UJALA JUDICIAL AND LEGAL REVIEW

UTTARAKHAND JUDICIAL AND LEGAL ACADEMY
BHOWALI, NAINITAL

UJALA JUDICIAL AND LEGAL REVIEW

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Reject wealth/money and desires which are contrary to dharma.
Reject also such rules of dharma obedience to which lead to unhappiness of a few or which cause public resentment.

(Manu Smriti - IV, 176)

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Chief Justice Barin Ghosh- A Tribute

Hon'ble Mr. Justice Barin Ghosh, former Chief Justice of High Court of Uttarakhand at Nainital, is no more with us. His Lordship was born on June 05, 1952. He was enrolled as an Advocate on December 19, 1978, and practised in the High Court of Calcutta mainly in matters of Civil, Company and Constitutional Affairs. He was appointed as a Permanent Judge of the Calcutta High Court on July 14, 1995. He was transferred to the Patna High Court, where he assumed Charge on January 07, 2005. He was appointed as the Chief Justice of Jammu & Kashmir High Court on

December 24, 2008 and took over as the Chief Justice of the High Court of Jammu and Kashmir on January 03, 2009. On transfer to the High Court of Sikkim he took oath on April 13, 2010 as Chief Justice of the High Court of Sikkim. He was transferred to High Court of Uttarakhand at Nainital and assumed charge on 12.08.2010 as Chief Justice of the High Court of Uttarakhand. Chief Justice Mr. Ghosh demitted his office on 04.06.2014 after attaining age of superannuation.

From Nainital, His Lordship went to Kolkata. He was playing golf regularly, as he used to play at Nainital. Suddenly we heard that he is suffering from carcinoma liver. The days were numbered. He passed away at Kolkata leaving behind his wife and two unmarried daughters. Shock wave engulfed Nainital and the whole of Uttarakhand. It is difficult for us to believe that he is no more with us.

Hon'ble Chief Justice Barin Ghosh was an astute administrator and a Judge of great repute. He was a disciplined Judge. He would take decisions quickly and would dictate his judgments in the open Court promptly. As indicated earlier, after putting in a few years at the Bar, he was elevated as a Judge of Calcutta High Court. Then he was transferred to Patna High Court. He remained Chief Justice of J&K High Court, Sikkim High Court and finally Uttarakhand High Court. He was possessed of a sharp intellect.

"A Judge is a lawyer first, and only thereafter he is a Judge", he used to say. What does the judiciary do? It only forms an opinion. The final opinion is enforced by the State machinery. If the Trial Court has taken a view, this is nothing, but an opinion. He expresses opinion on the basis of material considered by him. When matter is challenged before the Second Appellate Court or before the Hon'ble Supreme Court, the ultimate opinion is formed by the last Court, which reaches finality and once the opinion reaches finality, it is enforced by the State. The Judge has to have parameters, inputs and data in order to enable him to form an opinion, Chief Justice Ghosh used to say.

In one of the lectures delivered in the Academy, Chief Justice Barin Ghosh (as His Lordship then was) said that "the important contribution comes from the lawyer's community". It is their thought processes, assemblage of facts, knowledge of law which goes a long way in formation of opinion by a judge.

Further underlining the role of lawyers, Chief Justice Barin Ghosh said that untiring efforts by a lawyer brings a sea change in the system. Suppose a lawyer is capable of making an argument which is so persuasive and accepted by the Division Bench of a Court, then similar matters filed by a large number of litigants, who are not client of that Lawyer, whose opinion is accepted by the Division Bench, also gets benefitted because of those cases are decided on the basis of such precedent.

The most important contribution of lawyers is that of upholding the Rule of Law, for making a law settled and for dispensing justice to the grass-root. The most important, most tiring and the most laborious work is shouldered by the lawyers. A lawyer in the society is regarded as the philosopher of the society.

Comparing Allahabad High Court with Uttarakhand High Court, Chief Justice Barin Ghosh said, "The Allahabad High Court was established 150 years back. Lawyers at Allahabad Hih Court have rich knowledge and experience. A Lawyer at Allahabad High Court with, say, 30 years experience, gives and passes that knowledge and experience to his junior. So this junior who comes 30 years later has got an advantage of 30 years of knowledge gathered from his senior. So when he acquires 30 years of practice, his knowledge becomes 30+30, that is 60 years of rich knowledge and experience. So by that ratio, in Allahabad High Court you will find lawyers with almost 150 years of experience. But in Uttarakhand we are only 14 years."

"In our State when the High Court was established 14 years back, a few people came from Allahabad High Court but unfortunately not a many senior counsel came from Allahabad because they were all established in Allahabad. Why should they come to Uttarakhand, a much smaller High Court situated in Nainital, a difficult place to stay. Although I am told that Kashipur had a very good Bar, Roorkee had a very good Bar, Dehradun had a good Bar but Lawyers practicing in these Courts did not come to Nainital to set-up their practice. Those who came here were all juniors, may not be by age, but by way of knowledge and we had no mechanism established here to give them all the necessary impetus for becoming good Lawyers, to acquire knowledge, assimilate knowledge and put it in the manner to be put before the Judge. This is the most important part of advocacy."

Addressing a gathering of Lawyers, he said, "Your client may have many facts, some of those facts may be in your favour some of them may not be in your favour. Now you must first try to find out what would be your answer to the facts and factors which are not good for your case. How to deal with them? You have to know how to highlight the best facts and factors in favour of your client and put all the things in such a way that it is best put to the Judge on behalf of your client. Now in this advocacy a young boy getting a brief will be reading the entire brief. He has got knowledge, he had already read Law, he will look out the Law he will find out the law but for pleading it for the purpose of formation of that opinion he may lack skill."

Emphasising the need of training for lawyers, Chief Justice Ghosh said, "there the training comes. You are unfortunate that you have not got the opportunity to get trained under the umbrella of your seniors, in the sense those seniors who have got 150 years of knowledge in their history. At the same time we cannot wait for 150 years. You have to expedite by sharing your experience, by sharing your knowledge and this is the first step that we have taken so that now a community builds up for the purpose of developing the knowledge bank, developing the skill of accumulating the basic way of presenting the matters before the Court. I hope 10 years back when I become very old and I will come to visit this place I will find great Lawyers."

The concept of training in District Judiciary was highlighted by Chief Justice Barin Ghosh thus-"In the olden days, the system used to be, a munsif (read Civil Judge, Junior Division) is appointed and there was no concept of Training. He goes and sits with another Munsif, who are 2 years, 3 years or 4 years senior to him, he watches him several times how the matters are going, what the Lawyers are saying, how the Judge is interacting etc. This is how the new Munsif is trained, and once he starts presiding over his Court, the gets the confidence of asking the Lawyers that in a situation of this nature what should be the correct solution, and he was so confident that the Lawyer will come up with the correct solution. If he has any doubt he will ask another Lawyer. So in other words, he gets trained by the Lawyers, with his urge to know and the information which is supplied by the Lawyers. Now this Munsif is trained then ultimately he becomes a District Judge, all throughout he is being trained by the Lawyers. At every stage, he is doing different work viz. Munsif's work is different,

C.J.M.'s work is different and then that of the District Judge (it is also difficult). In every stage, he is trained by the Lawyers by giving him an input of their knowledge. Then they come to the High Court as a Judge, there again he is trained by the Lawyers. Further, they go to the Supreme Court, the again are trained by the Lawyers practicing there. It is that ability to find out the correct part that ultimately gives success."

