention of kidnapping or abducting;
Sixthly- An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release

16 Rohtash Kumar v. State of Haryana, (2013) 14 SCC 290

case if a dreaded criminal launches a murderous attack on the police to prevent them from doing their duty, the police may have to retaliate and, in that retaliation, such a criminal may get killed."[17] On the same lines, it has been held that if it is shown that there has been an assault towards the original assailant in the garb of private defence despite reasonable apprehension having ceased, the plea of self-preservation shall be negated.[18]

The Court further cautioned that it rarely matters that the victim was a common man, a terrorist, or part of a militant organization. In a democratic State such as ours, Rule of Law mandates that the law of land is equally applicable to each of them.[19] There is the imperative requirement of ensuring that the guardians of law and order do in fact observe the code of discipline expected of them and that they function strictly as the protectors of innocent citizens.[20]

It is therefore crucial that each instance of an alleged extra-judicial killing be examined with due care and caution. It might turn out that the victim was in fact an enemy. Nonetheless, this, enemy may actually be a citizen of the country entitled to fundamental rights especially under Article 21[21] and thus, the argument for discussion would still remain whether excessive or retaliatory force was used to kill that enemy.[22] In the case of Darshan Singh v. State of Punjab,[23] too it was aptly held that "when there is real apprehension that the aggressor might cause death or grievous hurt, in that event the right of private defence of the defender could even extend to causing of death. A mere reasonable apprehension is enough to put the right of self-defence into operation, but it is also a settled position of law that a right of self-defence is only a right to defend oneself and not to retaliate. It is not a right to take revenge."[24]

In the wake of the numerous instances relating to fake encounters, R. M. Lodha, J. in the case of People's Union for Civil Liberties v. State of Maharashtra,[25] while dealing with the issue of 99 encounters that were carried out by the Maharashtra police force pronounced certain guidelines to ensure that the contours of justice are not overstepped. These are delineated hereafter:[26]

1. Tip offs regarding criminal movement or activity shall be recorded in writing without disclosing the details of the suspect or his location.
2. If in pursuance of the tip off, an encounter takes place that results in death, a First Information Report shall be registered and forwarded and to the magistrate.[27]
3. An independent investigation of the encounter shall be carried out under supervision of a senior officer.
   a. Colored photographs of the victim shall be taken in order to identify him.
   b. The Team shall gather all necessary evidence.
   c. Names and contact details of witnesses shall be obtained.
   d. The cause and manner of the death shall be determined.
   e. Fingerprints of the deceased shall be sent for examination.

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17 *Id.*

18 V. Subramani v. State of Tamil Nadu, (2005) 10 SCC 358

19 *Supra note 12.*

20 ChaitanyaKalbagh v. State of UP, AIR 1989 SC 1452

21 Art. 21, THE CONSTITUTION OF INDIA, 1950 states that,"No person shall be deprived of his life or personal liberty except according to procedure established by law."

22 The Supreme Court of India held in 1974 in the case of D. Bhuvan Mohan Patnaik v. State of Andhra Pradesh1975 SCR (2) 24 that,"prisoners are not denuded of their fundamental rights including their right to life, by mere reason of their incarceration"

23 Darshan Singh v. State of Punjab,(2010) 2 SCC 333

24 *Id.*

25 People's Union for Civil Liberties v. State of Maharashtra, 2015 (3) SCJ 584

26 *Id.*

27 Sec157, The Code of Criminal Procedure, 1973 states that:

1. If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender; Provided that:

a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot;

b) if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case

2. In each of the cases mentioned in clauses (a) and (b) of the proviso to sub- section (1), the officer in charge of the police station shall state in his report his reasons for not fully complying with the requirements of that sub- section, and, in the case mentioned in clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated

f. The Post mortem of the deceased shall be video graphed and undertaken by two doctors, one being the Head of the District Hospital.

4. An inquiry under section 176 of the Code of Criminal Procedure shall be carried out and a report be sent to the Judicial Magistrate under section 190 of the Code.[28]
5. The National Human Rights Commission shall not intervene unless there is doubt upon the impartial investigation. However, the information of the incident must be sent to National or the State Human Rights Commission, at the earliest possible opportunity.
6. Medical Assistance shall be provided to the victim and his statement recorded.
7. The report of the investigation shall be sent to the appropriate Court.[29]
8. In the event of death, the next of kin of the alleged criminal/victim must be informed at the earliest.
9. Reports of incidents involving police firing that lead to death must be sent to the National Human

[28] Sec.176, The Code of Criminal Procedure, 1973 states that:

1. When any person dies while in the custody of the police or when the case is of the nature referred to in clause (i) or clause (ii) of Sub-Section (3) of section 174, the nearest Magistrate empowered to hold inquests shall, and in any other case mentioned in Sub-Section (1) of section 174, any Magistrate so empowered may hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police officer; and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence

1A. Where,-

any person dies or disappears, or rape is alleged to have been committed on any woman, while such person or woman is in the custody of the police or in any other custody authorised by the Magistrate or the Court, under this Code in addition to the inquiry or investigation held by the police, an inquiry shall be held by the Judicial Magistrate or the Metropolitan Magistrate, as the case may be, within whose local jurisdiction the offences has been committed

2. The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any manner hereinafter prescribed according to the circumstances of the case
3. Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death, the Magistrate may cause the body to be disinterred and examined
4. Where an inquiry is to be held under this section, the Magistrate shall, wherever practicable, inform the relatives of the deceased whose names and addresses are known, and shall allow them to remain present at the inquiry
5. The Judicial Magistrate or the Metropolitan Magistrate or Executive Magistrate or police officer holding an inquiry or investigation, as the case may be, under Sub-Section (1A) shall, within twenty-four hours of the death of a person, forward the body with a view to its being examined to the nearest Civil Surgeon or other qualified medical person appointed in this behalf by the State Government, unless it is not possible to do so for reasons to be recorded in writing

Explanation - In this section, the expression "relative" means parents, children brothers, sisters and spouse

[29] Sec. 173, The Code of Criminal Procedure, 1973 states that:

1. Every investigation under this Chapter shall be completed without unnecessary delay

1A. The investigation in relation to rape of a child may be completed within three months from the date on which the information was recorded by the officer in charge of the police station

2. (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating:

a) the names of the parties;
b) the nature of the information;
c) the names of the persons who appear to be acquainted with the circumstances of the case;
d) whether any offence appears to have been committed and, if so, by whom;
e) whether the accused has been arrested;
f) whether he has been released on his bond and, if so, whether with or without sureties;
g) whether he has been forwarded in custody under section 170
h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under section 376, 376A, 376B, 376C 2[376D or section 376E of the Indian Penal Code]

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any whom the information relating to the commission of the offence was first given

3. Where a superior officer of police has been appointed under section 158, the report, shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation
4. Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit
5. When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report:

a. all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;
b. the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses

6. If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceeding or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request
7. Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub-section (5)
8. Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding, such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)

Rights Commission and Director General of Police on a half yearly basis in the prescribed format.[30]

10. Disciplinary action shall be instituted and the officer be placed under suspension if an offence by use of fire arm under the Indian Penal Code, 1860 has been committed.
11. Provisions of Section 357A shall apply.[31]
12. No gallantry award shall be bestowed on the officer soon after the incident.
13. The family of the victim shall have recourse to the Session Judge for lack of independent investigation.[32]

Even prior to the pronunciation of these guidelines, several proposals by the High Courts and the National Human Rights Commission were predominant. However, none of them have been able to effectively tackle the situation.

3. Conclusion

"It is not the gun that kills; it is the mind that decides to." This is essentially so because with the escalation in terrorist activity, those who assassinate them emerge as modern day heroes delivering instant justice.[33]

The Security Forces in a Democratic Welfare State are expected to assist the citizens and be responsible for own acts. However, both these virtues are lacking with rising occurrences of police brutality. Little is being done to restrain police excess. Police academies lack courses for training officers in minimizing the use of force. There is acceptance, and even sanction at the highest level of leadership, of encounter killing.[34] It is rightly so that 'No one can be a Judge in his own Cause' and therefore, the police cannot themselves uphold the legality of their killing evading the due process of law. If the Constitution and the laws framed by Parliament provide for a procedure to be followed in all cases of death, there is no reason why the police can claim an exception and assert its right to cause death without proper investigation and trial in accordance with law.[35] It is thus essential that in every encounter that ensues death, a case of Culpable Homicide be registered and investigated by an autonomous agency and followed up by the courts from time to time. Perhaps this may deter fake encounters in the near future and put across the message that Rule of Law shall not be subverted.

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[30] It shall contain the following:
1. Date and place of occurrence
2. Police Station, District
3. Circumstances leading to deaths:
4. Self defence in encounter
5. In the course of dispersal of unlawful assembly
6. In the course of affecting arrest
7. Brief facts of the incident
8. Criminal Case No.
9. Investigating Agency
10. Findings of the Magisterial Inquiry/Inquiry by Senior Officers:

a) disclosing, in particular, names and designation of police officials, if found responsible for the death; and
b) whether use of force was justified and action taken was lawful

[31] Sec. 357A, The Code of Criminal Procedure, 1973 states that:
1. Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation
2. Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1)
3. If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation
4. Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation
5. On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry-award adequate compensation by completing the enquiry within two months
6. The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit

[32] People's Union for Civil Liberties v. State of Maharashtra, 2015 (3) SCJ 584

[33] People's Union for Civil Liberties, *Close Encounters: A Report on Police Shootouts in Delhi,* (2014), *available at:* http://www.pucl.org/major_reports/close_encounters.pdf (last visited on 15th November, 2016)

[34] Arvind Verma, A Heavy Hand: *The use of force by India's Police,* (August 2012) *available at:* http://www.india-ava.org/fileadmin/docs/pubs/IAVA-IB3-A-Heavy-Hand.pdf (last visited on 15th November, 2016)

[35] Sanjay Parikh, *Police Encounter Guidelines: Reaffirmation of Rule of Law,* Mainstream Weekly (October 6, 2016) *available at:* http://www.mainstreamweekly.net/article5227.html)(last visited on 15th November, 2016)

Nurturing Childhood against Crime: Unraveling Shadows behind the Young Offenders

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ABSTRACT

A juvenile can be characterised as a person who has not achieved mental maturity to understand the complexities of matter that come across his life. Due to this our law has always been lenient while dealing with juvenile delinquents. The sustained public pressure and outcry led by Nirbhaya's parents and supporters compelled a stalled RajyaSabha to debate and pass the law in a single day amending the Act. The juvenile, between the ages of 16-18 years, committing a heinous offence are now being tried for adult crime and sent to jail along with usual perpetrators. Harsh punishment cannot be a deterrent and this in turn could make juveniles hard core criminals. Thus this paper purports to analyze the societal factors that contribute to the committing of offence by the juveniles, the possible solutions and the need for reforms at the grass root level to prevent the juveniles from committing crime rather than punishing them for the actions which will serve no good, the flaws of recent amendment made in Juvenile Justice Act and its impact on the society. The paper will also make a comparative analysis of the Juvenile Justice System around the world. Lastly, the paper attempts to put forth various suggestions for dealing with the juvenile delinquents rather than by means of punishment. The new approach should focus more on restitution and rehabilitation of the juveniles compared to retribution. Victims should not be forgotten entities in the justice delivery system. Hence any variation in the system should take this into consideration while adopting the same.

Keywords: Juvenile Justice, Delinquents, Offenders, Punishment, Rehabilitation

1. Introduction

"Child is the father of the man" is a saying which means that man is the product of his habits and behavior developed in the childhood. It is now a saddening fact that the crimes committed by the children are increasing at an alarming rate. Juveniles are the youth of today as well as tomorrow. Juvenile in conflict with law is one of the most important issues which needs to be dealt with. The change in the level of exposure and social environment has resulted in corroding the mindset of the juveniles, so much so that its treatment has become next to impossible.

The Juvenile Justice Act which deals with the juveniles in conflict with law has now been amended. The public hue and cry during the release of the juvenile offender of the Nirbhaya case led to the amendment of the Act in a hastily manner without any consideration for justice. However the Parliament in its wisdom, under renewed public pressure has enacted a new Juvenile Justice Act.[1] According to the recent amendment children between the ages of 16-18 years can be tried as adults if they commit a heinous crime. The bill was passed by evoking a nationwide debate with people supporting as well as opposing the amendment. The amendment gives discretionary powers to Juvenile Justice Board to transfer child delinquents to criminal court for trial and punishment. In this context, the issues addressed through this paper are whether the amendment aids in arresting the crimes, whether it is at odds with the constitutional safeguards guaranteed to children and the ill effects of such an amendment which was an outcome of political expedience rather than serving proper justice.[2] The basic premise to enact such a law is public outcry over a recent crime pertaining to rape and murder. But such step obviously will lead to retributive justice, not juvenile justice. Juveniles are often considered as the weaker section of the society and our Constitution has always been lenient while handling child delinquents but the recent amendment is antithetic to the same.

2. Factors contributing to the commission of the offence by Juveniles

There are a number of causes responsible for juvenile delinquency, some of which include:

a. Urbanization: The shift in the habitat has exposed children to a world that is cruel and brutal. Media should also be held responsible for polluting young minds.

b. Family: Lack of positive communication by

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1 Harpal Singh, *New Juvenile Justice Act: A Setback for Child Rights,* THE BLOG, THE HUFFINGTONPOST, *available at* http://www.huffingtonpost.in/harpal-singh/new-juvenile-justiceact-_b_8893144.html, (last visited on October 22,2016)

2 Special Correspondent, *Amendment to Juvenile Justice Act Criticized,* THE HINDU (April 2, 2016), *available at* http://www.thehindu.com/news/national/karnataka/amendment-to-juvenile-justice-act-criticised/article7140406.ece (last visited on October 23, 2016).

guardians is a major factor resulting into juvenile delinquency. A child hears things from his parents and on the basis of that, he differentiates between what is right and what is wrong.

c. Neglect: Every child needs love affection and attention but when these are unavailable the child seeks other ways to satisfy himself and this often leads to indulgence in crime.

d. Biological factors: There are several children who attain puberty early and when the child does not get a proper guidance in such a scenario, then delinquency is likely to develop.

e. Socio-environmental factors: Whatever a child sees and hears, he learns the same and adapts himself accordingly. And this affects his behavior and temperament.

f. Poverty and illiteracy: Though poverty and unemployment are not, by themselves causes of violence, they become important factors when coupled with other triggers such as lack of opportunity, inequality, exclusion, the availability of drugs and firearms, and a breakdown in access to various forms of justice and education. Poverty and illiteracy go hand in hand. Statistics have shown that majority of the juveniles are from a poor and uneducated background.