Chief Justice Barin Ghosh also said that the names of great Judges are written in the law books, but no one reads their names. Citing an illustration of Keshvanand Bharti's case, Chief Justice Gosh told the audience in one of the lecture delivered in State Judicial Academy that "Kesvanand Bharti, a person I don't know whether anyone knows him from Kerala, is the name etched in the legal history and will remained etched for a millennium but people will forget who made Keshvanand Bharti famous. We will refer to the said judgment of the Hon'ble Supreme Court but we do not talk about the name of the Judge or the Judges who formed that opinion and who had breathed a change in the whole concept of looking at the Constitution of India. We will not refer to those lawyers who made the Judges to form that kind of an opinion. The names of the great Judges and lawyers are all written in the law books but no-one reads them."

Lamenting slow moving wheels of justice, Chief Justice Barin Ghosh told a gathering of legal fraternity that "In India, today we have lot a difficulty in the sense that the people outside India do not have much faith on the Indian judiciary. It is unfortunate but the basic reason appears to be accumulation of cases. A large number of cases have accumulated. Many reasons are there for this accumulation, but I personally feel that the most important reason for accumulation is that the trend of the Lawyer dealing with the client has changed. If a matter remains pending it suits the Lawyer, but 30-40 years back, if a matter is not pending that suited the Lawyers. That is where the sea change has taken place. If you want you can avoid this pendency at any point of time. It is entirely upon you to call upon the judge to work for whole day. It is you who can to go to the Court and say that my client is suffering, this matter is required to be heard within a reasonable time. If you want, a matter will be decided within a reasonable time. It is you who is the will of judicial movement. If you become slow, the judiciary will become slow. If you become fast, the judiciary will become fast. If you come to the Court just for purpose of your personal ego and personal satisfaction or showing your client that you have got great knowledge of

law and you argue…… [word omitted-Ed.], which has nothing to do with the matter, what you are doing is that you are wasting your time, you are wasting the Court's time and wasting the client's time. You have a trump card, put the trump card before the judge. First show that this is the law and plead all the facts. Give chance to the other side. Every matter has got a core issue. You can properly pin point the core issue and you can really show the judge that this core issue is required to be (adjudicated) in this particular manner. By doing this, the chances of the Judge making a mistake is also reduced, chances of appeals in the matter is also reduced because today you must understand that litigants are not illiterate. They know what is what? Once they have read it and they find that there is nothing further to be done, they will not take this matter up."

Though Hon'ble Chief Justice Mr. Barin Ghosh is no more with us, but present and next generation of Judges and Lawyers will continue to remember His Lordship through his judgments, which are not being cited here, for, they are already available to the members of legal fraternity, in legal journals and internet. It would be a befitting homage to him to emulate his forensic ability and articulation of principles of Law.

-Justice U.C. Dhyani
Editor-in-Chief

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UJALA : A PROFILE

Name of the Academy: Uttarakhand Judicial and Legal Academy, Bhowali, Nainital

Established in:	**2004.**
Inaugurated on:	**14 June, 2008.**
Contact No.	**05942 221375**
Website:	**www.ujala.uk.gov.in**
Administrative Setup:	
Director:	**Shri Pradeep Pant**
Contact No:	**Office - 05942 221374** **Residence - 05942 220658** **Cellphone - +919456597000** **E-mail : pradeep-p@indianjudiciary.gov.in**
Faculty:	
1. Additional Director (Training)	**Shri Yogesh Kumar Gupta** **Contact No: +919456596051** **E-mail : adjyogeshgupta@gmail.com**
2. Additional Director (Training)	**Sri Subir Kumar** **Contact No.+919456597005** **E-mail : subirsharmajudge@yahoo.in**
3. Joint Director (Administration)	**Sri Pradeep Kumar Mani** **Contact No: - +919456596058** **E-mail : pradeepmani82@gmail.com**
4. Assistant Director	**Ms. Vibha Yadav** **Contact No. +919456592155** **E-mail : vibhayadav.uttarakhand@gmail.com**

Brief History of the Academy:

On November 9, 2000 the new State of Uttarakhand was carved out from State of the Uttar Pradesh. In year 2004, Hon'ble Mr. Justice V.S. Sirpurkar, the then Chief Justice of Uttaranchal High Court took keen interest in establishing an Academy for training to the judges of the State. The Judicial Academy for the State was conceptualized and was christened as Uttarakhand Judicial and Legal Academy (UJALA). The foundation stone of UJALA was laid on December 19, 2004 by Hon'ble Mr. Justice R.C. Lahoti, the then Chief Justice of India in the presence of Hon'ble Sri N.D. Tiwari, the then Chief Minister of Uttarakhand and Hon'ble Mr. Justice V.S. Sirpurkar. Subsequently the Administrative-cum-Training block, a Mess and a hostel was constructed in the first phase of infrastructure construction. Cradled in a valley of rolling pine forested hills of Bhowali, the Academy became functional on June 14, 2008 when it was inaugurated by Hon'ble Mr. Justice K.G.. Balakrishnan, the then Chief Justice of India in the presence of Hon'ble Sri B.L. Joshi, the then Governor of Uttarakhand and Hon'ble Mr. Justice V.K. Gupta, the then Chief Justice of Uttarakhand High Court.

Activities at UJALA: Training and Research

Primarily, the Uttarakhand Judicial and Legal Academy is meant for the training of judges of the Subordinate Courts of the State of Uttarakhand. The Academy organizes Induction/Orientation Training Programmes and Reflective Training Programmes for newly appointed judges. The Academy also organizes In-Service Programmes like Refresher Programmes, Workshops, Seminars, and Specialized Training Programmes for other judges of Subordinate Courts of the State. However, the ultimate goal of the Academy is "to strengthen the administration of justice as a whole". To ensure the achievement of the goal, efforts are made that every stake holder in justice delivery system may benefit from the resources of UJALA. In this process the public prosecutors of the State, police officers, officers of various Departments of State Government, who by virtue of their official position have to take judicial or quasi judicial decision, etc are imparted training in UJALA to suit their needs.

Patron-in-Chief

The Hon'ble the Chief Justice of High Court of Uttarakhand is the Patron-in-Chief of the Uttarakhand Judicial and Legal Academy. The present Chief Justice of High Court of Uttarakhand is Hon'ble Mr. Justice K.M. Joseph.

Judge-in-charge (Judicial Education)

The day-today-affairs of the Academy are monitored and approved by the Judge-in-charge (Judicial Education). The present Judge-in-charge (Judicial Education) of the Academy is Hon'ble Mr. Justice Sudhanshu Dhulia.

Governing Council

The strategic decision making body of the Academy is the Governing Council. The Governing Council sits twice in a year to discuss issues relating to the Academy and monitor the activities of the Academy. The composition of the Governing Council is as under:

1.	Hon'ble the Chief Justice of High Court of Uttarakhand	Patron-in-Chief
2.	Hon'ble Judge-in-Charge (Judicial Education)	Member
3.	Advocate General, Uttarakhand	Member
4.	Principal Secretary, Personnel, Uttarakhand	Member
5.	Principal Secretary, Law, Uttarakhand	Member
6.	Principal Secretary, Finance, Uttarakhand	Member
7.	Director General Police, Uttarakhand	Member
8.	Registrar General, High Court of Uttarakhand	Member
9.	Member Bar Council, Uttarakhand	Member
10.	Director, UJALA	Member Secretary

Founding Director:

The Founder Director of the Academy was Hon'ble Mr. Justice Umesh Chandra Dhyani.

Facilities at UJALA:

Library: The library of Uttarakhand Judicial and Legal Academy was inaugurated on 26 June' 2011 by Hon'ble Chief Justice Sri Barin Ghosh in presence of Hon'ble Judges of High Court of Uttarakhand, Nainital. The Library is spread over 4500 sq ft. and stacks more than 15,000 volumes of books, available in open access in subjects ranging from Law, Science and Technology, Economics, History, Sociology, Literature etc. The library subscribes to more than 75 periodicals in print. Besides, the library has 6000 bound volumes of journals. In order to keep pace with the current trends of access to information resources through tools of Information Technology, the Library of UJALA has acquired all major Indian electronic legal-data resources like AIR-Webworld, SCC online, Manupatra Case Locator etc, which are available on both stand alone and online mode. The library services have been fully automated with the web based Library Management Software LIBSYS.

Auditorium : The Academy has fully Air-conditioned (all weather) Auditorium which is a state of the art building with a seating capacity of 300 people; It is one of the largest auditoriums in the region in a perfect ambience. The aesthetically designed Auditorium is tastefully built up to meet the current and future requirements for holding national and international scientific, industrial and cultural meets. The Auditorium has fully automized stage with the digital projection facility and dolby digital sound with a electronic podium. Auditorium is also equipped with 250 kva silent genset for power backup.

The auditorium of the academy can be made available for educational, social and cultural purposes to the government institution of states and the union of India statutory bodies, statutory units, universities of the state, Academies run by other states and others on prescribed charges. For more information please log on to our website www.ujala.uk.gov.in or landline 05942-221375.

Guest House: The academy has 5 fully furnished and immaculately clean suites for accommodation for distinguished guest and faculty visiting the Academy. Set amidst the mountains all suites of the guest house are provide with 2 bed rooms, drawing room and kitchen to offer tranquillity and absolute privacy.

Hostel : At present the Academy has three hostels building namely Old hostel, New hostel and Married hostel with 18, 12 and 30 room each with attached toilet. These rooms are well equipped with all modern facilities like TV with DTH, Geyser, room heaters Electric kettle etc. the balconies of all the hostel room offer picturesque scenes and provide ambient comfort to the guest.

Academy's hostel rooms, guest houses are now available for accommodation to the Judicial Officers across the country on payment of prescribed charges. For more information please log on to our website www.ujala.uk.gov.in or landline 05942-221375.

Mess: The naturally illuminated and ventilated mess provides a meticulously chosen menu of Indian appetizers. Great care is taken while designing the menu to keep all essential nutritious elements in the diet. The mess offers an ambient atmosphere to the trainee officers/participants not only to unwind themselves from hectic training schedules but also to discuss and share experiences in an absolutely amicable environment.

Recreation Centre:

A well designed and equipped recreation centre has been made operation in the Academy Premises having array of world class facilities for badminton squash court, gymnasium and table tennis to take care of fitness and well being of trainee while their stay in the Academy.

Journal:

To foster the spirit of research in the legal and judicial field, and to provide a platform for expressing legal/judicial thoughts and research work to research inclined Judges and the legal fraternity of the State, the Uttarakhand Judicial and Legal Academy has started publishing a journal **"UJALA-Judicial & Legal Review".** The present edition of the journal is the first issue of volume three.

CONTENTS

CRIMINOLOGICAL EXPLANATIONS OF SEX CRIMES

Professor B. B. Pande*

Sex Crimes can assume multiple forms, depending upon the mode of its execution and the social value attached to the involved interests. The objectives of criminalization of sexual behavior may vary from society to society and also differ with the time period, thus, the criminological explanations of sex crimes is bound to vary considerably in different societies. However, these criminological explanations are built around certain key notions such as : identification of sex deviance, bodily autonomy, liberalism, feminism and domination and control. I propose to briefly discuss the aforesaid notions at a very general level, but in order to make the discussion India-centric for the British audience, I would advert to the Indian stand-point, every now and then.

Identification of Sex Deviance

Sex deviance may relate to a wide variety of human behavior and may manifest in multiple forms such as physical sexual aggression as in the cases of rape and homosexuality or may be directed against the mind or psyche of the victim as in the cases of pornography and obscenity or may be directed against public morality and social values as in the case of prostitution. However, criminological literature relating to sex deviance in the western world has mostly centered round rape deviance that poses most potent challenge to gender justice. Perhaps the best treatment to rape deviance can be found in the early 1980s classic by Steven Box : Power, Crime and Mystification, where in chapter 4 titled as 'Rape and sexual assaults' on females, the author views rape as a symbol of assertion of male power. Such a power concept of rape is explained in terms of the fivefold categorization, namely : (i) Sadistic rape (ii) Anger rape (iii) Domination rape (iv) Seduction-turned-into-rape and (v) Exploitation rape. Box goes into analyse the types of rapists, the statistics and reports and the official and unofficial explanations of rape, to arrive at a conclusion that the 'power holders' continue to mystify the reality at every level. He critiques the narrow legal definition of rape in these words : "This legal

* Criminal Law Chair Professor, NLUD, Former Professor of Law, University of Dehli.

definition is too narrow and excludes forms of sexual access gained not by actual and threatened use of physical violence, where the female's utterances are simply ignored and her will to resist eroded by a constant verbal pressure...It also ignored economic pressure..." **(Box, 1983, at p. 150)**

The mid nineteenth century English Law concepts of rape and other sex offences were imported into India by the British, through the act of codification of the Indian Penal Code 1860. The conservative victorian concept of rape under the Code had some distinct features, namely : male fetish with one female orifice and one instrument for violation, low age of consent, generious 'spousal exception' and locating rape and other physical forms of sexual deviance in the 'offences against human body' chapter. Such a strict and narrow rape law was considered just adequate for meeting the needs of the largely rural and agricultural Indian society of the mid nineteenth century, that in any case depended more upon religion, traditions and other informal means for the regulation and control of the sexual urges. In the post independence era and with the advent of the Constitution, the social attitudes and thinking about sex underwent significant changes. However, in the last four decades, particularly after the *Delhi Gang Rape Incident* in December, 2012, the thinking on the subject had started changing drastically, particularly in urbanized metropolitan cities and also exerted impact on the law reforms. In this context the enactment of the Criminal Law (Amendment) Act, 2013 that led to almost a re-writing of the rape law, is notable. The new rape law has certain progressive features that can be described as decisive departure from the earlier law on the point. First, the ambit of rape offence has been broadened by including other orifices of the female body such as anus urethra or mouth. Similarly the instrument of penetration may now be an object such as stick or manipulated body part. Second, the age of consent has been raised from 16 to 18 years (in consonance with the UN Convention on the Rights of the Child). But the new law has retained its male perpetrator-centric character, has still located rape offence amidst 'offences against human body' chapter, and the most regressive, retained the 'marital exemption clause', despite. Justice Verma committee's categorical recommendation against it. However, under the influence of international feminist movement, particularly in the urban and metropolitan cities, there is a much greater awareness about sexual offence victimization and gender justice issues today. Women's education and socially alive and conscientious

media has played a key role in the construction of such a progressive climate. But it is not yet clear whether such a positive progressive mood would be able to transform the gender bias social reality?