   According to National Crime Records Bureau, on classifying the delinquents on the basis of economic status, it is seen that those families that have income of Rs. 25,000 or less constitute a major part of juvenile delinquents.[3] This is because parents are unable to send their children to schools resulting into lack of education. Moreover, children who have attained education more than primary schooling but less than higher education are the ones who have the tendency to be more delinquent. This is basically because at this age, they attain puberty and if all the factors, some of which I discussed above, are not appropriate, there are chances of a child becoming delinquent.

With such a rise in the number of delinquents, the question arises: Is our Juvenile Administration effective enough to deal with them?

3. Flaws in the Amendment

Sending juveniles who allegedly commit 'serious' crimes to jail on the excuse of public safety is not in the interest of children, families, or the wider community. Placing adolescents who are at a difficult transitional phase in their lives along with adult criminals will only serve to place these young people at risk of being physically, sexually and emotionally abused and being further criminalized. This regressive outcome is in stark contrast to our constitutional mandate and the rehabilitative aims outlined in the preamble of this Bill.[4] Neuroscience proves in more ways than one, that an adolescent is at an age where he/she is not mature enough to understand the consequences of his/her actions. He/she is still vulnerable and can live a normal healthy adult life if allowed to undergo reformation through corrective measures. Our reluctance to acknowledge and prevent issues that cause children to turn to crime is a detriment to society.

Moreover when a juvenile is send to an adult court he will probably leave the court premises when he turns the age of 26 or 28 and at this prime age he will be accompanied with social stigmatization which in turns defeat the very purpose of juvenile law. The amendment reinforces the deceitful idea that sending juveniles to jail who commits ghastly crimes can maintain social order and tranquility.

According to the Article 40(1) of the UNCRC, all children in conflict with the law must be treated in a manner that is consistent with their sense of dignity and worth and reinforces their respect for human rights and fundamental freedoms. The treatment must ensure promotion of their reintegration into society. The Juvenile Justice Bill, 2014 blatantly disregards the aims of reintegration and restoration of a child in conflict with the law, by providing for a highly arbitrary determination of their competence to make 'meaningful contributions' to society when they reach the age of 21 years. A failure to pass this test would result in an automatic transfer to an adult jail. Even if a child is found to have undergone reformative changes at the end of this assessment process however, she or he will incur the disqualifications attached to the conviction, making it difficult to secure gainful employment or stand for elections in short the idea of reintegration would be nearly impossible. Putting children with adult criminals is self-destructive and self-defeating. Adolescents in conflict with law need adult guidance not the company of hardened criminals.[5]

The provisions that are inserted in the bill blatantly violates Articles14, 15(3) and 21 of the Constitution and International conventions which allows special laws for marginalized sections of society, including children.

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[3] Dr. Shimayil Wani, *Children, Rights and the Law: An Empirical Study of Deprivation of Rights and Humane Treatment of Juveniles in Conflict with Law in India,* The 6th International Conference of the International Juvenile Justice Observatory (IJJO), 3- 4 December, 2014, Brussels (Belgium), *available at:* http://www.oijj.org/sites/default/files/paper_oijj_re-_revised.pdf (last visited on October 24, 2016)

[4] *Id.*

[5] *Id.*

When a 16-year old commits an offence that attracts a minimum seven year sentence, he will be produced before the Juvenile Justice Board comprising a magistrate and two social workers who will decide on the physical and mental capacity of the child to commit the offence as well as his ability to understand the consequence of the offence and the circumstances in which he committed the offence.[6] This is a very subjective process which creates scope for an enormous amount of arbitrariness and the "latest research shows that individualized assessments of adolescent mental capacity are not possible." Hence, the preliminary assessment by the Juvenile Justice Board providing for procedural arbitrariness violates Articles 14 and 21 because an accurate assessment of mental capacity for the purpose is just not possible and will result in subjective and arbitrary transfers into the adult criminal system. The assessment also violates the principle of presumption of innocence as it operates on the assumption that the child has committed the offence.[7]

By treating adolescents as adults, the proposed system will incorrectly treat two distinct categories equally.[8] This strikes at the very core of Article 14. The Supreme Court has repeatedly upheld the principle that injustice arises not only when equals are treated unequally, but when unequal are treated equally. The Bill creates a distinction between two juvenile offenders committing the same offence on the basis of the date of apprehension. It is unclear what public purpose is being achieved by differentiating between two individuals, committing the same offence, on the basis of date of apprehension Article 21states that no person can be deprived of their right to life or personal liberty, except according to procedure established by law. Courts have interpreted this to say that any law or procedure established should be fair and reasonable; the differentiation based on the date of apprehension may fail this standard. In 2005, a Constitution Bench of the Supreme Court, while determining the age of a juvenile and the resulting penalty (under the 2000 Act and an earlier 1986 Act) decided that the date on which the offence is committed matters, and not the date of apprehension.[9] The provision of the Bill mentioned above contradicts this ruling of the Constitution Bench, and considers the date of apprehension when deciding the penalty given to a juvenile.[10]

Further the provision in the Juvenile Justice Bill stipulating that if a juvenile between the ages of 16–18 commits an offence and is apprehended at a later date he will be subjected to a higher penalty than what would be applicable to him if he had been apprehended at the time of commission of the offence is inconsistent with Article 20(1) of our Constitution which lays down that a person should not get a penalty higher than what would be applicable at the time of commission of the offence.

The UN Convention on the Rights of the Child is a human rights treaty which was enacted to safeguard the civil, political and cultural rights of the children; it acts a watch dog for protecting the interest of the children. India is a signatory to the UNCRC which mandates the age of a child to be below 18 years. Countries all over the world use this definition. India too, defines a child between the ages of 0-18 years. By law, he/she is not allowed to vote, sign a contract or engage a lawyer because he /she is not considered mature enough to make such decisions.[11] By enacting this law our country has gone against the spirit of the International convention. Article 19 of the Convention states that state parties must: "Take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence." When children are pushed into this complex legal system they are administered with mental and physical torture which results in manufacturing hardened criminals.

4. The Juvenile Justice System around the world- A Comparative Analysis

In the U.S.A, the age to determine the juvenile varies from state to state, while most of the states it is 18 years, in few it is 16 or 17 years. In U.K, a child between the ages of 10-18 years becomes criminally responsible for his actions. He can be tried by the youth court or the adult court as per the severity of the offence committed. The Youth Court can issue community sentences, behavioral programs, youth detention and rehabilitation programs which last for three years. In Canada, the Youth Criminal Justice Act governs the application of criminals and correctional law to those

6 Staff Reporter, *Very Basis of Juvenile Justice Amendment Is Unconstitutional,* THE WIRE (May 12, 2015), *available at* https://thewire.in/1534/very-basis-of-juvenile-justice-amendment-is-unconstitutional/,(last visited on October 24, 2016).

7 Swagata Raha, et. el. *Transfer system, mental capacity assessment in juvenile justice bill violates equality rights,* MY LAW BLOG (May 28, 2015) *available at:* http://blog.mylaw.net/transfer-system-mental-capacity-assessment-in-juvenile-justice-bill-violate-equality-and-are-arbitrary/, (last visited on October 23, 2016)

8 M. Nagaraj v. Union of India, AIR 2007 SC 71; Joginder Nath v. Union of India AIR 1975 SC 511.

9 Pratap Singh v. State of Jharkhand &Anr., Appeal (Crl.) 210 of 2005, Decided on February 2, 2005, (N. Santosh Hegde, S.N. Variava, B.P. Singh, H.K. Sema (JJ.) (Supreme Court of India)

10 Legislative Brief The Juvenile Justice (Care &Protection of Children) Bill, 2014,*available at* http://www.prsindia.org/uploads/media/Juvenile%20Justice/ Legislative%20Brief%20Juvenile%20Justice%20Bill.pdf, (last visited on October 24, 2016).

11 Jatin Gandhi Ed.,10 Things you Need to Know About the new Juvenile Law, CHEAT SHEET NDTV (December 22, 2015) *available at:* http://www.ndtv.com/cheat-sheet/10-things-you-need-to-know-about-the-new-juvenile-law-1257667(last visited on October 25, 2015).

who are 12 years old or older, but younger than 18 at the time of committing the offence. Although trials take place in a youth court, a youth may be awarded an adult sentence for certain offences and in certain circumstances.

Countries all around the world, such as US, UK and France have realized the need for change and have acted accordingly. U.S Juvenile Justice System involves both incarceration as well as alternative schooling programs. In UK, children between 13 and 15 years who commit crime are tried under Youth Court and if the crime committed is serious, the case is transferred to Crown Court. Similarly, in France, if a minor between 13 and 18 years commits an offence, punishment can be educational as well as criminal, in special circumstances.[12]

5. Delving into the real cause: The much needed change in approach

The concern of the society has always been on the offender rather than the cause of offence. It is high time that the society should analyze "what is it that is causing the child to adopt a path of criminality".[13] It also becomes vital to study the genesis of crime amongst children at the age eighteen, sixteen or even fourteen or twelve. There is enough evidence to suggest that there is a complete collapse in the social order and therefore, it become all the more important to identify the reasons for the same.[14] It should not be an overlooked factor that majority of the children in conflict with law come from illiterate families, poor homes or are even homeless.[15]

This clearly suggests that the poor and the marginalized sections of the society fall prey to such illegal ways,[16] thus it can be concluded that most of the juveniles who commits heinous crimes are victims of violence, neglect, emotional deprivation, sexual abuse, broken families, poverty, substance abuse and so on and by sending them to jail without giving any chance to reform we are doing a grave injustice to the children as well as to society as whole. Most of the child offenders are dogged with post-traumatic stress and mental agony for years and transferring them to the adult criminal justice system and incarcerating them in adult prisons will only lead to a situation where these youngsters will come out of jail a few years later-thoroughly groomed and trained as career criminals.

Rather than understanding the more complex background that breeds such dreadful acts of crime and violence in our legal systems, we often, take recourse to fixing individual blame. Law should be a system that should be reformative in its character rather than being strictly retributive. The use of punishment alone cannot be the only premise to reinstate clarity to the social order. It is necessary to probe into a welfare analysis, to recognize why and how criminal situations and behaviors occur - without justifying the crime of course. A welfare analysis should involve the discerning of a social chain, a chain to trace social injustices that give birth to criminal behavior amongst children.[17] The thorough study of social welfare chain of the incidents of child crimes would provide ample evidence of the failure, on the part of the state, to secure social justice for those many children who have accidentally brushed themselves against the law.[18]

Punishment alone cannot realize the idea of justice and welfare in any legal system. Moreover there is no evidence available to support the claim that subjecting juveniles who commit serious crimes as adults will deter crime.[19] Social welfare should promote efforts at reconciliation and social reconstruction and should not solely be aimed at revenge. A condemning criminal justice system would only silence the human suffering, not cure it. Banishing juveniles to adult prisons will expose them to hardened criminals who will feed on their vulnerability and initiate them into serious crime. This will put society at a higher risk and increase the supply to organized crime.[20] By tracing the reasons for juveniles in conflict with law, a rehabilitation process for the problem of child crimes can be put in the already existing institutions and systems.[21] This would thus ensure social development.

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12 Scott Bernard Peterson, *France Juvenile Justice and Youth Justice Global Youth Justice System,* GLOBAL YOUTH JUSTICE BLOG (July 31, 2014) *available at:* http://blog.globalyouthjustice.org/?p=2689(last visited October 23, 2016)

13 FP Staff, *Juvenile Justice Act: In Lok Sabha, Shashi Tharoor says amended bill will embarrass govt.,* FIRST POST (May 7, 2015) *available at:* http://www.firstpost.com/politics/juvenile-justice-act-in-lok-sabha-shashi-tharoor-says-amended-bill-will-embarrass-govt-2232156.html(last visited on October 25, 2016).

14 Miguel Queah, *The argument over the Juvenile Justice Act India, Miguel and children,* (August 6, 2014) *available at* http://miguelandchildren.blogspot.in/, (last visited on October 23, 2016).

15 Juvenile Justice Bill 2015, (introduced in RajyaSabha on December 21, 2015).

16 *Id.*

17 *Supra3*

18 *Supra7*

19 Swagata Raha, *Busting misconceptions on juvenile justice,* THE HINDU (August 26, 2013), *available at* http://www.thehindu.com/opinion/op-ed/bustingmisconceptions-on-juvenile-justice/article5061398.ece, (last visited on October 23, 2016).

20 *Id.*

21 *Supra7.*

The concern/emphasis of the system should be more in creating preventive systems of care and protection that would dissuade criminal practices amongst children at the source rather than focusing on the stigmatization of children from the age group of sixteen to eighteen. Large scale public delivery and social work interventions should be put in place to make sure that children grow up in an environment of care and support.[22] Various studies establish that juveniles involved in crimes need educational and reformative measures to rehabilitate them and punitive strategies are not as effective as reformative measures.[23]

In fact, another component of the Juvenile Justice (Care and Protection of Children) Act clearly sets out the progressive measures that are to be undertaken for "children who are in need of care and protection".[24] If Juveniles committing crimes, from the age group of sixteen to eighteen, are aware of the protection, the actualization of the other part of the same Act, by the State and the civil society, in the first place could be used as an effective deterrent machinery to prevent criminal behavior amongst those very children.[25] The most urgent and critical area of reform therefore, is not of the law, but of the way it is being implemented. If the law is implemented in letter and spirit, and services are designed and delivered by dedicated professionals from various disciplines, juveniles alleged to or found to have committed serious crime can indeed be rehabilitated, reformed and re-socialized.[26]

The need of the hour is to increase investment into education, developing infrastructure, restoration, recruiting qualified staff and rehabilitation.[27] Evidence clearly shows that given chance young offenders, even those who commit heinous crimes, are able to change and can be rehabilitated and reintegrated into the society.[28] What is needed is proper implementation of multi-systematic interventions including working with families, mentorship, the use of positive role models and cognitive behavior therapy.[29]

6. The Balancing act of Justice system

The existing juvenile justice system does not reflect an understanding of the plight or the rights of victims of juvenile crime.[30] Victims are often seen as forgotten entities in the adversarial criminal justice system. They have been met with denial and disbelief, with society failing to develop an adequate response to a crime which shows that criminal justice system which is expected to deliver a sense of justice has failed in its current response to satisfy the large majority of the victims. Restorative Justice programs that enable victim-offender reconciliation is increasingly gaining ground around the world (even in cases of juveniles who commit serious/violent crime), attempting to balance 'competency development, public safety goals and accountability in an effort to restore victims, communities and offenders, and restore broken relationships.'[31] There are little or no services or systems in the current system to ensure that the needs and rights of victims of juvenile offences are valued and realized.[32] However, the interest in protection of juveniles has to be stable with the interest of protecting particularly vulnerable members of society from violent crimes committed by persons less than 18 years of age and amending the law when societal conditions radically change over time.[33]

The perception of justice has undergone a radical change and the society has now awakened to realize that the punitive options under the current system are neither in the society's long term interest nor do they serve as an effective deterrent. Some victims demand for a benefit in the long run by restitution or restorative method. However, this 'justice deadlock' can be overcome by adopting a rehabilitative/ reformative method – one that incorporates both compassion and condemnation, both healing and justice.[34] Hence there should be balance of justice.