Attributes of Bodily Autonomy

Human sexuality is significantly influenced by the state, through the legal and quasilegal instrumentalities. Laws lay down the norms for the permitted and the prohibited kinds of sexual activities and thus exercises significant influence over bodily autonomy and social construction of sexuality. It may be worthwhile to quote an observation by Nicola Lacey and Celia Wells, thus : "Bodily autonomy can demand protection in two senses : First, protection of one's own choices and second, protection against interference by others. Protection of one's own choice can include freedom to engage in (possibly) 'self harming' activities, such as prostitution, surrogacy, euthanasia. Protection against interference by others would mean prevention of rape, sexual or other forms of assault. Although these two senses of protection are two sides of the same coin, it is useful to conceive them as different tensions within debates about criminal regulation of bodily autonomy" **(Nicola Lacey et al., at p. 354).**

'Protection in the first sense' is reflected in the social attitudes to sexuality and its regulation. The British society has been extra sensitive in keeping a watch on the social attitudes, particularly in sexual matters relating to pre-marital sex, extra-martial sex and same sex relationships. The 5th Report and the 9th Report of the *British Social Attitudes* (ed. by R. Jowell et al, 1988 and 1992) have reported that the societal attitudes to sexual permissiveness underwent a sharp change from less permissiveness to more permissiveness between 1980 to 1990. This is an indication that in the sex matters the British society turned increasingly permissive over a period of time. Comparing the British society's permissiveness to the contemporary Indian society one encounters the reality of lack of any authentic empirical research on the issue. The limited inference that can be drawn from sporadic studies and the reports of sex incidents, is enough to arrive at a conclusion of extremely low or even no toleration to sex permissiveness. Thus, any kind of sexual choice outside the socially sanctified or legally legitimized sexual relations is either strictly prohibited or highly stigmatized, except amongst the very limited ultra modern urban sections. Such an environment of lack of permissiveness, is one big reason

for increasing incidents of power rapes, incestuous sex, child rapes and the brutalization of sexual behavior generally.

Limitations of Liberalism

Every liberal society faces the problems associated with the regulation of sexuality through law that seeks answers to issues : To what extent law can be involved in applying sanctions to apparently 'harmless' activities ? How far law can be deployed to enforce conventional moral standards ?

P.J. Fitzgerald refers to the 'other classes of crimes' while writing in this context that may be described as 'offences of immorality' that do not pose any kind of physical threat to body or property. (Fitrgerald, 1962, pp. 78-81). Such offences differ in one important respect that such crimes directly affect only those who commit them. No clear and direct attack is made on any other by such crimes. Fitzgerald opined that "Today, however, the imposition by force of moral standards for their own sake is not generally accepted as defensible". The aforesaid views are in consonance with the Wolfendon Report (1956).

The ideas kick started by Wolfenden Report findings and the arguments of Fitzgerald were later followed up in the famous Lord Devlin and Professor, H.L.A.. Hart debate. Lord Devlin refused to accept the distinction between private and public morality. He opined that the established morality of a society is entitled to protect itself against the disintegration which would follow from the loosening moral bonds resulting from failure to observe the rules of established morality. As against Lord Devlin, Professor Hart felt that the above views were based on several unapproved assumptions. First, failure to enforce sexual morality in the past has not led to the disintegration of the society. Second, failure by a few to follow the moral code does not lead to abandonment of all the rules by the other members. Third, there does not exist any sort of unanimous moral agreement in the society. It appears that on the issue of enforcement of public morality the western society is closer to Professor Hart's views.

Commenting specifically on the Indian position on the enforcement of public morality, an example can be picked from the two new kind of offences of Assault on woman under sections 354C and 354D of the Penal Code. 'Voyeurism' that only requires a man to 'Watch' or 'Capture

the image' of woman engaging in a private act in circumstances where she would usually have the expectation of not being watched. Similarly the new offence 'stalking' requires intentionally 'following a woman' or 'attempt to develop contact despite the woman's disinterest'. These new kinds of assaults appear to be motivated more by the concern for upholding public morality, rather than the protection of woman against any kind of direct harm.

The Feminist Argument

The feminist argument is in contract to philosophical and legal liberalism, because it is based on an assumption that the sex crime laws, procedures, institutions and ideologies only go in to reinforce the patriarchal relations between men and women. The current feminist writings and researches about sexuality, follow either of these two lines. First, that rejects the liberal thinking about distinction between public and private domains, second, that advocates taking into account women's view point in the interpretation of sexual violence. The first line of feminist argument is represented in the writings of Kathrine O'Donovan (1985), Lucia Zedner (1995). While writings and thinking of Catharine Mac Kinnon (1987), Judith Vega (1988), Susan Brownmiller and Carol Smart (1986) expound the second line. The following observation of Carol Smart sums up the essence not only of the second line. But also the total import of the feminist argument:

> Where woman resort to law, their status is already imbued with specific meaning arising out of their gender. They go to law as mothers, wives, sexual objects, pregnant woman, deserted mothers, single mothers and so on... I going to law women carry with them cultural meanings about pregnancy hetero sexuality, sexual bodies... Laws that deal with the private sphere operate on fully gendered subjects... (Carol Smart, 1990 pp. 7-9).

Domination and Control Through Sexual Deviance

Sex deviance becomes a means of domination and control over women, either through laws or other non law mechanisms such as the social, economic and medical discourses. Nicolas Rose (1987) had said in the field of sexuality we would do well to heed the maxim the 'analysis of law is the wrong place to start if one wishes to understand the regulatory

strategies'. The sexuality, the reproductive capacities and the bodies of women are controlled by religion, traditions and customs, psychiatric and medical science and the economic considerations of the family since all the aforesaid social institutional frameworks are dominated by the partiarchal viewpoints, the extra-legal mechanisms also turn into a means of control of women in the name of regulations of sexuality. Steven Box provides aptly the reasons for the continued domination and control of the women through non-legal strategies, thus :

> Few people are aware how men, who on the whole are more socially, economically, politically, and physically powerful than women, use these resources frequently to *batter* wives and cohabitate, *sexually harass* their female (usually subordinate) co-workers, or *assault/rape* any women who happens to be in the way. But we are very aware of female shoplifters and prostitutes and of those poor female adolescents who are 'beyond parental control' and in need of care and protections even though this is a gross misrepresentation of female crime and though the relative absence of serious female crime contradicts the orthodox view that crime and powerlessness go hand in hand **(Box 1983, pp. 12-13; Citations within the quote Omitted).**

Summing up the Criminological Explanations of Sex Crimes

(i) Criminology still does not provide any sort of distinct explanations for sexual behaviours. Perhaps this is because of the higher priorities accorded to other forms of criminalities.

(ii) As a consequence sex crimes remain highly under-addressed and under researched. The limited studies and researches have mainly focused on sex crimes of visible violence type only.

(iii) However, yet the State as well as the society continue to resort to the process of the criminialization and de-criminalization of sex crimes without really caring for empirical and scientific data. The Indian society's criminalization of 'Voyeurism' and 'Stalking' and the Indian Supreme Court's refusal to 'decriminalize' homosexuality between adult consenting parties are examples on the point.

(iv) Criminology desciplines' compulsions to toe the official line that panders to the views supporting commercialization of sex and its

inability to lead the social change towards a just and gender fair view of sex, are the big reasons for the existing state of lack of criminology of sex crimes.

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SENTENCING POLICY AND VICTIM'S PLIGHT

Alok Kumar Verma*

A judge is not a mere umpire to answer the question "How's that"? His object, above all, is to find out the truth, and to do justice according to law. This is the passage which is quoted by Lord Denning in his book on "Due process of law."

As regards the sentencing policy, it is well-settled that just and appropriate sentence has to be imposed keeping in mind the proportion between crime and punishment and having regard to the facts and circumstances of each case particularly, the nature of offence, the sentence prescribed, mitigating and other attending circumstances. Such act of balancing is indeed a difficult task. No straight jacket formula is possible and it is a major issue for maintaining consistency in sentence but proportion between crime and punishment is a goal respected in principle. The object of sentencing policy should be to see that the crime dose not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it.

In State of U.P. versus Shri Kishan, (2005) 10 SCC 420, the Hon'ble Apex Court has held,"undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed."

It is the duty of the court to see that sentence should not be passed sub-silentio. The Hon'ble Supreme Court in Bachan Singh versus State of Punjab, (1980) 2 SCC 684, has held that a balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before the option is exercised. Guidelines emerged from Bachan Singh's case were noticed by the Hon'ble Supreme Court in Machhi Singh and others versus State of Punjab, (1983) 3 SCC 470.