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22 *Supra2.*

23 Kafila, *Need to re-enact Juvenile Justice Act-Myths and Realities,* (August 4, 2014) *available at* http://kafila.org/2014/08/04/need-to-re-enact-juvenile-justice-act-mythsand-realities-kishore/, (last visited on October 25, 2016).

24 *Supra2*

25 *Supra7*

26 *Id.*

27 *Supra 2*

28 *Supra 2*

29 Nikhil Roy, *How should we treat juveniles who commit the most serious crimes? A view from India, Penal Reform International,* (August 27, 2014) *available at:* http://www.penalreform.org/blog/juvenile-juvenile-view-india/, (last visited on October 22, 2016).

30 A. Manoharan and S. Raha, *The Juvenile Justice System in India and children who commit serious offences-Reflections on the way forward,* THE INTERNATIONAL JUVENILE JUSTICE OBSERVATORY (2015), *available at* https://www.nls.ac.in/ccl/justicetochildren/intl.pdf, (last visited on February 12, 2016).

31 Balanced and Restorative Justice for Juveniles, A Framework for Juvenile Justice in the 21st Century, Office of Juvenile Justice and Delinquency Prevention, Balanced and Restorative Justice Project, University of Minnesota, 1997, p. ii.

32 Supra 12

33 Aparna Vishwanathan, *Balancing the Juvenile act,* THE HINDU (September 9, 2013), *available at:* http://www.thehindu.com/opinion/lead/balancing-the-juvenileact/article5107620.ece (last visited on October 23, 2016).

34 K. Daly, *Sexual Assault and Restorative Justice* (2013), *available at:* http://www.griffith.edu.au/__data/assets/pdf_file/0006/50289/kdpaper11.pdf (last visited on October 23, 2015).

7. Conclusion and Recommendations

Punishment alone via the formal criminal justice system is not the right way of dealing with juvenile delinquency. Concerted efforts by the society, the government and the functionaries can only help solve this problem. The response to juvenile crime has to be fair, age-appropriate and reflective of an understanding of developmental psychology. Any amendment to existing law needs to be facilitated through intense participatory, consultative and deliberative processes. Altering the position with respect to age of a juvenile without much study will be an inappropriate and regressive response. The amendment of the Juvenile Justice Act, as a reaction to the countrywide outrage against one juvenile will set a dangerous trend and may affect hundreds of adolescents. It will also violate the legal obligations arising from the Constitution, the recommendations of the Justice J.S.Verma Committee and the universal standards enshrined in the UN Convention on the Rights of the Child. The nation needs to re-dedicate itself to investing in such juveniles, to reform and rehabilitate them into the community with dignity. A few recommendations to improve the situation rather than punishment are as follows:

a. Proper education as a means to address the juvenile crimes

b. Conduct awareness programs

c. Developing and establishing Specialized Juvenile Offender Rehabilitation Programmes for juvenile sex offenders

d. A Special Committee consisting of professional social workers, counselors, psychiatrists, advocates, child rights experts, etc., should be established in order to provide specialized services to juveniles residing in Observation Homes/special Homes

e. Establishment of Integrated Treatment Centers for juveniles in conflict with law

f. Enhancing effectiveness of rehabilitation programs

g. Proper training to the functionaries dealing with juveniles

Hence by strengthening the existing juvenile justice system – where they still have a chance to reform themselves and helping them take responsibility for their actions, teaching them to make amends to their victims and to society in appropriate ways – is the way to help prevent further crime and actually bring about some measure of healing and justice for all concerned.

Contours of Judicial Review and Activism

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Saptarshi Das**

ABSTRACT

In democratic countries, the doctrine of judicial review is accorded a pedestal of great significance. Judicial review and activism is a potent weapon in the hands of the judiciary to ensure that governmental machinery does not exercise functions that are not explicitly sanctioned by the Constitution. But the potent weapon sometimes mutates into a 'chimera' or what the executive branch says, that it is judicial terrorism. Francis Bacon had remarked in 1625: "Let judges also remember that Solomon's throne was supported by lions on both sides: let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty".This paper traverses the contours of judicial review and activism and analyses whether through judicial review and activism, blood and life is infused into the dry skeleton or whether it is an instance of "overreach". Case laws will be analyzed to substantiate the same. The paper tries to introspect whether judicial restraint is the need of the hour in order to maintain the fine balance of separation of powers.

Key Words: Judicial Review, Judicial activism, Constitution, Public Interest Litigation, Separation of Powers, Judicial Restraint.

1. Introduction

The Supreme Court has an onerous burden, a burden to discharge justice so that it informs all the institutions of political and social life. Alexander Hamilton had stated: "The Executive holds the sword.....the Legislature commands the purse. The Judiciary, on the contrary, has no influence over the sword or the purse. It neither has the power of the purse nor that of the sword; i.e. neither money nor patronage on one hand nor physical power to enforce its decisions."[1]

How does it then discharge this onerous burden?

The potent weapon that Judiciary possesses is the power of judicial review. Judicial review can be defined as the competence of a court of law to adjudicate upon the constitutionality or otherwise of a legislative enactment. "Being the guardian of the Fundamental Rights and arbiter of the constitutional conflicts between the Union and the States with respect to the division of powers between them, the Supreme Court enjoys the competence to exercise the power of reviewing legislative enactments both of Parliament and the State's legislatures."[2]

In democratic countries, the judiciary is given a place of great significance. Courts constitute a dispute resolving mechanism. The primary function of courts is to settle disputes between one citizen and another but this function also extends to settling disputes between citizens and various organs of the state.

The doctrine of judicial review entails that "the Constitution is the supreme law of the land and any law inconsistent therewith is void."[3] The courts perform the function of expounding the provisions of the constitution and exercise power of declaring any law or administrative action which may be inconsistent with the constitution as unconstitutional and hence void. This judicial function stems from a feeling that a system based on a written constitution can hardly be effective in practice without an "authoritative, independent and impartial arbiter of constitutional issues". It is of utmost importance to restrain the governmental organs from exercising powers which have not been expressly sanctioned by the provisions of the Constitution. In short, the doctrine of judicial review envisages that there is no transgression of powers which may ultimately culminate in an authoritarian government.

The Constitution of India, 1950 does not entail the term "judicial review" but has secured it through various articles like 13, 32, 131-136, 143, 226 and 246. It can therefore be said that "the doctrine of judicial review is thus firmly rooted in India and has the explicit sanction of the

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1 Nancy Staudt, *The Judicial Power of the Purse: How Courts Fund National Defense in Times of Crisis,* NORTHWESTERN SCHOOL OF LAW SCHOLARLY COMMONS, *available at* http://www.constitution.org/fed/federa78.htm(Last Visited on November 1, 2016)

2 M.P Jain, INDIAN CONSTITUTIONAL LAW, 1603 (Lexis Nexis, 7th ed. 2014)

3 SamirendraNath Ray, *The Crisis of Judicial Review in India,* Vol 29, THE INDIAN JOURNAL OF POLITICAL SCIENCE, 3, (1968)

Constitution,"[4] which is vivid from Article 13(2) of the Constitution which provides: "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

2. 'Demiurgic' role of Judges: Defining the concept of Judicial Review

Judicial review and activism is a potent weapon in the hands of the judiciary to ensure that governmental machinery does not exercise functions that are not explicitly sanctioned by the Constitution.

2.1 Importance of Judicial Review

For constitutional supremacy to prevail, for the Constitution to remain a "living moral and intellectual force", Judicial Review is of utmost importance.[5] Hence, the power of judicial review is of paramount importance. Cooley rightly said: "Legislators have their authority measured by the Constitution, they are chosen to do what it permits and nothing more and they take solemn oath and support it."[6]

It is through the process of judicial review that the higher judiciary has succeeded in moulding the governmental process and has regulated the social, economic and political structure of the society and has intellectual and spiritual acumen of the citizens. So, judicial review is the process of "judicial scrutiny of the legislative acts on the touchstone of the Constitution."[7]

Justice Frankfurter rightly said,"Man being what he is, cannot safely be trusted with complete power in depriving others of their rights. Had it not been for the prescience of our constitution makers, our fundamental rights and liberties would by now have been in sorry tatters."[8]

Not only has the Constitution laid down the liberties of the individual but it has also armed the Courts with the power to declare legislative acts void if they offended the guaranteed freedom.

2.2 Constitutional Provisions for Judicial Review

The Constitution of India adopted the Judicial Review in the similar vein as that of the U.S. Constitution which has recognized the said doctrine after the landmark case of Marbury v. Madison.[9] The Supreme Court is entrusted with the power of reviewing the legislative enactments of Parliament and the State Legislatures. This power of Judiciary aimed at maintaining checks and balances has sometimes been criticized as destroying the sanctity of separation of powers. This aspect will be addressed in the chapter on judicial activism.

The Constitutional Provisions which guarantee judicial review of legislation are Articles 13, 32, 131-136, 143, 226, 145, 246, 251, 254 and 372. These articles in nutshell are as follows:

a. Article 372 (1) establishes the judicial review of the pre-constitution legislation.

b. Article 13 declares that any law which contravenes any of the provisions of the part of Fundamental Rights shall be void.

c. Articles 32 and 226 entrusts the roles of the protector and guarantor of fundamental rights to the Supreme and High Courts.

d. Article 251 and 254 states that in case of inconsistency between union and state laws, the state law shall be void.

e. Article 246 (3) ensures the state legislature's exclusive powers on matters pertaining to the State List.

f. Article 245 states that the powers of both Parliament and State legislatures are subject to the provisions of the constitution."[10]

Hence it is explicit that the legitimacy of any legislation can be challenged in the court of law "on the grounds that the legislature is not competent enough to pass a law on that particular subject matter; the law is repugnant to the provisions of the constitutions; or the law infringes one of the fundamental rights."[11]

2.3 Constitutional Amendments and Judicial Review

The provisions for amendment to the Constitution have been incorporated in the Constitution of India, 1950 because "if no provisions were made for the amendment

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4 *Id.*, Note 85, p. 1604

5 Chandrashekhar Jha, JUDICIAL REVIEW OF LEGISLATIVE ACTS, 116, (Lexis Nexis2nd ed. 2009)

6 Thomas James Norton, THE CONSTITUION OF THE UNITED STATES-ITS SOURCES AND ITS APPLICATION, 117 (Nesterman Publishing, 1st ed. 1967)

7 Amar Singh &Ors. v. State of Bihar &Ors 2007 (2) BLJR 2575

8 Quoted in Mauro Cappalletti, *Judicial Review in Comparative Perspective*, Vol58 CALIFORNIA LAW REVIEW, 1023, (1970)

9 Marbury v. Madison, 5 U.S. 137 (1803)

10 J.N. Pandey , CONSTITUTIONAL LAW OF INDIA, 655 (Central Law Agency 49th ed. 2012)

11 *Id.*, at. 657

of the Constitution, the people would have had recourse to extra constitutional method like revolution to change the Constitution."[12] The procedure for amendment is incorporated in Article 368 of The Constitution of India, 1950. In Shankari Prasad v. Union of India,[13] the validity of the Constitution (1st Amendment) Act, 1951 which inserted Articles 31-A and 31-B were challenged. The Amendment was challenged because it purported to take away or abridge the rights conferred by Article 13(2) and hence was void. But it was held that Article 368 entails the power to amend the fundamental rights as well and the word "Law" in Article 13(2) includes an ordinary law made in exercise of the legislative power and does not include constitutional amendments made in exercise of constituent power. Similarly in Sajjan Singh v. State of Rajasthan,[14] Gajendragadkar C.J. said that "if the Constitution makers intended to exclude fundamental rights from the scope of the amending power they would have made a clear provision in that behalf." But in Golak Nath v. State of Punjab,[15] SubbaRao C.J., held that Parliament cannot amend Part III of the Constitution and enunciated the doctrine of "prospective overruling." So, any law which takes away or abridges any of the rights conferred under Part III of the Constitution will be subject to judicial review.

2.4 Social Welfare and Role of Judiciary

In the present times, the concept of judicial activism has emerged as a new phenomenon in the Indian polity with a specific role of judiciary in the social welfare. During the last two decades, the working of Indian judiciary has been characterized by judicial activism. It has increased the significance of judiciary in the process of governance. Being an activist, judiciary has delivered historic verdicts relating to various spheres of life, environment, human rights, child labor, etc. The social, economic and political justice can be achieved if every instrumentality under the Constitution functions as per the mandate of the Constitution.[16]

2.5 Judicial Review and Expansion of Fundamental Rights: An analogy of landmark cases

In State of West Bengal v. Committee for Protection of Democratic Rights, West Bengal,[17] it was held that "the State shall not make any law which takes away or abridges the rights conferred by Part III of the Constitution and any law made in contravention of this clause shall to the extent of the contravention be void."

The courts in India are thus under a constitutional duty to interpret the Constitution and declare the law as unconstitutional if found to be contrary to any constitutional provisions. The Courts act as sentinel on the qui viveas far as the Constitution is concerned.

In State of Madras v. V.G. Row[18], it was held that the Constitution contains express provisions for judicial review of legislation as to its conformity with the constitution and that the courts face up the task of scrutinising a legislation to ensure its conformity with the constitution.

In A.K. Gopalan v. State of Madrasit[19] was held:

> "In India, it is the Constitution that is supreme and for a statue law to be valid, must in all cases be in conformity with the constitutional requirements. It is for the judiciary to decide whether any enactment is constitutional or not. If the Legislature transgresses any constitutional limits, the Court has to declare the law unconstitutional for the Court is bound by its oath to uphold the Constitution."

The doctrines of supremacy of Constitution and judicial review has been expounded very lucidly but forcefully by Justice Bhagwati in State of Rajasthan v. Union of India,[20]

> "It is necessary to assert in the clearest terms particularly in the context of recent history, that the Constitution is supreme lex, the permanent law of the land and there is no department or branch of government above or beyond it. Every organ of the government, be it the executive, legislature or judiciary, derives its authority from the Constitution and has to act within the limits of its authority."

Justifying judicial review, Justice Ramaswami has observed in S.S. Bola v. B.D. Sharma,[21]

> "The founding fathers very wisely, therefore,

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12 Kesavananda Bharati v. State of Kerala AIR 1973 SC 1461

13 Shankari Prasad v. Union of India AIR 1951 SC 455

14 Sajjan Singh v. State of Rajasthan AIR 1965 SC 845

15 Golak Nath v. State of Punjab AIR 1971 SC 1643

16 K. Bag, *Judicial Activism vis-à-vis Public administration*, 42 THE ADMINISTRATOR, 167, (1997)

17 State of West Bengal v. Committee for Protection of Democratic Rights, West Bengal AIR 2010 SC 1476

18 State of Madras v. V.G. Row AIR 1952 SC 196

19 A.K. Gopalan v. State of Madras AIR 1950 SC 27

20 State of Rajasthan v. Union of India AIR 1977 SC 1361

21 S.S. Bola v. B.D. Sharma AIR 1997 SC 3127

incorporated in the Constitution itself the provisions of judicial review so as to maintain the balance of federalism, to protect the fundamental rights and fundamental freedoms guaranteed to the citizens and to afford a useful weapon for availability, availment and enjoyment of equality, liberty and fundamental freedoms and to help to create a healthy nationalism."

Justice Khanna emphasized in KesavanandaBharati v. State of Kerala,[22] "As long as fundamental rights exist and are part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by these Rights are not contravened. Judicial Review has thus become an integral part of our constitutional system."

The power of the court to declare legislative enactments invalid is secured by the Constitution under Article 13, which declares that "every law in force, or every future law inconsistent with or in derogation of the Fundamental Rights, shall be void."

3. Infusion of Life and Blood in the dry skeleton: Vindicating 'Judicial Activism'

The paper traverses the contours of judicial review and activism and analyses whether through judicial review and activism, blood and life is infused into the dry skeleton or whether it is an instance of "overreach".Case laws are analyzed to substantiate the same.

3.1 A Sentinel on the 'qui vive' as against a submissive judiciary

In State of Madras v. V.G. Row,[23] it was held that the "role of the judiciary is that of the sentinel on the qui vive". It means that the judiciary is the supreme interpreter, arbiter and guardian of the Constitution and has the onerous responsibility of declaring any law which is in contravention to the Constitution as void. But there exists a thin line, the transgression of which mutates judicial review in judicial activism and judicial activism into judicial terrorism.

While responding to the meaning of the term judicial activism, it is needed to be clarified that judicial activism is not the performance of the function of settling the disputes in accordance with Constitution or law of the land but rather t is the "adoption of pro-active approach by the judiciary."[24] Judicial activism reflects the situation when the judiciary comes out of its sphere of traditional rote and becomes active in its working while laying down the policies and programmes to ensure the protection of rights and liberties of the people which otherwise is within the discretion of the executive and the legislature. One of the arguments raised in this paper is that the judiciary is discharging its duty to ensure the accomplishment of the ideals of the welfare state. It is not overstepping its areas assigned by the constitutional framework rather it is in tune with democratic norms. It is not judicial anarchy, judicial over activism and judicial despotism.

3.2 Legislation by Judiciary: Challenging the archaic notion of 'jus dare'

The role of judges has always been understood to be 'jusdicere', i.e. interpret law and not 'jus dare', i.e. make laws.[25] But this concept has undergone a paradigm shift. In the case of Vishaka v. State of Rajasthan,[26] the Supreme Court lamented that the legislature had not brought in comprehensive legislation to deal with sexual harassment of women in the workplace, and declared the law as follows:

> "In view of the above, and in the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, guidelines and norms are hereby laid down for strict observance. This is done in exercise of the power available under Article 32 for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by the Supreme Court under Article 141 of the Constitution of India."

This is a clear case of judicial legislation and usurpation of the power of the legislature, but it has benefited the people.

Justice Markandey Katju in Priyadarshini v. The Secretary to Government[27] has explained:"Under the Constitution, the legislature, the executive and the judiciary have their own broad spheres of operation. It is, therefore, important that these three organs of the state do not encroach upon the domain of another and confine themselves to their own, otherwise the delicate balance in the Constitution will be upset… The judiciary must therefore exercise self-

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22 Kesavananda Bharati v. State of Kerala AIR 1973 SC 1461

23 State of Madras v. V.G. Row AIR 1952 SC 196

24 S. K Patnaik and Swaleha Akhtar, *Judicial Activism in India : Myth and Reality,* Vol 58 INDIAN JOURNAL OF POLITICAL SCIENCE, 85, (1997)

25 V.P. Sarathi, INTERPRETATION OF STATUES, 1 (Lexis Nexis, 4th. Ed. 2003)

26 Vishaka v. State of Rajasthan(1997) 6 SCC 241

27 Priyadarshini v. The Secretary to Government 2005 (3) CTC 449

restraint and eschew the temptation to act as a super legislature."

3.3 Is Activism equivalent to Despotism?

Since there is no rigid separation of powers in the Constitution, each organ must be cautious while exercising power in their respective domain. This was taken into account in the case of State of Kerala v. A. Lakshmi Kutty.[28] When the judiciary encroaches upon the field which are earmarked for the executive and the legislature, there is high probability that their personal views may take the form of legal principles as they don't have the required traits and the vision to understand the varied needs of the people. In the case of P RamachandranRao v State of Karnataka,[29] the Apex Court envisaged that: "The Supreme Court does not consider itself to be an imperium in imperio or would function as a despotic branch of the State. The primary function of the Judiciary is to interpret the law. It may lay down principles, guidelines and exhibit creativity in the field left open and unoccupied by legislation. But they cannot entrench upon in the field of legislation properly meant for the legislature. It is not difficult to perceive the dividing line between permissible legislation by judicial directives and enacting law – the field exclusively reserved for the legislature."

In the landmark case of KesavanandBharti, the court held that the amendment duly passed was invalid. The scope of basic structure is undefined and so it has no limit.

3.4 Substantive Due Process and Article 21: Expansion of Fundamental Rights

Article 21 of the Constitution of India provides that "no person shall be deprived of its life and liberty except according to the procedure established by law". This article has been interpreted and re-interpreted a multitude number of times and given an expansive interpretation and a whole new set of rights have been incorporated.

The Supreme Court of India gave a new interpretation to Article 21 of the Constitution of India in the case of Maneka Gandhi v. Union of India[30] and held that law must be "just, fair and reasonable". The anvil of "reasonableness and fairness" has been used to test the validity of legislative acts.

3.5 The PIL Regime, Environmental Jurisprudence and Judicial Activism

Judicial Activism and Public Interest Litigation have an intricate link. From entertaining a Public Interest Litigation on the basis of a letter,[31] the judiciary has shown its activism to combat inhuman prison conditions,[32] right to free legal aid,[33] right to livelihood,[34] revamping the blood bank system,[35] relieving bonded labours from the shackles of bondage,[36] taking up the cause of old pensioners,[37] right to education,[38] negating the abuse of children in circus[39] or providing compensation to rape victims.[40] The list is never ending.

Similarly, environmental jurisprudence has been developed in India by judicial activism and concepts like "public trust", "precautionary" and "polluters' pay principle" have been developed.[41]

4. Intense Judicial Review: Trespassing from Judicial Activism to Judicial Overreach

"Courts have played a salutary and corrective role in innumerable instances. The dividing line between judicial activism and judicial over-reach is a thin one. A takeover of the functions of another organ may, at times, become a case of over-reach."

- Manmohan Singh[42]

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28 State of Kerala v. A Lakshmi Kutty (1986) 4SCC 632

29 P Ramachandran Rao v State of Karnataka (2002) 4 SCC 578

30 Maneka Gandhi v. Union of India 1978 SCR (2) 621

31 Laxmikant Pandey v. Union of India 1984 SCR (2) 795

32 Sunil Batra v. Delhi Administration1979 SCR (1) 392

33 M.H Hoskot v. State of Maharashtra AIR 1978 SC 597

34 Olga Tellis & Ors. v. Bombay Municipal Corporation 1985 SCC (3) 545

35 Common Cause v. Union of India (1996) 1 SCC 753

36 Bandhua Mukti Morcha v. Union Of India AIR 1987 SC 802 and Neeraja Chaudhari v. Union of India AIR 1984 SC 802

37 D.S. Nakara v. Union of India AIR 1983 SC 130

38 Mohini Jain v. State of Karnataka (1992) 3 SCC 666

39 Bachpan Bachao Andolan v. Union of India AIR 2011 SC 3361

40 Bodhisatthwa Gautam v. Subhra Chakraborty (1996) 1 SCC 490 and Chairman, Railway Board v. Chandrima Das AIR 2000 SC 988

41 See M.C. Mehta v. Kamal Nath (1997)1 SCC 388; Vellore Citizens Welfare Forum v. Union of India AIR 1996 SC 2715; Municipal Council, Ratlam v. Vardichand, (1980) 4 SCC 162; Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh &Ors. 1985 SCR (3) 169; M. C Mehta v. Union of India (Oleum Gas Leak Case)1987 SCR (1) 819 etc.

42 http://www.thehindu.com/todays-paper/manmohan-talks-of-judicial-overreach/article1825481.ece

Judicial activism, a nebulous fiction is becoming judicial adventurism day-by-day which goes against the principles of Constitution. Separation of powers which is an integral part of the basic structure should be applied strictly in order to avoid conflicts.

The proactive role played by the judiciary in devising core doctrines such as the basic structure, due process of law, Article 356, etc. have restored the faith in judiciary. But there are numerous instances where judiciary has crossed the boundary and which is not desirable. The latest case of Supreme Court overturning the NJAC bill undermines the authority of Parliament. Other examples include the sealing of unauthorized commercial operations in Delhi which led to widespread protests, Gujarat fake encounter case, etc. Judiciary's role in Vishaka's case is somewhat not criticized because despite the guidelines given by the courts it took more than a decade to design a law for sexual harassment.

Judicial activism by the courts of the other two organs of the government has definitely led to its criticism. There may be some criticisms which are legitimate but if the criticism is not just it may drive away the faith of the public in such an esteemed institution. The thin line of difference i.e. 'Lakshmanrekha' between judicial activism and judicial overreach must be acknowledged as this determines the smooth functioning of constitutional democracy. It is often said that judicial activism is a medicine and so it must not be taken daily. The judges must keep in mind that they could enforce a law but they should not create a law and seek to enforce it.

"If the judiciary does not exercise restraint and overstretches its limits, there is bound to be a reaction from politicians and others. The politicians will then step in and curtail the power, or even the independence of the judiciary."[43]

Judicial restraint and judicial activism are two sides of the same coin. It means limiting the power of the judges to strike a law. It helps in preserving the balance in the working of the three organs thereby promoting harmonious construction. Judicial restraint is often used in connection with pro-government, pro-rich, anti-social justice etc.

If judiciary takes over the charge of others then this will ventilate grievances and the aggrieved party will have no forum to address their grievances. Judicial restraint governs the extent to which, or the intensity with which, the courts are willing to scrutinize a legislative decision and the justification advanced in support of that decision.[44] A judge is required to deliver justice according to law and not as per his whims and fancies. Judicial restraint is necessary as it accomplishes two goals. Firstly, it recognizes equality of the other two branches and helps to foster it. Secondly, it tries to protect independence of judiciary.[45]

5 Judicial Activism vis-a-vis the importance of Judicial Independence

Judicial independence plays an important role in maintaining the democratic set-up of any country.

5.1 The "Judges Transfer" Case

In Judges Transfer Case I, i.e. S.P. Gupta v. Union of India,[46] the Supreme Court held that

> "the word consultation did not mean concurrence and the Executive was not bound by the advice given by the Judges. The government may completely ignore the advice of the legal experts. Thus the power of appointment of the Judges of the Supreme Court and the transfer of the High Court judges was solely vested in the executive from whose dominance the judiciary was expected to be free."

In Judges Transfer Case II, i.e. S.C. Advocate on Record Association v. Union of India,[47] the Supreme Court by a 7-2 majority overruled S.P. Gupta's caseand held that "the opinion of the Chief Justice of India must be given the greatest weight in appointment of judges of Supreme Court and High Court and transfer of judges of High Court."

But in Transfer of Judges Case III, i.e. Re. Presidential Reference,[48] a nine bench judge of the Supreme Court has unanimously held that the recommendations made by the Chief Justice of India on the appointment of judges without following the consultation process are not binding on the government.

5.2 IXth Schedule of the Constitution of India, 1950: The "Black Box" of the Constitution

State of Bihar v. Kameshwar Singh.[49] is a landmark case in

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43 Aravalli Golf Course v. Chander Haas.(2008) 1 SCC 683.]

44 http://www.stafforini.com/jdg/kavanagh.pdf, (5 November, 2016)

45 Justice Markandey Katju in Minor Priyadarshini's case (2005 (3) CTC 449)

46 S.P. Gupta v. Union of India AIR 1982 SC 149

47 S.C. Advocate on Record Association v. Union of India (1993) 4 SCC 441

48 Re. Presidential Reference AIR 1999 SC 1

49 Kameshwar Singh v. State of Bihar AIR 1955 SC 282

which The Bihar Land Reforms Act 1950 was challenged on the "ground that the classification of Zamindars made for the purpose for giving compensation was discriminatory and denied equal protection of laws guaranteed to the citizen under Article 14 of the Constitution." The Patna High Court held this piece of legislation as violative of Article 14 and the legislation was struck down on the basis of "colourable legislation."

As a result of these judicial pronouncements, the Government got apprehensive that the whole agrarian reform programmes would be endangered. To ensure that agrarian reform legislation did not run into heavy weather, the legislature amended the Constitution in the year 1951 which inserted Ninth Schedule.[50]

If an amendment abridged or took away a fundamental right guaranteed by Part III of the Constitution, the amending act itself was void and ultra vires, in other words, Parliament has no power to amend or take away the fundamental rights enshrined under Part III of the Constitution.[51] Subsequently, the Supreme Court held that all the provisions of the Constitution can be amended, but the provision affecting the fundamental rights / basic structure of the Constitution could not be amended; and any Constitutional Amendment, which alters the basic structure of the Constitution could be struck down by the Court which was held in KesavanandaBharati v. State of Kerala.[52]

All amendments to the Constitution made on or after 24th April 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principle underlying them. To put it differently even though an Act is put in the Ninth Schedule by a Constitutional Amendment, "its provision would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights is/are taken away or abrogated pertains or pertain to the basic structure" This was laid down in the judgment by the nine Judge Constitutional Bench of the Supreme Court in I. R. Coelho v. State of Tamil Nadu.[53]

5.2.1 A turning point in 1973

In Kesavananda Bharati v. State of Kerala,[54] the Supreme Court for the first time held that "any law, including a Constitutional Amendment, which altered the basic structure of the Constitution could be struck down." This judgment made the judiciary the ultimate arbiter and interpreter of what falls under the basic structure of the Constitution as the Constitution nowhere provides as to what would amount to basic feature. It is open to judicial interpretation.