* District Judge, Chamoli

It will be proper to mention here some aggravating circumstances, which are:-

(i) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal conviction.

(ii) The offence was committed while the offender was engaged in the commission of another serious offence.

(iii) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(iv) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(v) Hired killings.

(vi) The offence was committed by a person while in lawful custody.

(vii) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another.

(viii) When there is a cold blooded murder without provocation.

(ix) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Some mitigating circumstances, which are:-

(i) The offence was committed under the influence of extreme mental or emotional disturbance.

(ii) The age of the accused is a relevant consideration but not a determinative factor by itself.

(iii) The probability that the accused can be reformed and rehabilitated.

(iv) The condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

Sentencing is an important task in the matter of crime. One of the prime purpose of the criminal law is imposition of appropriate, adequate,

just and proportionate sentence commensurate with the nature and gravity of crime and manner in which the crime is done.

In Dhananjay Chatterjee versus State of West Bengal, (1994) 2 SCC 220, the Hon'ble Apex Court held, "In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."

An analysis of the amended provisions on punishment under I.P.C., Prevention of Corruption Act, 1988, The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, The Juvenile Justice (Care and Protection of Children) Act, 2015 would give a clear indication on the penal philosophy of deterrence conceived by the parliament. As far as punishment for offences under the P.C. Act is concerned, there is no serious scope for reforming the convicted public servant. The moment he is convicted, he loses his job. Hence, there is no significance to the theory of reformation of his conduct in public service. The only relevant object of punishment in such cases is denunciation and deterrence but remedial statutes are different law.

Therefore, the object should be to protect the society and deter the criminal in achieving the avowed object of law by imposing appropriate sentence.

In State of Gujarat and another versus Hon'ble High Court of Gujarat, (1998) 7 SCC 392, the Hon'ble Apex Court observed "One area which is totally overlooked in the above practice is the plight of the victim. It is a recent trend in the sentencing policy to listen to the wailings of the victims. Rehabilitation of the prisoner need not be by closing the eyes towards the suffering victims of the offence. A glimpse at the field of victimology reveals two types of victims. The first type consists of direct victims, i.e. those who are alive and suffering on account of the harm inflicted by the prisoner while committing the crime. The second type

comprises of indirect victims who are dependents of the direct victims of crimes who undergo sufferings due to deprivation of their bread winner."

The State of Uttar Pradesh by U.P. Act No. 17 of 1992 inserted the following proviso in clause (d) of sub-section (1) of Section 357 Cr.P.C...- "Provided that if a person who may receive compensation under clauses (b), (c) and (d) is a member of the Scheduled Castes or the Scheduled Tribes and the person sentenced is not a member of such Castes or Tribes, the Court shall order the whole or any part of the fine recovered to be applied in payment of such compensation."

By U.P. Act No. 17 of 1992 for sub section (3) of Section 357 of Cr.P.C., the following sub section (3) has been substituted, "When a Court imposes a sentence, of which fine does not form a part, the Court may, and where the person who has suffered the loss or injury is a member of the Scheduled Castes or the Scheduled Tribes and the person sentenced is not a member of such Castes or Tribes the Court shall, when passing judgement, order the person sentenced to pay, by way of compensation, such amount as may be specified in order to the person who has suffered any loss or injury by reason of the act for which the person has been so sentenced."

Section 357A of Cr.P.C. was inserted by the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009) on the recommendation of 154th Report of Law Commission and this amendment duly came into force in view of the Notification dated 31.12.2009.

In the case where the accused is unable to pay adequate compensation to the victim or his heir, the compensation should be awarded under Section 357A of Cr.P.C. against the State from the funds available under the Victim Compensation Scheme framed under the same provision. In exercise of the powers conferred by Section 357A of the Code of Criminal Procedure, 1973, a Scheme has been framed by the State of Uttarakhand called "the Uttarakhand Victim from Crime Assistance Scheme, 2013".

The grant of compensation to the victim of a crime is a part of sentencing. In Suresh and another versus State of Haryana, 2015 (1) CCSC 461, the Hon'ble Apex Court observed that even though almost a period of five years has expired since the enactment of Section 357A, the award of compensation has not become a rule and interim compensation,

which is very important, is not being granted by the courts. The Hon'ble Apex Court held "We are of the view that it is the duty of the courts, on taking cognizance of a criminal offence, to ascertain whether there is tangible material to show commission of crime, whether the victim is identifiable and whether the victim of crime needs immediate financial relief. On being satisfied on an application or on its own motion, the court ought to direct grant of interim compensation, subject to final compensation being determined later. Such duty continues at every stage of a criminal case where compensation ought to be given and has not been given, irrespective of the application by the victim. At the stage of final hearing it is obligatory on the part of the court to advert to the provision and record a finding whether a case for grant of compensation has been made out, and, if so, who is entitled to compensation and how much. Award of such compensation can be interim. Gravity of offence and need of victim are some of the guiding factors to be kept in mind, apart from such other factors as may be found relevant in the facts and circumstances of an individual case."

It is a mandatory duty on the court for considering of grant of compensation to the victim of a crime and victim has a right to file an appeal against the grant of inadequate compensation. It is also very clear that according to Section 357B of the Code of Criminal Procedure, 1973, the compensation payable by the State Government under Section 357A shall be in addition to the payment of fine to the victim under Section 326A or Section 376D of the Indian Penal Code, 1860. In the light of the provision of Section 357A of the Code of Criminal Procedure, 1973, even if the accused is not tried but the victim needs to be rehabilitated, the victim may request the State or District Legal Services Authority to award him/her compensation.

The court must provide substantial and just compensation to the victim of a crime. In Laxmi versus Union of India and others, 2015 (3) CCSC 1424, the Hon'ble Apex Court held "We have gone through the chart annexed alongwith the affidavit filed by the Ministry of Home Affairs and we find that despite the directions given by this Court in Laxmi versus Union of India, (2014) 4 SCC 427, the minimum compensation of ? 3,00,000.00 (Rupees three lakhs only) per acid attack victim has not been fixed in some of the States/Union Territories. In our opinion, it will be appropriate if the Member Secretary of the State Legal Services Authority takes up the issue with the State Government so that the orders passed

by this Court are complied with and a minimum of 3,00,000.00 (Rupees three lakhs only) is made available to each victim of acid attack.

As per judgement of the Hon'ble Supreme Court in Suresh and another versus State of Haryana (Supra), the scheme adopted by the State of Kerala is applicable to all the States. The Hon'ble Supreme Court observed that it has also been pointed out that the upper limit of compensation fixed by some of the States is arbitrarily low and is not in keeping with the object of the legislation. The Hon'ble Supreme Court held "We are also of the view that there is need to consider upward revision in the scale for compensation and pending such consideration to adopt the scale notified by the State of Kerala in its scheme, unless the scale awarded by any other State or Union Territory is higher."

It is the duty of the court to duly consider the aspect of rehabilitating the victim of a crime. In Manohar Singh versus State of Rajasthan and others, 2015 (1) CCSC 219, the Hon'ble Apex Court held that order of sentence in a criminal case needs due application of mind. The Court has to give attention not only to the nature of crime, prescribed sentence, mitigating and aggravating circumstances to strike just balance in needs of society and fairness to the accused, but also to keep in mind the need to give justice to the victim of crime. In spite of legislative changes and decisions of the Apex Court, this aspect at times escapes attention. Rehabilitating victim is as important as punishing the accused. Victim's plight cannot be ignored even when a crime goes unpunished for want of adequate evidence.

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WOMEN & LAW OF LAND

Ritesh Kumar Srivastava*

It is a fact that women have been ill-treated in every society for ages and our society is not exception of this. It is also a fact that most Indian women suffer silently from cradle to grave. The irony lies in the fact that in our country women are treated as Goddess as Laxmi, Saraswati and Parvati, but the atrocities are committed against her in all sections of life. They are not accordant due importance in the society. In the case of Muller Vs. Oregon 208 US 412 (1908), Supreme Court of United States has declared that women are naturally a weaker sex. In this case this fact was first acknowledged. The Supreme Court of United States observed that due to physical structure and performance of maternal functions women are at a disadvantage. Women works are often confined to domestic environment. She had to do all kinds of domestic works which are not even recognized and unpaid. It is a responsibility of the society to implement favourable laws to bring them on the same lend as men.

It is to say that women are honored where, divinity blossoms their. This is also an ideology of our Indian culture and society. For the development and welfare of society, improvement and empowerment of women is imperative. Swami Vivekanand also once said, “there is no chance of the welfare of the world unless the condition of women in improved. It is not possible for a bird to fly on one wing.” Improvement of women is imperative for the whole world.

Global Scenario

We have ratified many international conventional to secure gender justice. At International Scenario, Charter of the United Nation, 1945 ensures equality in very first article of it, Article 1 says that “To achieve international co-operation is solving international problems of an economic, social, cultural or humanitarians character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language and religion...”. Universal Declaration of Human Rights, 1948 which is a milestone of human rights, reaffirms equality and ensures in article-1 that “All human being are born free and

* Civil Judge (Senior Division) Pithoragarh

equal in dignity and rights". Article-2 of Declaration invoices that "Everyone is entitled to all rights and freedoms set forth in this Declaration without distinction of any kind, such as race, color, sex, language, religion, birth or other status." The International convention of economic, social and cultural rights, 1966 and the International Convention of cultural, social and political rights, 1966 lays stress on equality with men and woman. In 1979 the General Assembly adopted The Convention of the Elimination of all forms of Discrimination against Women (CEDAW). This treaty defines discrimination against woman and affirms the reproductive rights of woman. It spells out what constitutes discrimination against women and propagates strategies based on non-discriminatory model, so that woman rights are seen to be violated, if woman are denied the same rights as men. In 1993 General Assembly approved declaration on Elimination of Violence against women. This Declaration deals with the violence against woman and expressly states that gender based violence is a form of discrimination which seriously inhibits a women's ability to enjoy rights and freedom on the basis of equality with men and asked all the parties of convention to regard this which they reviewing or enacting or mending their laws. The Declaration of 1993 is a comprehensive statement with regard to violence against women. This Declaration sets out the international standard which states have recognized as being fundamental in the struggle to eliminate all forms of violence against women. The convention of the Elimination of all forms of Discrimination against Women (CEDAW) is landmark treaty and marking the struggle for women rights. The Convention prohibits all discrimination to women. India ratified this resolution on 25th June, 1993. In Article 253 of Indian Constitution it has been provided that the parliament has empowered to make such laws for implementing any treaty, agreement or convention to effect any decision made at any international conference. The Indian parliament have enacted many laws in pursuance of Article 253 of Indian Constitution to protect the honor of women.

Indian Scenario

Our Constitution also ensures gender equality. The Constitution of India provides *inter alia* fundamental rights, fundamental duties and directed principle of State. We have a democratic polity, our laws, policies, plans and programmes have aimed at women's empowerment, improvement and advancement in all sections and different spheres.

Preamble to the constitution inter alia assures, social, economic and political justice, equality of status and opportunity and dignity of the person. Several provisions in Indian constitution expressly deals favourable action to women. Our constitution not only grants equality to women but also empowers the State to adopt measures of affirmative discriminations in here favour.

Constitution of India

Very firstly Article-14 of the Indian Constitution secures the right to equality to every person. This article embodied the principle of rule of law which is the basic feature of our Constitution as well. Article-15 of the Indian Constitution clearly disallows, discrimination on the ground of sex and same time Article-15 makes a favourable provision for women by empowering the state to make special provision for them. Article-16 of Indian Constitution deals with the equal opportunity in public employment. Article-23 of Indian Constitution improved the condition of women in terms of forced prostitution as this provision prohibits traffic in human beings and other similar forms of forced labour.

In directive principle of the state inter alia Article 38 requires the state to strive to eliminate inequalities in status, facilities and opportunities. The State to direct its policy towards securing for men and woman equally the right to an adequate means of livelihood under Article-39(a). Article 39 (d) invoices equal pay for equal work. Article 39(e) urges the State to ensure that person are not forced into work that is unsuitable to their age or strength due to economic necessity. Article 39A secures access to justice for all. Article-42 requires the State to make provision for securing just and human condition of work and for maternity relief. Article-46 of Indian Constitution states that the State should promote with special care the education and economic interest of the weaker of the people and to protect them from social injustice and all forms of exploitation. Article-47 makes improvements of public health of primary duty to State. Article-51 also protect the dignity of women and declares that the duty of every citizen in India is to renounce practice derogatory to the dignity of woman. Article-243 guarantees minimum one third seats for women in every Panchayat and Municipality. In the case of Sarla Mudgal Vs. Union of India, AIR 1995 SC 1931, Hon'ble Supreme Court urged the implementation of Uniform Civil Code as provided under Article 44 of Indian Constitution by State to improvement of condition of women.

Parliamentary Enactments

to secure the gender justice, Indian Parliament has enacted many laws intended to ensure safety, rights and protection of women. A women can be victim of any of crime in society and in fact all crimes cannot be classified as a crime against women except few crimes which affects a women largely. Our parliament has passed many legislation which has proved as weapons for women and helped them to stand in male dominating country. Firstly we will identify crimes against women as under Indian Penal Code, 1860

(1) Crimes against women under Indian Penal Code, 1860 with amendment in 2013 are as follows :

1. Public servant fails to record any information given to him about acid attack or sexual offences against women (Sec. 166A), 2. Non-treatment of victim by hospital (Sec. 166B), 3. Acid attack (Sec. 326A & Sec. 326B), 4. Outraging modesty by assault or criminal force (Sec. 354), 5. Sexual harassment (Sec. 354A), 6. Assault or use of criminal force to woman with intent to disrobe (Sec. 354B), 7. Voyeurism (Sec. 354C), 8. Stalking (Sec. 354D), 9. Rape (Sec. 376), 10. Kidnapping & Abduction (Sec. 363-373), 11. Trafficking of person (Sec. 370), 12. Exploitation of a trafficked person (Sec.370A), 13. Dowry Deaths (Sec. 304B), 14. Mental & physical torture (Sec. 498-A), 15. Insult to modesty of woman (Sec. 509).

Many crimes against women also identified under Special Legislations, although all are not gender specific but to safeguard and interests of women. These acts are like a boon to women at large to protect their dignity. Besides identification of crimes against women, some acts also have special provisions to safeguard women and their rights and interests.