The Supreme Court has held that "it can strike down any law which is included in the Ninth Schedule, if, in its opinion, the law violates the basic structure of the Constitution and if it was inserted after April 24, 1973 (the day the Keshavananda Bharati judgment was delivered.)"

5.2.2 The I.R. Coelho Judgment

The judgement in I. R. Coelho v. State of Tamil Nadu[55] was pronounced on January 11 and it virtually repeals an important provision of the Constitution, namely Article 31B, and undoes what was done in 1951. In other words, it gives to the Supreme Court the power to strike down any law on the ground that it violates fundamental rights resulting in the violation of the basic features of the Constitution.

Also, another landmark case is Waman Rao v. Union of India.[56] It was held that "the amendments made to the acts which were already placed in the IXth Schedule are not automatically immunized from legal challenge and hence their validity can be challenged even after their inclusion in the IXth schedule. The protection of Article 31-B is available only against the 'Original Acts'. These acts refer to the acts placed in the IX the schedule before 24 April, 1973, i.e. the date of judgment of Kesavanadacase."These are 64 in number.

5.3 Supreme Court Advocates on Record Association v. Union of India WP No 13 of 2015

This case is colloquially known as the NJAC case.The Supreme Court by a majority of 4:1 struck down the NJAC Act.

As per the scheme of our Constitution, an independent and fearless judiciary is our Constitutional creed.[57] This concept has been described as a basic feature of the

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50 The Constitution (1st Amendment) Act, 1951

51 Golak Nath v. State of Punjab AIR 1971 SC 1643

52 Kesavananda Bharati v. State of Kerala AIR 1973 SC 1461

53 I. R. Coelho v. State of Tamil Nadu 2007 (1) SC 137

54 Kesavananda Bharati v. State of Kerala AIR 1973 SC 1461

55 I. R. Coelho v. State of Tamil Nadu2007 (1) SC 137

56 Waman Rao v. Union of India AIR 1981 SC 71

57 Samsher Singh v. State of Punjab, 2 SCC 831 (1974).

Constitution[58] and is essential for the preservation of the democratic system.[59] In the Second Judges Case it was held that: "… independence of judiciary is the livewire of our judicial system and if that wire is snapped, the dooms day of judiciary will not be far off."

It has been observed that the concept of independence of judiciary is a noble one, which inspires the Constitutional scheme and is a foundation on which rests the edifice of democratic polity. The judiciary should be above suspicion and should be above any political influence[60] so that none may have the complaint to say that "higher courts are right because they are superior, not superior because they are right".

5.4 Doctrine of Basic Structure v. Administrative Tribunals Act, 1985

In Sampat Kumar v. Union of India,[61] the constitutional validity of Article 323-A and the Administrative Tribunals Act, 1985 was challenged on the ground that the Act, by excluding the jurisdiction of the High Courts under Articles 226 and 227 in service matters, had destroyed the basic feature of the Constitution. The Supreme Court had upheld the validity of Article 323-A and the Act as the necessary changes suggested by the Court were incorporated in the Administrative Tribunal Act, 1985. It was held that though the Administrative Tribunal Act, 1985 has excluded the judicial review of High Court in service matters under Articles 226 and 227 but, as it has not excluded the judicial review under Articles 32 and 136 of the Supreme Court and hence the Administrative Tribunals Act, 1985 is valid. The Amendment does not affect the basic structure of the Constitution as it has vested the power of judicial review in an alternative mechanism, after taking it from the High Courts which is not less effective than the High Courts.

In a landmark judgment in L. Chandra Kumar v. Union of India,[62]a seven-member Constitution Bench has unanimously, while considering Sampat Kumar's case has struck down clause 2(d) of Articles 323-A and clause 3(d) of Article 323-B which provided for the exclusion of the jurisdiction of the High Courts under Articles 226 and 227 and Article 32 of the Constitution as unconstitutional and invalid as they damage the power of judicial review, which is the basic feature of the Constitution.

6. Need for Judicial Activism

Judicial activism is a state of mind. It has its genesis in the inactivity and apathy of the legislature and the executive. It is nothing but the performance of the judicial activities. It is creativity to fill the gulf between the positive and the normative aspects of the law. Indian Constitution does not contain the term 'judicial activism' but it has become an integral part of the present day functioning of judiciary.

It is generally understood as connoting that function of judiciary, which represents its active role in promoting justice. In the modern context, the jurist intends to explore how justice is ensured to the society through active participation of the court in general and against public agencies in particular. A judge who selects a bold course of action is generally understood as representing judicial activism.[63]

6.1 Filling the 'Vacuum in Law'

The inactivity, incompetence, disregard of law and Constitution by the legislature, and callousness, negligence, corruption, greed for power, and money, indiscipline in the executive had created the vacuum as a result of which both the organs of the government failed to fulfil the constitutional obligations and compelled the judiciary to play an activist role in order to fill the vacuum created by the executive and the legislature and to check the unconstitutional behaviour of the executive and the legislators[64].

In Kesavananda Bharti v. State of Kerala,[65] the Supreme Court of India held that basic features of the Constitution of India such as democracy, rule of law, federal system, secularism and independence of judiciary cannot be amended. If it is amended, then the Supreme Court will declare such law as unconstitutional. Such enunciation of doctrine of basic structure, which is not contained in the Constitution, is nothing but judicial activism.

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58 S.P Sampat Kumar v. Union of India, 4 SCC 653 (1992).

59 Second Judges Case; Shri Kumar Padma Prasad v. Union of India, 2 SCC 428 (1992).

60 Constitutional Assembly Debates (VI, 2) 579; GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: THE CORENERSTONE OF A NATION, 164-165 (1966).

61 *Sampat Kumar* v. *Union of India* AIR 1987 SC 386

62 *L. Chandra Kumar* v. *Union of India* AIR 1997 SC 1125

63 P. M. Bakshi, *Judicial activism. Some reflections*, 42(2), THE ADMINISTRATOR, 5 (1997)

64 K. L. Bhatia, JUDICIAL REVIEW AND JUDICIAL ACTIVISM: ACOMPARATIVE STUDY OF INDIA AND GERMANY FROM AN INDIAN PERSPECTIVE, at. 116. (Deep and Deep Publications 1st ed. 1997)

65 Kesavananda Bharti v. State of Kerala AIR 1973 SC 1461

In Minerva Mill Ltd. &Ors v. Union of India &Ors[66] also the court held that the basic features of the Constitution cannot be amended.

Judicial activism is the assumption of an active role on the part of the judiciary, which is expected to adjudicate or evaluate the policies promulgated by the legislature, or the executive wing of the government.[67]

6.2 Advancing the cause of Justice

In the modern political systems, with the development of the idea of Constitutionalism, judicial activism is sine qua non of democracy. Now the primary functions of the judiciary are not restricted to the settlement of disputes and punish the defiance of law, but to safeguard individual liberty and social cohesion against undue institutional encroachment. According to the Chambers' 20th Century Dictionary, Activism means a policy of vigorous action of a philosophy or a creative will. In Webster's New 20th Century Dictionary, activism has been stated to mean the policy of being active or doing things with decision. Judicial activism means an activism by taking recourses to judicial process, which means judicial pronouncement on different intricate issues whereby new legal philosophy can be created.[68] As held in Sukh Das v. Union Territory of Arunachal Pradesh,[69] the task of the judiciary is not merely to interpret the law but to make it by imaginatively sharing the Constitution for the end of social justice. It had its origin in America at the hands of Justice Marshall in Marbury v Madison as far back as in 1803.

Justice Bhagwati, the father of Public Interests Litigations in India, observes that judicial activism is a central feature of every political system that vests adjudicatory power in a free and independent judiciary.[70] The term judicial activism is not the term of fashion or popularism but a term signifying an important source of judicial power, which judges should use for the realization of willed result.[71] The activist role of the judiciary is not only confined to the protection of Fundamental Rights and legal rights but also tries to implement the socio-economic rights envisaged in the Part IV (Directive Principles of State Policy) of the Constitution which are not enforceable in the court of law.

So the judicial activism is the expanded role of judiciary. It encompasses an area of legislative vacuum in the field of human rights. Justice A.S. Anand holds that:

> "Judicial activism reinforces the strength of democracy and reaffirms the faith in the rule of law. It would not be in the interest of the democratic society, if the judiciary shuts its door to the citizen who finds that the legislature is not responding and the executive is indifferent. It must be seen that the 'authorities come out of the slumber and perform their due role."

6.3 Paramount importance of Public Interest: Onerous Burden on the Higher Judiciary

It is a bold effort to revitalize the system through the provision of simplest, fastest and cost free access to man. This type of creativity on the part of judiciary has made it possible to realize the Preambular justice of socio-economic nature. Being Constitutional courts, the Supreme Court and High Courts have used this device to a greater extent in the eighties and onwards.[72] The exposure of the magnitude of corruption at the highest level sent the message that political leaders are not immune to judicial scrutiny. Another set of meaning holds that if the court becomes a principal legislator in the governmental process, and if its decisions pronounce it fit to assume this role, then others will call it judicial activism. At the same time, the judges have to be aware of the social requirements and economic and political compulsions and recognize the changes taking place in a fast developing society.

Judicial activism has a dimension of public interest though the private interest remains involved. Judicial activism seeks to restore to the citizens a platform of resistance to the neo-colonial practices of power, which seek to convert citizens into subjects.[73] It stands against the non-enforcement of the Constitutional norms at the level of political activity. The device of judicial activism has provided for the expansion of the Fundamental Rights while providing new grammar of interpretation for the purpose of providing access to justice to those who were denied their basic rights. It has made the executive to be careful and cautious to discharge its duties and functions in a rational manner because they are aware that in case

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66 Minerva Mill Ltd. &Ors v. Union of India &Ors AIR 1980 SC 1789

67 SusantaChatterji, *For Public Administration: Is Judicial Activism Really Deterrent to Legislative Anarchy and Executive Tyranny*, 42 (2), THE ADMINISTRATOR,.9 (1997).

68 SatyabrataSinha, *Judicial Activism. Its Evolution and Growth*, 42(2), THE ADMINISTRATOR, at. 51 (1997)

69 Sukh Das v. Union Territory of Arunachal Pradesh (1986) 2 SCC 401

70 K. N. Bhat, *Judges Vs Judges*, THE TRIBUNE, December 15, 2007.

71 A. Lakshminath, *Jurisprudence of Judicial Activism*, 42(2), THE ADMINISTRATOR, 109 (1997)

72 C.M. Jariwala, *Poorman's Access to Judicial Justice: A Reality or Myth,* 45(3), INDIAN JOURNAL OF PUBLIC ADMINISTRATION, 336 (1999)

73 State of Rajasthan v. Union of India (1979) (3), SCC 634

of their committing wrong they would be liable to face the consequences. It can be inferred from the foregoing discussion that the term 'judicial activism' means doing while deciding. In other words, it means the active role being played by the judiciary as it has followed an activist goal-oriented approach in the matter of Constitutional interpretation in the dimensions of new social movement. Since seventies, judiciary in its working has undergone an incredible transformation and is being identified by itself as well as by the people "the last resort for the oppressed and the bewildered."

7. Conclusion: The Role of Judiciary as the 'balance wheel'

Francis Bacon had remarked in 1625: "Let judges also remember that Solomon's throne was supported by lions on both sides: let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty".[74]

Throughout history, strong rulers facing resistance from an unappreciative judiciary have resorted to all kinds of measures to bring judges to heel. On 12 August, 2016, Honorable Chief Justice of India T.S. Thakur remarked: "Don't force us to ask where the files are. Don't force us to judicially intervene. Don't try to bring this institution to a grinding halt. That's not the right thing to do." "Send the file back to us if you have a problem with a name suggested by us. We have no problem re-looking into it… But this kind of logjam…….whole situation is getting very difficult…Do you know that most High Courts are working with only 40 per cent of their sanctioned strength?? People are languishing in jails for 13 years for a hearing".[75]

This was in relation to delay in appointment in judges. It is an example of how the judiciary has taken a proactive stance.

As had been already stated in the introduction, in democratic countries, the judiciary is given a place of great significance. Courts constitute a dispute resolving mechanism. The primary function of courts is to settle disputes between one citizen and another but this function also extends to settling disputes between citizens and various organs of the state.

No system based on a written constitution can be effective without an independent and impartial arbiter of disputes. This indispensable role is dispensed by the Judiciary. Till date, judicial activism has been stigmatized as judicial terrorism, judicial adventurism, judicial anarchy, judicial aberration, judicial emergency, judicial tyranny, judicial over-reaching, judicial takeover, judicial usurpation of power, etc.

But the importance of judiciary cannot be undermined. So, in order to mitigate the conflict between judicial review and separation of powers, a middle path has to be traversed known as the exercise of "judicial restraint". Judicial restraint is consistent and contemporary with the balance of power among the three independent branches of the state. It not only recognises the equality of other branches of law with judiciary but it also fosters the equality by minimising inter branch interference by the judiciary. The need of the hour is judicial restraint. Justice MarkandeyKatju very aptly remarked in Priyadarshini v. The Secretary to Government[76] that judicial restraint has two values: "Firstly it not only recognizes the equality of the other two branches with the judiciary, it also fosters that equality by minimizing inter-branch interference by the judiciary and secondly, it tends to protect the independence of the judiciary." He asked; "If judges act like legislators or administrators it follows that judges should be elected like legislators or selected and trained like administrators."

So, while judicial review and activism is in furtherance of public interest and social justice, it should not be detrimental to the sacrosanct bond of "separation of powers". For the effective functioning of a democracy, all the three branches have a pivotal and indispensable role and each other's functioning must be monitored by the other and not encroached.

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[74] Quoted in Sanjay Hegde, *An avoidable war of attribution,* The Hindu, August 17, 2016.

[75] *Available at* http://www.livelaw.in/cji-warns-centre-delaying-appointment-judges-read-petition/, (Lat visited on September 11, 2016)

[76] Priyadarshini v. The Secretary to Government 2005 (3) CTC 449

Transgender as Third Gender

Manas Daga*

ABSTRACT

The transgender people are the one whose self-identity does not confirm unambiguously to conventional notions of male or female gender. This paper is an analysis of 2014 Supreme Court judgment (National Legal Services Authority v. Union of India) that affirms the constitutional rights of transgender people and communities. It critically appreciates the judgment of the Supreme Court which has declared the transgender as a third sex. Also it will throw some light on the problems faced by the member of this community. The case comment will discuss the jurisprudential aspect of the evolvement of such judgment with reference to foreign statutes, judgments and international conventions. It will also suggest the ways to curb the discrimination and implementation of such laws in our country. It will highlight the protection provided by the Constitution of India to transgender community and how the people have made a mockery of those provisions by discriminating transgender community from the society.

Keywords: Transgender community, Unnatural Offences, Sexually Transmitted Diseases, Eunuchs and Hijras

1. Introduction

"That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."

-John Stuart Mill[1]

Section 377 of Indian Penal Code is an illusion of colonial creation, and has criminalized "unnatural sexual acts" since its application as law in 1862.[2] Homosexuality, which falls within the ambit of such acts, attracts punitive measures. The orthodox Indian community has divided our society into two halves, i.e. man and woman, since the civilization came into being. The concept of 'TrityaPrakriti' or 'Napumsaka' was an essential part of Hindu mythology, folklore in early Vedic and puranic literatures. The 'Napunsaka' are unable to procreate and are uniquely presented with significant difference from masculine and females.

From the Vedic period to the modern scenario, the transgenders have been continuously subjected to discrimination. The people of Indian society never realized the trauma, pain and agony which the members of transgender community (hereinafter referred as TG community) are facing in their daily lives. The situation is awful as TG community is being harassed at every point of their lives, in hotels, trains, theaters, schools and various other public places. They are forced towards prostitution to get their daily wages.[3]

Discrimination faced by this group is unimaginable and the rights of TG committee need to be protected and guaranteed. There is a need that the rights of transgender such as Hijras, eunuchs, etc. have to be examined, so as their right to remain a third gender. And also their physical and psychological integrity must be maintained. This group is being discarded by the society and is being subjected to molestation and torture.[4] The plentiful instances of abuse and violence against homosexual are not sufficient, thus Section 377 adds spices to their sufferings which punishes them for unnatural offences. The case of Suresh Kumar Kaushal v. NazFoundation,[5] has again declared Section 377 of IPC to be in line and length with the Constitution, overruling the decision of Delhi High Court. Section 377 of IPC has been lengthily used by the law enforcers to hassle and feat homosexuals and transgender.

According to the recent survey of United Nation Development Programme, there has been tremendous increase in the Sexually transmitted diseases amongst

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1 J S Mill, *On Liberty*, E Rapaport 9 (1978)

2 Sec. 377 of Indian Penal Code, 1860.

3 Jayalakshmi v. State of Tamil Nadu, (2007) 4 MLJ 849.

4 People's Union for Civil Liberties (PUCL) Report on Rampant violation of rights of Sexual Minorities, p.14 (2000)

5 *Suresh Kumar Kaushal* v. *Naz Foundation,* (2014) 1 SCC 1

Hijras. The sexually transmitted disease amongst men having sex with men (MSM) population is around 7.4% and 17.5% is amongst women.[6] The report submitted by NACL indicates that transgender such as Hijras are extremely vulnerable to HIV. Both the reports highlight the extreme necessity of taking emergent steps to improve their sexual health, mental health and also address the issue of social exclusion.

Law is nothing but a tool to bridge the gap between different interest groups of the society.[7] It is a social engineering, as propounded by Roscoe Pound, according to which a law should be planned in such a manner so that it works for the betterment of all classes of the society. Law is mindful in bridging the gap between different interests of the society. The case of *National Legal Services Authority v. Union of India*[8](NALSA's case) has made an attempt to remove the hardship faced by the TG community. It has bridged the gap between law and transgender society by recognizing them as third gender.

2. International Conventions and Development

While pronouncing the judgment of *NALSA's case*[9], the apex court has taken into consideration various international conventions to which India is a signatory. These conventions play a great role as there is no municipal law when it comes to the right of transgender people. It becomes an obligation on the Indian court to give regard to the international conventions. The principles of Yogyakarta determined the rights which need to be protected of the transgender community by the judiciary. The UN Bodies, Regional Human Rights Bodies, Government Commissioner and National Courts have determined the Yogyakarta Principles and considered them as an important tool for identifying the obligations of state for fulfilling and respecting human rights. Some of the principles of Yogyakarta which ensures these rights are:

Principle 3: Right to recognition before the Law: Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life.[10]

Principle 18: Protection from Medical Abuses: No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity.

In this respect, reference may also be made to the General Comment No.2 of the Committee on Torture and Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 2008 and also the General Comment No.20 of the Committee on Elimination of Discrimination against Woman, responsible for the implementation of the Convention on the Elimination of All Forms of Discrimination against Woman, 1979 and 2010 report.[11] Along with this, the provisions of Universal Declaration on Human Rights also provide that there should be equality before law and there must not be any discrimination done against any person.

Justice K.S. Radhakrishnan has taken the help of various foreign statutes while giving the NALSA's judgment. The lordship was of the opinion that accepting the transgender as a third gender is not a medical or social issue but a human rights issue. The judiciary has tried to understand the situation which is prevailing in other nations. They want to know how the foreign nations are dealing with the discrimination or harassment done to transgender persons. In 2008, the Philippines Supreme Court permitted an intersex individual to alter his birth certificate and change his gender from female to male, as well as his name.[12]

United Kingdom has enacted Equality Act, 2010 which defines certain characteristics to be "protected characteristics" and one shall be discriminated or treated less favorably on grounds that the person possesses one or more of the "protected characteristics". This Act tries to protect the rights of transgender community. The Act also imposes duties on Public Bodies to eliminate all kinds of discrimination, harassment and victimization.

In Australia, the government has enacted Sexual Orientation, Gender Identity and Intersex Status Act, 2013 defines and gender identity as the appearance or

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6 *Hijras/Transgender Women in India: HIV, Human Rights and Social Exclusion,* (December 2010) *available at*: http://www.undp.org/contents/dam/india/docs/hijras_transgender_in_india_hiv_human_rights_and_social_exclusion.pdf (last visited November 12, 2016)

7 KarandeepMakkar, *Law as a tool for Social Engineering in India, available at*: http://manupatra.com/roundup/331/Articles/law%20as%20tool.pdf (last visited 10 November, 2016)

8 National Legal Services Authority v. Union of India (2014) 5 SCC 438.

9 *Id*.

10 Supra note 1

11 Aniruddha Dutta, *Contradictory Tendencies: The Supreme Court's NALSA judgment on Transgender Recognition and Rights,* 5 (Monsoon) JILS (2014) 225 (last visited 10 November, 2016)

12 Republic of the Philippines v. Jennifer B. Cagandahan, GR No. 166676 (2008)

mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not) with or without regard to the person's designated sex at birth. This act tries to protect the rights of transgender people by eliminating all kinds of discrimination and harassment.[13]

3. Protection of Rights of Transgender people by the Constitution

John Stuart Mill has articulated the Harm Principle in his essay 'On Liberty' in year 1859[14] which states that "The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns him, his independence is, of right, absolute."[15] There was a huge debate by H.L.A. Hart and Lord Devlin on this issue.[16] J. S. Mill was of the opinion that the sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection.

Lord Devlin was holding an opinion that, "There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government. The suppression of vice is as much the law's business as the suppression of subversive activities."[17] H.L.A. Hart was of the estimation that morality was a virtue left to one's own interpretation and analysis, and a pervasive action of the state constituted a momentous infringement of the individual's right to liberty and dignity. The debate on state morality against individual rights still furies on, and an illusion of it was witnessed in the instant case.

The spirit of the Constitution is to provide equal status to all human beings. It provides an opportunity to all the people to grow irrespective of their race, caste, sex or religion. Still, these people face huge discrimination at various phases of lives. Indian judiciary has now recognized the rights of transgender people and came to know about the violation of rights of transgender people.[18] The judiciary has taken into consideration various international conventions to which India is a signatory to also various judgments pronounced by the foreign court. There is an obligation on the domestic courts to give due regards to the international conventions in the absence of any municipal law. The Yogyakarta Principles are well used in the judgment by the apex court while deciding the matter of NALSA[19] which does not go in conflict with fundamental rights.

Article 21 is the heart and soul of the Constitution and speaks of the right to life and personal liberty. It protects the personal dignity of an individual and it also guarantees freedom and privacy to an individual. In the case of Anuj Garg v. Hotel Association of India,[20] the apex court emphasized that the personal freedom is both the negative right of not to be subjected to interference by the others and positive right of the individual for making decision of his life and to choose which activities to take part in. Therefore, no one has the authority to interfere in their life and violating their right of privacy.

In the case of City of Chicago v. Wilson et al., the Supreme Court of the United States of America has stuck down the municipal law prohibiting cross-dressing and held that such laws are inconsistent with the right of privacy, self-privacy, autonomy and personal integrity.

All the above mentioned provisions are gender neutral and are specific to neither male nor female. Hence, these provisions of the Constitution apply to the transgender community.

4. Legal Recognition of Third Gender

After the judgment of National Legal Services Authority v. Union of India,[22] the apex court has recognized the concept of 'third gender' in India. The transgender people who were without any status earlier are now can be known as third gender. Previously, they were forced to write male or female against their gender. The apex court had asked the center to treat transgender as socially and

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13 Gee Imaan Semmalar, *Gender Outlawed: The Supreme Court Judgment on Third Gender and its Implication,* ROUNDTABLE INDIA (19 April 2014), *available at:* http://roundtableindia.co.in/index.php?option+com_content&viewarticl...t-judgment-on-third-gender-and-its-implication-&catid=120&Itemid=133 (last visited 10 November, 2016)

14 B Harcourt, *'The Collapse of the Harm Principle,'* 90 J. Crim. L. & Criminology 109 (1999);

15 JOHN STUART MILL, ON LIBERTY (Elizabeth Rapaport ed., Hackett Publishing Co, Inc. 1978) (1859) at p. 9

16 Devlin and Hart, *Devlin and Hart on Legal Moralism, available at:* http://faculty.ycp.edu/~dweiss/phl347_philosophy_of_law/devlin%20and%20hart%20notes.pdf, (Last visited 11 November, 2016)

17 *Sixth Form Law*, *available at:* http://sixthformlaw.info/01_modules/other_material/law_and_morality/08_hart_devlin.htm (Last visited 11 November, 2016)

18 National Legal Services Authority v Union of India, (2014) 5 SCC 438

19 (2014) 5 SCC 466.

20 Anuj Garg v. Hotel Association of India, (2008) 3 SCC 1

21 City of Chicago v. Wilson et al, 75 Ill 2d 525 (1978)

22 *Supra* note 2.

economically backward class. It also allowed the transgender people to take admission in educational institutions and they were also given employment on the basis that they belong to third gender category. This judgment gave the formal recognition to the transgender community and third gender will be considered under OBC's. The court also ordered the government to construct the special toilets at public places and also departments to look into their special medical issues.[23]

The Parliament has realized the need to enact legislation for the protection of the rights of transgender people. Therefore, after the pronouncement of the landmark judgment for declaring transgender as third gender, the RajyaSabha passed a private member bill on The Rights of Transgender Persons Bill, 2014[24] to provide for the formulation and implementation of comprehensive national policy for ensuring overall development of the transgender persons.

Section 377 of Indian Penal Code ('IPC') penalizes any sexual conduct that is "against the order of nature" including consensual adult same sex conduct.[25] The constitutionality of this Section was recently upheld in the Supreme Court decision of *Suresh Kumar Koushalv Naz Foundation*.[26] The United Nations AIDS organization (UNAIDS) has asked India along with some other countries to repeal all laws criminalizing adult consensual same-sex conduct on the basis that such criminalization hampers efforts to reduce and treat HIV/AIDS.

5. Conclusions and Suggestions

The judgment pronounced by the apex court in the NALSA's case has though provided transgender community a special status, but still when it comes to practical aspects of life, the people of this community still face a lot of discrimination in employment, education and health. To this affect, the paper asserts that the proposals given by H.L.A. Hart now have been realized by the Indian judiciary, while the schemes of Lord Devlin have been quelled as it reflects archaic social thought.

The transgender people are often subjected to molestation, harassment and victimization. The people of India need to understand the problems being faced by this community and should show some harmony to them. The crimes against them are increasing at a very fast rate which needs to be curbed down by the government. One can only hope that transgender/ hijra communities will continue to question and strive beyond the governmental and legal adjudication and management of transgender identity, even as we stake our rightful claim to citizenship, rights and recognition.

It is suggested that the government should prepare and execute plans to educate the people about the rights and privileges of TG community. The government has the duty to convey the general public, through various advertisements on television, radio and other mediums, to include them as a member of society and not to outcast them. Merely giving them a right would not suffice, proper implementation of such rights is necessary.

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23 Dhananjay Mahapatra, *Supreme Court recognizes Transgender as Third Gender,* TIMES OF INDIA (April 15, 2014) *available at*: http://timesofindia.indiatimes.com/india/Supreme-Court-recognizes-transgenders-as-third-gender/articleshow/33767900.cms (Last visited 11 November, 2016)

24 The Rights of Transgender Persons, Bill 2014 (Bill No XLIX of 2014)

25 S.377 of Indian Penal Code, 1872.

26 (2014) 1 SCC 1.

Essay

Indian Attestation Laws: An Overview

Raavi Mehta*

ABSTRACT

Attesting documents by a competent witness is imperative to give effect to certain provisions as provided under various Indian legislations. Indian Evidence Act, 1872, Transfer of Property Act, 1882 and Indian Succession Act, 1925 lays down the directions to attest documents to give affirmation of its authenticity. No particular mode of attestation is prescribed in these legislations. Therefore, only a signature of any competent witness which is distinctly visible on the document would suffice the procedure. The article analyses the requisites of attestation, thereby providing comprehensive information on its provisions in India. It begins with an enumeration about the common law rule which necessitates the proving of an attested document by at least one competent witness for its execution. It further elucidates upon the provisions of attestation in the Indian Evidence Act, 1872 providing for the mode of attestation in accordance to Section 68 to 71 of the Act. The next part of the paper provides for the essentials of a valid attestation as provided in the Transfer of Property Act, 1882. The article concludes by differentiating among attestation, notarizing and apostilling, which are the most commonly confused terms.

Keywords: Attestation, Apostilling, Notarization, Execution of documents, Witnesses, Mode of attestation.

1. Introduction

Attestation means to sign and witness any fact. It is the act of attending the execution of a document and being witness to its authenticity by signing under one's name for giving affirmation to its genuineness. It means that the subscribing witness saw the writing executed or heard it acknowledged and, at the request of the party, there uponsigned before his name as a witness.[1]

It is a declaration by a witness that an instrument has been executed in the presence of the undersigned according to the formalities required by law. No specific form of attestation is prescribed by any statute, but it is imperative that the witness should put his signature with the intention of attesting it and the attestation must not precede execution, only follow it. It ensures the authenticity of the execution of the document.

The common-law rule which necessitated the proving of execution of an attested instrument by at least one witness has been modified over the years. The modifications by means of different enactments and amendments in provisions provide that no attestation is required in certain documents unless their genuineness is questioned or the testimony of the maker of the statement will suffice to prove its execution.