(2) Legislative Acts (Specific or Related to Women) are as follows:-

1. The Immoral Traffic (Prevention) Act, 1956.
2. The Dowry Prohibition Act, 1961 (28 of 1961) (Amended in 1986)
3. The Indecent Representation of women (Prohibition) Act, 1986
4. The Commission of Sati (Prevention) Act, 1987 (3 of 1988)
5. Protection of women from Domestic Violence Act, 2005

6. The Sexual Harassment of Women at Workplace (PREVENTION PROHIBITION and REDRESSAL) Act, 2013
7. The Dissolution of Muslim Marriage Act, 1939.
8. The Indian Christian Marriage Act, 1872 (15 of 1872).
9. The Married women's Property Act, 1874 (3 of 1874).
10. The Guardians and Wards Act, 1890.
11. The workmen's Compensation Act, 1923.
12. The Trade Unions Act, 1929.
13. The Child Marriage Restraint Act, 1929 (19 of 1929).
14. The Payments of Wages Act, 1936.
15. The Payments of Wages (Procedure) Act, 1937.
16. The Muslim Personal law (Shariat) Application Act, 1937.
17. Employers Liabilities Act, 1938.
18. The Minimum Wages Act, 1948.
19. The Employees' State Insurance Act, 1948.
20. The Factories Act, 1948.
21. The Minimum Wages Act, 1950.
22. The Plantation Labour Act, 1951 (amended by Acts Nos. 42 of 1953, 34 of 1960, 53 of 1961, 58 of 1981 and 61 of 1986).
23. The Cinematography Act, 1952.
24. The Mines Act, 1952.
25. The Special Marriage Act, 1954.
26. The Protection of Civil rights Act, 1955.
27. The Hindu marriage Act, 1955 (28 of 1989)
28. The Hindu Adoptions & Maintenance Act, 1956.
29. The Hindu Minority & Guardianship Act, 1956.
30. The Hindu Succession Act, 1956 with amendment in 2005
31. The Maternity Benefit Act, 1961 (53 of 1961).
32. The Beedi & Cigar Workers (Conditions of Employment) Act, 1966.
33. The Foreign Marriage Act, 1969 (33 of 1969).
34. The Indian Divorce Act, 1969 (4 of 1969).
35. The Contract Labour (Regulation & Abolition) Act, 1970.

36. The Medical Termination of Pregnancy Act, 1971 (34 of 1971).
37. Code of Criminal Procedure, 1973.
38. Code of Civil Procedure, 1908.
39. The Equal Remuneration Act, 1976.
40. The Bonded Labour System (Abolition) Act, 1979.
41. The Inter-State Migrant workmen (Regulation of Employment and Conditions of Service) Act, 1979.
42. The Family courts Act, 1984.
43. The Muslim women (Protection of Rights on divorce) Act, 1986.
44. Mental Health Act, 1987.
45. National Commission for women Act, 1990 (20 of 1990).
46. The Protection of Human Rights Act, 1993 (As amended by the Protection of Human Rights (Amendment) Act, 2006 - No. 43 of 2006).
47. Juvenile Justice (Care and Protection of Children) Act, 2000.
48. The child Labour (Prohibition & Regulation) Act.
49. The pre-Conception and Pre-Natal Diagno Techniques (Prohibition of Sex Selection) Act, 1994.
50. The Prohibition of Child Marriage Act. 2006.
51. Prevention of Children from Sexual Offences Act, 2012.
52. The Indian Evidence Act, 1872.
53. The Criminal Law (Amendment) Act, 2013.

Conclusion

We have enacted and reviewed many laws for improvement and empowerment of woman but condition of woman still leaves much to be desired. Improvement of education, skills and capability should be given top priority, if we want real empowerment of women. Unless the process of development is properly engendered, it shall remain endangered. No doubt Indian laws ensure gender justice but real solution lies in changing the mindset, attitude and perception of people towards women. Once Jawahar Lal Nehru said that “You can tell the condition of a nation by looking at the status of its women.” Real equality can only be achieved by improvement and empowerment of economic, social and political status of women. Swami Vivekanand once remarked that “Nation which does not

respect women will never become great now and nor will ever in future." Legislative, Executive and also the Judiciary have the responsibility to empower the women, as mandated in our constitution. We have enacted laws for equality with men and women. Our constitution provides that no law can be made and can be implemented which discriminate. Despite the constitutional guarantee of equality of sexes, discrimination and exploitation of women in India continues. The incidence of dowry deaths, acid attacks, sexual harassment, molestation and other violence against women are on increase. It is high time now that women should get a honorable and dignified status. Awareness in the women as well as society should be created and their equal rights and protection should be effectively implemented. Our Judiciary and Legislature has accepted the fact that women are one of the most important elements of society.

In our society changes have been taking place in every moment and in almost every field to protect honour of women. On 8th of March the International Women Day is celebrated, a number of laws and policies for women have been made. There are so many organizations have been working for freedom and empowerment of women. The essential to all women get educated to solve all women issues. Every woman has a fundamental right to be safe Protesting injustice, if a woman is able to protest herself with the right and education, then that protest her life becomes miserable. It should be remembered that the socio-economic empowerment must be ensured by the nation to minimize the exploitation which can help to improve the status of women. Moreover, apart from awareness, education, culture, laws, even Constitution can't bring any changes in the women's safety without change of people's mind set and attitude. Our constitution gives equal rights and protection to both men and women. However, the solution lies in changing the mindset and perception towards women. Equality of women in power sharing, and active participation in decision making of political process will be ensured for the real achievement of women's rights. In our country women are facing exploitation, work exploitation, sexual harassment, moral; verbal and physical abuse, bride burning, dowry, trafficking, acid throwing, rape and other crime. Illiteracy, ignorance, economic and social programme, superstition are highly responsible for such acute and pitiable scenario of the women in the country. But I say again that changes required in people's culture, mindsets, attitudes, perception and beliefs. If our laws which are enforced presently will implemented properly then the situation would be

better. The Government also have to take up radical reforms, to ensure justice to make women's lives more safe and secure in this social environment. Enhancement of healthy and sound environment for women everywhere is also necessity of the situation. It is also required that State must provide legal, political and social security to women to increasing their economic empowerment. Legal awareness everywhere about women's right is also would be a vital thing to empowerment of women.

Through this writing it is my humble attempt to cover all the constitutional rights of women and all the legislative acts about women which are in existence. I hope this article will help us to understand rights of women in India. Global efforts about women's rights also included by me in this writing. I also want to say that above list of parliamentary legislation is not conclusive. Beside these enactments it is more required that we change our mindsets towards women. If we eliminate female infanticide, dowry deaths, sexual abuse then only actual gender equality can become a reality.

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QUALITY OF LIFE IN GERIATRIC POPULATION IN INDIA

Dr. Lily Srivastava*

Ageing is a nature's gift and god's blessing. Earlier in India, the aged obtained respect due to the traditional norms of our country. The values and ethos of our country dictated the people to respect the elders. Religion also played an important role in this. "Pitri Devo Bhava" was the insignia of our culture. Joint family system was prevalent in the country. It provided a support system for the elderly and also ensured that their proper care was being taken. But the situation has changed today. The aged are facing a lot of problems.

Aging is a broad concept which includes many processes like biological, psychological, social and emotional. The present study will focus on social relationships, psychological well being, satisfaction with life, and perceptions of the aging and also to identify social and health characteristics that contribute in social and psychological well-being

A report released by the United Nations Population Fund and Help Age India to mark the International Day of Older Persons observed on October 1 suggests that India had 90 million elderly persons in 2011, with the number expected to grow to 173 million by 2026. Of the 90 million seniors, 30 million are living alone, and 90 per cent work for livelihood.

The steady rise in proportion of elderly in the population is taking place due to inter-alia increase in life expectancy as well as for relatively improved health care facilities, especially in private health sector. The demographic profile of rural and small towns has changed rapidly and significantly in recent decades. As people get older they are more vulnerable to economic, physical, financial and mental crisis requiring family or institutional support. Elderly abuse is a sensitive issue that requires immediate attention from policy makers, police and members of civil society.

Quality of life is also a multidimensional concept that is recognized as a useful tool to measure the welfare of the society. This concept may

* Ph.D. (Law & Medicine) LL.D. (Post-doctoral) Clinical Research Law-Associate Professor Law, SJNPG College, Lucknow, Email : lilyshreyansh@gmail.com

be broadly categorized in demographic, social, psychological, economic and health aspect. A quality life must include an optimal portion of leisure participation. Leisure activity participation ensures the elderly to gain control over the environment, express the abilities and identify the important components of life. Therefore leisure education is needed to make all the elderly to understand the importance of leisure activities. Engagement in meaningful leisure activities improves life satisfaction and quality of life of the elderly.