Section 63 of the Indian Succession Act 1925, Section 68 of the Indian Evidence Act,1872 and Section 3 of the Transfer of Property Act, 1882 make a mandatory obligation to have the document attested, and evidence of such attestation must be made available before the court at the time of trial.[3]

2. Provisions on Attestation in the Indian Evidence Act, 1872

A private document (Section 75) can be proved by 4 ways: By a registered document, by an attested document when it is registered by law, by an attested document when it is not registered by law, or by an unattested document. The mode of proving an attested instrument is in accordance with Section 68 to 71 of the Act. Attesting witness must have animus attestandi while signing the document i.e. he must intend to attest and bear evidence on the point of his/her presence while making attestation.

According to Section 68, no less than one attesting witness must be inspected for proving the execution of the document (will). It provides that if it is required by law to attest a document, it shall not be used as a proof until at least one attesting witness has been called for the purpose of proving its execution. A witness is called if such an attesting witness is alive and capable of giving evidence which is subject to the process of the Court. It is furthermore provided that it might not be important to call an attesting witness in verification, of the execution of any document, not being a Will, which has been registered as per the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it shows to have been executed is especially denied. So, to call at least one attesting witness for the purpose of proving the execution of the will is a mandate. Will is one such document

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1 Luper v Werts, 23 P. 850, 855, 19 Others 122

2 K.M.Varghese and Others.Vs.K.M. Oommen and others AIR1994Ker85, ILR1993(1)Kerala372, 1994(2)KLJ393

3 N Kamalam v Ayyasamy (2001) 7 SCC 503

required by law to be attested and its execution has to be proved in the manner provided by Section 68 of the Indian Evidence Act read with Section 63 of the Indian Succession Act, 1925.

When a witness dies, Section 69 comes into picture as it provides for proof where no attesting witness is found. When no such attesting witness can be found or if the documents were executed in the United Kingdom, proof that attestation of at least one attesting witness is in his handwriting and that the signature of the person executing the document is in the handwriting of that person must be shown.

Section 70 applies only to the documents required by law to be duly attested. When the party to an attested document admits the execution of such a document, it shall suffice to prove the execution as against him. The section lays down that if the executant concedes the execution of the document it might be a sufficient proof of its execution as against him regardless of the fact that it is required by law to be attested by a witness. In any case, an admission in such circumstance ought to be clear and unqualified.

Proof of document not required by law to be attested is provided in Section 72. A document can be proved as if it was unattested, if it is attested, but not required by law to be attested.

3. Provisions on Attestation in Transfer of Property (TP Act), 1882

The requisition as to attestation was first made by the TP Act.[4] As per TP Act, to attest is when two or more persons have signed the document by way of testimony of the fact that they saw it executed. The party who sees the execution of a document is a 'witness'. Now, the requisition applies to anomalous mortgages also i.e. a deed cannot operate as mortgaged if the attestation is not valid. In India, it is not required by both the attesters to be present at the same time or see the actual execution of the document.

Particular documents are to be compulsorily attestable by two or more witnesses as provided in Section 3. Some of those documents are Gift deed (registration compulsory), mortgage deed (registration compulsory except in case of deposit of title deeds for mortgage.), will bequeathing properties to interested persons (optional registration), Sale deed (compulsory registration) and demand promissory note i.e. negotiable instrument (not compulsory attestable document). Following are the essentials of a valid attestation as per this section.

1. It is a must to have two or more witnesses.
2. Every witness must see
   a) The executants' sign / affix his mark (thumb impression) to the instrument
   b) Or some other person sign the instrument in the presence, and by the direction, of the executants
   c) Or the witness ought to have received from the executants a personal acknowledgment of his (executants') signature/mark or of the person marking for the sake of the executants.
3. The witness should put his signature with animus attestandi[5] (sign with an intention to attest and for the purpose of attesting the signature), which means that for the purpose of attesting, he has seen the executants' sign or has received from him a personal acknowledgment of his sign.
4. An attesting witness need not witness the actual execution of the deed, in as much as he can attest on the affirmation of execution by the executants himself.
5. Each witness must sign the instrument in the presence of the executants.
6. For a valid attestation, every witness must sign only after the execution is complete.[6]
7. All the attesting witnesses need not validate at same time.
8. No specific form of attestation is necessary. Also, the signature of an attesting witness is not necessary to be in any specific place. Thus, regardless of the possibility that the witness signs the report against the signature of the executants, where he has executed the document, it is an appropriate attestation of the document.[7]

Section 59 provides for the mortgage when to be by assurance. Where the principal cash secured is one hundred rupees or more, a mortgage other than a deposit of title deeds for mortgage can be affected just by a registered instrument signed by the mortgagor and confirmed by no less than two witnesses.

Section 123 lays downs the provision for transfer for the purpose of making a gift of immovable property. To gift an immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses.

It is not necessary to get every document attested. But transfer of immovable property requires attestation. The Act does not prescribe for particular form of attesting documents. Attesting witness may put his signature anywhere on the deed. In fact, a mere signature is sufficient. The definition of attestation specifically mentions that "'no particular form of attestation shall be necessary'". However, the signing should be visible from the document. The main purpose of attestation is to testify to the voluntary execution of the document by the transferor, which must be clearly evident.

It makes the deed of transfer of property invalid i.e. a deed cannot operate. No transfer of property takes place under it. Therefore, the document is not enforceable in a court of law. If the document is for mortgage, it can neither operate as mortgage, nor as charge.

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4 Ahmad Raza v. Abid Husain (1961) ILR 38 All 494

5 Abdul Jabbar v. Venkata Sastri (1969) 3 SCR 513, AIR 1969 SC 1147.

6 Sant Lal v. Kamla Prasad (1952) SCR 116

7 Kaderbhai Ismailji v. FatimabaiAIR1944Bom25, 1943(45)BOMLR911

4. Provisions on attestation in Indian Succession Act, 1925:

The requirement of Section 63 is only that the will should have two attesting witnesses and that there is no requirement that the attesting witnesses also should be present at the same time.

5. Conclusion

Attesting, Apostilling and Notarizing are the most commonly confused terms.

Notarizing means that a notary public is swearing as to the identity of the person (i.e. they have seen documents supporting their identity) signing a document. Whereas, attestation is witnessing (anyone) the signing of a document and making sure that it is signed properly by the persons bound by the contract. To notarize a document, you have to be sworn in by the State and take an oath to be a Notary Public but an attestation may be done by any witness.

The act of authorizing the signature on a document must be completed by a legal public notary. Requisites for getting this title shift from state to state; which may generally include paying an expense, taking an oath and being confirmed by the individual state. On the other hand, attestation can be performed by anybody notwithstanding whether the individual is a state-commissioned public notary. Attestation can be utilized in the context of sanctioning the substance of any document.

Another key contrast between notarial acts and attestations includes the process in which they are executed. When a notarial act is being performed, the public notary is normally required to place his or her official stamp on the record. In any case, somebody who is verifying the marks, on any document, is not required to put a stamp or seal on it.

Usually, legal documents, like affidavits or personal statements are notarised while copies of documents such as scholastic qualification certificate, mark sheets, or other existing documents are confirmed by any attesting authority with no notarial stamp expense.

Apostille intends to verify, affirm or complete. An apostille is a type of verification in which certain documents are sanctioned in a specific format that is admitted in all countries that have a place in the Hague Convention. Basically, apostille is a universal confirmation that is validated in around 92 nations and the greater part of the western world acknowledges it.

Apostilles are attached by Competent Authorities assigned by the administration of a state which is party to the Hague Convention. A rundown of these powers is kept up by the Hague Conference on Private International Law. An apostille is the sanctioning of particular documents for universal use. When you show a legal record or document in an outside nation, there are always questions regarding its legality and genuineness. Hence, in 1961, the procedure for authorizing legal documents and records for use in abroad was supplanted by an easy certificate of validness, called an 'apostille', under the Hague Convention.

It is a certificate that is affixed to an official legal record or document to confirm that the signatory specified in the document is authentic and the undersigning individual is a perceived and authorized individual of the association that issued the record. Each apostille is dated, given a distinctive identity number and enlisted. On the off chance that a report is apostilled, it doesn't require to be attested.

Almost, every kind of document can be apostilled like Birth Certificate, Adoption Certificate, Marriage Certificate, Divorce Decree, Death Certificate, Power of Attorney, School Diploma and/or Transcripts, Corporate Documents, Affidavits, Identity records and/or Passports, Deeds and Wills, Agreements, Bills of Sale, Proof of Ownership, Private Documents etc.

Case Comments

A Note on the Philippines v. China Arbitration

Dr. Yubing Shi*

On January 22, 2013 the Republic of the Philippines (hereinafter the Philippines) initiated arbitral proceedings against the People's Republic of China (hereinafter China) in accordance with Article 287 of the 1982 United Nations Convention on the Law of the Sea (hereinafter UNCLOS or the Convention) and Annex VII to the Convention.[1] Through presenting a Note Verbale, a Notification and Statement of Claim to the Chinese Embassy in Manila,[2] Philippines hoped to address its disputes with China over maritime entitlements to the South China Sea by legal means. China adopted the position of non-acceptance of and non-participation in this arbitration, which is consistent with its policy that any territorial disputes should be handled through bilateral negotiations. After three and a half years the *Philippines v. China* Arbitration case finally ended on July 12, 2016, with a Merits Award totally in the Philippine'sfavor. As the respondent, China rejected this Merits Award as well as the Award on Jurisdiction and Admissibility released on October 29, 2015 by the Tribunal.

In accordance with international law, the award of July 12, 2016 is rendered beyond the Tribunal's jurisdiction.[4] The interpretation and application of the Convention in this case, as the sole responsibility of the Tribunal, is also controversial in the international academia.

First of all, the Tribunal asserts that its ruling only concerns the interpretation and application of relevant provisions under the UNCLOS, without reference to territorial sovereignty or maritime delimitation.While land territorial sovereignty related matters are beyond the scope of the UNCLOS, issues concerning maritime delimitation and involving historic titles have been excluded by the *2006 Declaration* filed by China to the Secretary-General of the United Nations.[5] In view of the award's actual effects, it has gone beyond the authorization of the UNCLOS.

For example, the Tribunal rules that Mischief Reef(Meiji Jiao) and Second Thomas Shoal(Ren'ai Jiao) fall within the Philippines' exclusive economic zone and continental shelf, and that they are both low-tide elevations on the basis of which no territory can be claimed.[6] This has actually denied China's claims of territorial sovereignty over them and has in fact led to the effects of maritime delimitation. It is thus clear that the arbitration in essence involves territory and delimitation related issues. Based on the Award on Jurisdiction and Admissibility made by the South China Sea Arbitral Tribunal on October 29, 2015, the Philippines' Submission could be understood to relate to sovereignty if it were convinced that "the actual objective of the Philippines' claims was to advance its position in the Parties' dispute over sovereignty".[7]

Secondly, the Tribunal's award does not go well with the Philippines' Submissions and violates the rule of "*non ultrapetita* (no ruling should go beyond the scope of petitions)"or Article 10 of Annex VII to the Convention that

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1 *United Nations Convention on the Law of the Sea*, opened for signature December 10, 1982, 1833 UNTS 3 (entered into force November 16, 1994) [*UNCLOS*].

2 *Note Verbale from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila* (January 22, 2013), Doc No. 13-0211.

3 *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines* (December 7, 2014) [*China's Position Paper*], *available at* http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml (Last visited on February 4, 2017). See also Yubing Shi, *An Overview of China's Position on the Philippines v. China Arbitration*, Vol. 1 ASIA-PACIFIC JOURNAL OF OCEAN LAW AND POLICY 116-120 (2016).

4 The award of Jurisdiction of October 29, 2015 by the Tribunal has been critically examined by a number of papers. See, e.g., Stefan Talmon, *The South China Sea Arbitration: Observations on the Award on Jurisdiction and Admissibility*, Vol. 15 CHINESE JOURNAL OF INTERNATIONAL LAW(2016); SreenivasaRaoPemmaraju, *The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility*, Vol. 15 CHINESE JOURNAL OF INTERNATIONAL LAW (2016); Chris Whomersley, *The South China Sea: The Award of the Tribunal in the Case Brought by Philippines against China—A Crique*, Vol. 15 CHINESE JOURNAL OF INTERNATIONAL LAW (2016).

5 *Declaration made after ratification* (China, August 25, 2006), *available at*http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China%20Upon%20ratification (Last visited on February 4, 2017). This declaration states that, "The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention".

6 *South China Sea arbitration case* (The Philippines v. China) Award, 2016, PCA reports, para. 1203(B)(4), (7) (Permanent Court of Arbitration).

7 *South China Sea arbitration case* (The Philippines v. China) Award on Jurisdiction and Admissibility, 2015, PCA reports, para. 153

requires that the award "shall be confined to the subject-matter of the dispute". In contrast, the award does not wholly respond to the objections in China's Position Paper on the Tribunal's jurisdiction issued on December 7, 2014.

Just as was pointed out by Judge Hanqin XUE of the International Court of Justice on July 15, 2016 at the Public International Law Colloquium on Maritime Disputes Settlement held in Hong Kong, the Tribunal's ruling has exceeded the scope of the Philippines' Submissions and its own jurisdiction. Thereby, it breaches the rule of "*non ultrapetita*", which should be observed by international judicial or arbitral agencies. For example, the Philippines' Submissions do not include aquery over China's stance of taking the Spratly Islands (Nansha Qundao) as a whole to claim for its maritime rights and interests. However, the final award overtly overrules China's assertion, and decides that Article 47 of the UNCLOS cannot be applied to Spratly Islands (Nansha Qundao).[8] The legal status of *all* maritime features in the South China Sea including Itu Aba Island (Taiping Dao) is another case in point. The Philippines has altogether submitted fifteen disputes, which do not involve the status of Itu Aba Island and some of other maritime features in the South China Sea. Although the Philippines referred to the status of South China Sea maritime features including the Itu Aba Island during the hearings in 2015, this does not serve as a formal submission. Therefore, the Tribunal should not have ruled over the informal claims in its final award.

Furthermore, although China's 2014 Position Paper makes clear that it shall not be regarded as China's acceptance of or its participation in the arbitration,[9] the Tribunal still, in its 2015 Award on Jurisdiction and Admissibility, treated the Position Paper as China's plea.[10] Nevertheless, the Tribunal did not respond to all three objections of China against its jurisdiction in the Position Paper. Based on Article 20(3) of the Rules of Procedure,[11] the Arbitral Tribunal has to rule on all the objections provided in China's Position Paper whereas the Tribunal failed in fulfilling its obligation in this regard.

Some of the merits rulings are also problematic. An example is the Tribunal's dealing with the Submission 13 of the Philippines. The Tribunal decides that Chinese law enforcement vessels led to serious risk of collision when they attempted to drive the Philippines law enforcement vessels out of the territorial sea of the Scarborough Shoal (Huangyan Dao) in 2012.[12] Based on the two reports provided by two experts appointed by the Tribunal and the Philippines respectively, the Tribunal rules that the Chinese law enforcement vessels violated the Convention on the International Regulations for Preventing Collisions at Sea (COLREGS) in 2012.[13] The Tribunal asserts that the COLREGS is the "generally accepted international regulation" provided in Article 94(5) of the UNCLOS, based on which the Tribunal decides that China violates Article 94 of the Convention.[14]

In this case the Tribunal treats the COLREGS as the main instrument to decide whether Chinese law enforcement vessels' activities are legal or not. However, this is controversial. First, it is significant to decide which country owns the Scarborough Shoal although the Tribunal does not agree to this point. From the perspective of China, the entry of the Philippines law enforcement vessels into its territorial sea and its internal waters of the Scarborough Shoal should not be regarded as the innocent passage provided in Articles 18,19 and 21 of the Convention. It is thus legitimate for China to "take the necessary steps" to drive them out of its territorial waters in accordance with Article 25(1) of the Convention. In this sense the Tribunal should have applied Article 25 to decide the legitimacy of Chinese law enforcement vessels rather than the COLREGS. Indeed it is impossible to decide the legitimacy of the activities of Chinese or the Philippine's law enforcement vessels in this maritime zone without knowing the sovereignty of the Scarborough Shoal, and the legitimacy of vessels' activities relate to the applicability of law in this case. Namely, given the Scarborough Shoal owned by China, China and the Philippines are a coastal State and a flag State respectively in the territorial sea of the Scarborough Shoal. It is thus reasonable that Article 94 of the Convention, as a provision on the duties of flag States, should not be applied to Chinese law enforcement vessels in the territorial sea of the Scarborough Shoal. Meanwhile, it is also problematic for the Tribunal to apply Article 94 of the UNCLOS, a provision applicable to the high seas,[15] directly to the territorial sea without providing

(Permanent Court of Arbitration).

8 *South China Sea arbitration case* (The Philippines v. China) Award, 2016, PCA reports, para. 573 (Permanent Court of Arbitration).

9 *China's Position Paper* para. 2.

10 *South China Sea arbitration case* (The Philippines v. China) Award on Jurisdiction and Admissibility, 2015, PCA reports, para. 15 (Permanent Court of Arbitration).

11 Art. 20(3), *Rules of Procedure*, adopted on August 27, 2013, in the Matter of an Arbitration before an Arbitral Tribunal constituted under Annex VII to the 1982 UNCLOS between the Philippines and China, PCA Case No. 2013-19.

12 *South China Sea arbitration case* (The Philippines v. China) Award, 2016, PCA reports, para. 1203(B)(15)(a) (Permanent Court of Arbitration).

13 *South China Sea arbitration case* (The Philippines v. China) Award, 2016, PCA reports, para. 1203(B)(15)(b) (Permanent Court of Arbitration).

14 *Id*.

15 UNCLOS Art. 86.

any legal reasoning. Article 10 of Annex VII to the Convention provides that the award of the arbitral tribunal shall "state the reasons on which it is based".[16]

Secondly, the COLREGS only applies to vessels on navigational purposes rather than intentional collision, whereas the Chinese law enforcement vessels operated in its territorial sea aiming to maintaining its sovereignty where the COLREGS should not be applicable. In practice, the law enforcement vessels may even use force to deal with non-innocent passage whenever it is necessary. This has been proved by a number of international judicial cases,[17] and is also a common practice in many countries including the USA and Japan.[18]

Thirdly, the Tribunal asserts that "where the operational requirements of law enforcement ships stand in tension with the COLREGS, the latter must prevail". In other words, if law enforcement vessels operate in accordance with Article 25 of the Convention and this Article conflicts with the COLREGS, the COLREGS must prevail.[19]This assertion is not correct. Article 293(1) of the UNCLOS provides that "A court or tribunal having jurisdiction under this section shall applythis Convention and other rules of international law not incompatible withthis Convention". It is thus logic to conclude that Article 25 of the Convention must prevail over the COLREGS if there is any conflict between them.

The interpretation and application of Article 121(3) of the Convention in this case is another very controversial matter. It is arguable that the interpretation of this Article by the Tribunal does not comply with the context and the ordinary meaning of the provision as well as the background of negotiations of the Convention. Furthermore, the application of Article 121(3) to the maritime features in the South China Sea, particularly the Itu Aba Island, does not reflect the true situations on the island,[20] and would possibly jeopardise the legally binding force of the merits rulings.

In conclusion, it is arguable that the South China Sea Arbitral Tribunal's award is beyond its jurisdiction and goes against relevant rules in international law. As things currently stand, the rulings would not address the maritime disputes between the Philippines and China. It seems increasingly possible that the ongoing dialogue and negotiations between the two countries would play a more constructive role in the future addressing of the disputes between the two countries.

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16 UNCLOS Annex VI Art. 10.

17 See, e.g., 1999 *M/V "SAIGA"* (No. 2) (Saint Vincent and the Grenadines v. Guinea), 1935 *S.S. "I'am Alone"* case (Canada v. United States), and 1962 *Red Crusader case* (Commission of Enquiry, Denmark v. United Kingdom).

18 See, e.g., *The Commander's Handbook on the Law of Naval Operations*, edition July 2007, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A, para. 2.5.2.1; *Japan Coast Guard Act* art 20, *available at* http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi (Last visited on February 4, 2017).

19 *South China Sea arbitration case* (The Philippines v. China) Award, 2016, PCA reports, para. 1095 (Permanent Court of Arbitration).

20 Chinese (Taiwan) Society of International Law, *Amicus Curiae submission by the Chinese (Taiwan) Society of International Law*, (March 23, 2016), *available at* http://csil.org.tw/home/wp-content/uploads/2016/03/SCSTF-Amicus-Curiae-Brief-final.pdf (Last visited on February 4, 2017).

M. Chinna Karuppasamy v. Kanimozhi: The Case that has Triggered the Debate on Maintenance

Harsh Mahaseth*

1. Introduction

M. ChinnaKaruppasamy v. Kanimozhi[1] is an interesting case as it poses the question of whether a woman, against whom a decree for divorce under the charge of adultery has been passed, is entitled to maintenance under Section 125 of the Code of Criminal Procedure, 1973.

2. Brief Overview of the Case

The respondent is the divorced wife of the petitioner. The marriage had taken place under Hindu customs on the 1st of February in 1998. They had children out of their marriage as well. However, due to some misunderstandings between the two their marriage broke up and the petitioner then filed for an ex-parte divorce before a Family Court in 2009 on the grounds that the respondent was living in adultery. The respondent was alleged to be having an extra marital affair during the marriage and to be in continuance of it. While the matter was pending in the Family Court the respondent filed a claim for a monthly maintenance of Rs. 2500 before the Chief Judicial Magistrate under Section 125 of the Code of Criminal Procedure.

The respondent argued that the petitioner wanted her consent to marry her sister's daughter and upon refusal she was harassed and eventually thrown out of the matrimonial home. She further denied the claims of her adulterous relationship and claimed for a monthly maintenance of Rs.2500 as the petitioner earned a monthly salary of Rs.15000. While the maintenance case was pending in front of the Chief Judicial Magistrate, the Family Court granted the divorce. The Trial Court had dismissed the claim for maintenance; however the Principal District and Sessions Court directed the petitioner to pay a monthly sum of Rs.1000. This then came in front of the Madras High Court as a Criminal Revision Case.

In this case the High Court, the foremost contention made by the counsel for the petitioner was that once a decree for divorce had been granted on the ground of the wife living an adulterous life then under Section 125 sub-section 4 of the Code of Criminal Procedure she loses the right to claim maintenance. It is claimed that the definition of the term "adultery" in the said section is applicable to widows as well.

The counsel for the respondent argued that a woman should be able to choose her own way of sexual life and that the term "adultery" under Section 125 sub-section 4 of the Criminal Procedure Code is only applicable to women whose marriage is still in subsistence.

3. The Holding

The judgment was delivered on the 16th of July in 2015 and the Court held that a divorced wife who lives in adultery is disqualified from claiming maintenance under Section 125 of the Code of Criminal Procedure. It was also held that this also applies to a wife who lives an adulterous life during the subsistence of the marriage.

The Full Bench held that the term "adultery" as given under Section 125 sub-section 4 of the Criminal Procedure Code should be given a liberal interpretation than its ordinary sense: it should include a married woman having sexual relations with a man other than her husband. Even the definition of "wife" should not be confined to wives whose marriages are still in subsistence. If the wife wants to retain her right to claim maintenance then she is expected to maintain the same discipline she was expected to maintain during her marital ties even after the marriage has ended. If the wife continues to maintain the same discipline even after marriage then she is entitled to claim for compensation; however if she commits a breach to the said obligation and starts living an adulterous life then she loses the right to claim for maintenance.

The entire objective of introducing Chapter IX of the Criminal Procedure Code was for the wife, children and parents to receive monetary compensation to rescue them from the treacheries of destitution. A wife is entitled to maintenance, from the husband, after a divorce so that she does not end in destitution. However, if she commits a breach and starts living, in an adulterous relationship, with another man then she is disqualified from claiming maintenance under Section 125 sub-section 4 of the said Act. She may be entitled maintenance from the man she started the adulterous relationship in but she cannot claim it from her former husband.

The Family Court had granted the divorce on the ground of adultery and such finding has not been challenged by the

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[1] M. Chinna Karuppasamy v. Kanimozhi, 2015 SCC On-line Mad 6845.

respondent. Under Section 41 of the Indian Evidence Act, 1872 once the decree for divorce was granted on the ground of adultery, the Court does not need to decide on the issue of whether adultery was present in the current case or not. Hence, in the present case the Family Court has proved that the respondent was living in an adulterous relationship during the time of her marriage and this, she is disqualified from claiming maintenance from the petitioner.

4. Analysis of the Judgment

The question that arose before the Madras High Court was whether a claim of maintenance under Section 125 of the Criminal Procedure Code can be filed by a woman against whom a decree for divorce had been passed on the ground of adultery.

According to Section 125 of the Criminal Procedure Code wives, children and parents can ask for maintenance from the husband/father/son who is in the financial condition to sustain his living. The fundamental inherent principle behind Section 125 is the amelioration of the people from destitution.[2] Section 125 ensures social justice as it provides a speedy remedy and falls within the ambit of Article 15(3) reinforced by Article 39 of the Constitution of India.[3] However, the Magistrate has the power to make an order under Section 125 sub-section 4 and refuse the compensation claim. The sub-section reads as follow: "No Wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent."

The High Court included divorced women under the term "wife" in this Section. As no definition of adultery has been specified apart from that under Section 497 of the Indian Penal Code the High Court decided to give it a liberal interpretation and also include a married woman having a sexual relation with a man other than her husband. In the end the claim of the petitioner for maintenance was rejected.

Two things should be noted from the judgment the Court has made.

The High Court included divorced wives under the ambit of the term "wife" in Section 125 sub-section 4. The expression "wife" in sub-section 4 of Section 125 does not have the extended meaning of including a woman who has been divorced. This is for the obvious reason that unless there is a relationship of husband and wife there can be no question of a divorcee woman living in adultery.[4]

The High Court did consider the past Supreme Court judgments and concluded the opposite of those judgments. The Court has said that the wife has to maintain the same discipline that she would have to as she did during the subsistence of the marriage.

Further, another error made by the High Court was that they have failed to differentiate between the terms "adultery" and "living in adultery".

Adultery is the sexual intercourse of two persons, either of whom is married to a third person. This clearly supposes the subsistence of marriage between the husband and wife and it is during this subsistence that if a wife lives in adultery then she would be disqualified from claiming maintenance under Section 125 of the Criminal Procedure Code.[5]

In the context of Section 125 the term "living in adultery" has been used and it has been defined in several previous judgments; while the definition of "adultery", on the other hand, constitutes of a single act of sexual intercourse outside of the marriage.

The definition of the phrase "living in adultery" in the section denotes a continuous course of action rather than singular events of immorality. One or two acts of sexual misconducts would be insufficient to prove that the woman was "living in adultery".[6] It denotes the principle that a husband is absolved from the obligation to maintain his wife when his wife has some man other than her husband to maintain her. The obligation of the husband arises to maintain his wife as Chapter IX was created to protect the deserted wives from means something quite different from living an unchaste life. A wife is supposed to continue getting maintenance till she re-marries.[7] The husband is absolved from maintaining his wife only when she has a de facto protector who can maintain her[8] or when her adulterous conduct has persisted for some length of time suggesting that she has found herself another albeit less honorable source of income.[9]

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2 ShamimaFarooqui v. Shahid Khan, (2015) 5 SCC 705.

3 Captain Ramesh ChanderKaushal v. Mrs. VeenaKaushal and Ors., (1978) 4 SCC 71.

4 Vanamala v. H.M. RanganathaBhatta, (1995) 5 SCC 299.

5 Rohtash Singh v. Ramendri and Ors., 2000 (2) SCR 58.

6 Khin v. N. L. Godenho, AIR 1936 Rangoon 446.

7 Ravi Kumar v. SantoshKumari, (1997) ILR 2 Punjab and Haryana 357.

8 Lakshmi Ambalam v. Andiammal, AIR 1938 Madras 66.

9 Nesamma v, ManuvelHentry,LAWS(KER)-1961-10-5.

5. Conclusion

In conclusion, the Madras High Court tried to direct the debate towards Section 125 of the Criminal Procedure Code which is essential. As the law stands right now adulterous wives/widows have the benefit of still getting maintenance from her husband.

Section 125 of the Criminal Procedure Code has been one of the most effective legal instruments for providing parents, children and, mostly, wives with the economic support that is required. This Section, however, needs to be amended. As already noted by the Court the term "wife" should include divorced wives as the entire Chapter IX was built while keeping them in mind as well.

In this case even if it is assumed that the respondent did have a relation with a man other than her husband, she is entitled to get maintenance from the petitioner since Section 125(4) is not attracted in this case.[10] The judgment given by the Madras High Court was given in the right direction but there was no substantial reasoning given by them. The husband should maintain the wife unless she has another de facto protector or another less honorable source of income.

In this day and age, where women empowerment has seen a rise and women have broken the old cultural boundaries and perceptions of women only being the household care-taker, women are encouraged to work and earn their own living. In cases such as this one there should be allowance for maintenance for a limited time period in which the wife is expected to adapt to the changing environment and earn a living for herself. There is a need for the laws to be amended and the present case has been successful in triggering this debate.

[10] Valsarajan v. Saraswathy, 2003 (2) KLT 548.

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