The elderly poor are facing several challenges with lack of earning opportunities, poor family support and inadequate state support. Secure and comfortable living arrangement for such elderly poor is becoming a challenge. In this paper I will try to outline the problems, troubles of old age and the remedies. This paper will also focus on the role of active community participation in Geriatric Care programmes. Capacity building of the community leaders/groups is essential for the success of community based geriatric and rehabilitative health services which can also play an important role in identifying the felt needs of the elderly and in resource generation.

Health of an individual, both physical and psychological, is the key factors in determining their quality of life especially in later life. Older people usually suffer from health conditions that are predominantly chronic in nature and are basically different from those of adult and young populations. The health status of aged population becomes particularly perplexed as they are prone to get multiple illnesses. With more than 100 million elderly, India is not in a position to meet their needs and provide a quality care through existing care facilities. We do not have a particular scheme and policies for providing health facilities for old people.

International Scenario

Except Article 25 (1) of the Universal Declaration of Human Rights 1948[1], at the international level, there were not any specific instruments to deal with the problems of elderly persons before 1982. To protect and promote the human rights and fundamental freedoms of elderly persons various agreements, covenants, conventions and declarations have been constructed, which are as under:-

[1] Everyone has the right to a standard of living adequate food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, widowhood, old age or other lack of livelihood in circumstances in his control.

The International Plan of Action on Ageing[2] was adopted at the First World Assembly on Ageing in Vienna August, 1982. Further, in 1992 the United Nations General Assembly adopted eight global targets on ageing for the year 2001 and a brief guide for setting national targets. United Nations General Assembly adopted 'Proclamation on Ageing 1992' in which it urged that elderly should be seen as contributors to their societies and not as a burden. This proclamation gave older persons the assurance that they are entitled to aspire to the highest possible level of health and noted that United Nations activities must also consider ageing in the context of human rights, employment, education, health, housing and the advancement of women. In brief, there are various instruments as: International Conference on Population and Development (Cairo Programme of Action), World Summit for Social Development (Copenhegen Declaration), Copenhegen Programme of Action, Beijing Platform for Action, Second World Assembly on Ageing 2002. The United Nations, officially declared the year of 1999 as the 'International Year of Older Persons' to promote independence, care, participation, self-fulfillment and dignity for elderly people.

Rights under Indian Context: Constitution of India

All Indian citizens are entitled to fundamental rights guaranteed to them by the Indian Constitution. Senior citizens are not an exception to it. They are also entitled to fundamental rights to life and personal liberty, freedom of speech and equality before law but these rights often difficult for them to achieve for a variety of reasons.

In the Constitution of India, Art. 41 is about, Right to work, to education and to public assistance in certain cases : The State shall, within the limits of economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Art. 46 : Promotion of educational and economic interests of……. and other weaker sections : The State shall promote with special care the educational and economic interests of the weaker sections of the people…..and shall protect them from social injustice and all forms of exploitation.

[2] Resolution No. 37/51 dated 03 December 1982.

However, these provision are included in the Chapter IV i.e., Directive Principles of the Indian Constitution. The Directive Principles, as stated in Article 37, are not enforceable by any court of law. But Directive Principles impose positive obligations on the state, i.e., what it should do. The Directive Principles have been declared to be fundamental in the governance of the country and the state has been placed under an obligation to apply them in making laws. The courts however cannot enforce a Directive Principle as it does not create any justiciable right in favour of any individual. It is most unfortunate that state has not made even a single Act which is directly related to the elderly persons.

Under Personal Laws - Hindu's Law:

Apart from obligations enshrined in customary law for children, the statutory provision for maintenance of parents under Hindu personal law is contained in Sec 20 of the Hindu Adoption and Maintenance Act, 1956. This Act is the first personal law statute in India, which imposes an obligation on the children to maintain their parents.

Muslim Law:

Children have a duty to maintain their aged parents even under the Muslim law. According to Mulla :

(a) Children in easy circumstances are bound to maintain their poor parents, although the latter may be able to earn something for themselves.

(b) A son though in strained circumstances is bound to maintain his mother, if the mother is poor, though she may not be infirm.

(c) A son, who though poor, is earning something, is bound to support his father who earns nothing.

According to Tyabji, parents and grandparents in indigent circumstances are entitled, under Hanafi law, to maintenance from their children and grandchildren who have the means, even if they are able to earn their livelihood.

Christian & Parsi Law:

There are no personal laws providing for maintenance for the parents. Parents who wish to seek maintenance have to apply under provisions of the Criminal Procedure Code.

Under the Code of Criminal Procedure:

The provision, however, was introduced for the first time in Sec. 125 of the Code of Criminal Procedure in 1973. It is also essential that the parent establishes that the other party has sufficient means and has neglected or refused to maintain his, i.e., the parent, who is unable to maintain himself. It is important to note that Cr.P.C. 1973, is a secular law and governs persons belonging to all religions and communities. Daughters, including married daughters also have a duty to maintain their parents.

Government of India has brought out a national policy of elderly persons in 1999.

1. To develop policy instruments by covering different income segments to monthly income
2. To revise Monthly pension income need to be at intervals to cover inflation and to reach out all persons 60+ living below poverty line.
3. To regulate Pension fund by a strong Regulatory Authority.
4. To give top priority for health care by giving better insurance scheme. Many of these recommendation are still to be implemented.

Major Current Welfare Programmes

1. Old age Pension Scheme,
2. Provident Fund Scheme
3. Mediclaim scheme to cover health related problems
4. Annapurna Schemes giving 10Kg of food every month to senior citizens
5. Financial rebate of elderly in income tax and train travel.
6. Free legal aid to senior citizens by BS Bharathi Vidhya Peth new law college in Pune.
7. Swavalamban, another scheme approved by Government in 2010 to cover workers in unorganized sector including senior citizens.
8. Government has come out with a legislation entitled. “The Maintance and Welfare of Parents in Senior Citizen Act of 2007”, to help senior citizens neglected and ill-treated by their children
9. Government has come out with projects to set up Geriatric wards in Hospitals.

Rights Under Maintenance and Welfare of Parents and Senior Citizens Act, 2007

There are different laws in India which have given piece meal concessions, privileges and benefits under legislations[3] and from time to time the government also framed policies[4] and scheme for the elderly persons. But the reality is that they are enjoyed by some of the elite class and have yet to reach to the door steps of the old persons living below poverty line and those living in rural areas. The present legislation is intended to give a ray of hope to bring back the lost culture and tradition through the legal control[5]. This Act is to provide for more effective provisions for the maintenance and welfare of parents and senior citizens guaranteed and recognized under the Constitution and for matters connected therewith or incidental thereto. It was enacted in December, 2007 to ensure need based maintenance for parents and senior citizens and their welfare. The Act provides for:-

- Maintenance of Parents/ senior citizens by children/ relatives made obligatory and justiciable through Tribunals.
- Revocation of transfer of property by senior citizens in case of negligence by relatives.
- Penal provision for abandonment of senior citizens.
- Establishment of Old Age Homes for Indigent Senior Citizens.
- Adequate medical facilities and security for Senior Citizens.

The attention to the increasingly alarming problems of the elderly population has been paid from only in the last few years. It was assumed that the elderly were well taken care of, safe in the custody of the well-integrated family system in India. But recent ethnographic case studies have indicated that the so-called 'joint family system' is a myth. Many elderly, though living with their sons and their families, are often neglected and uncared for. At any age, the family should provide the individual, the

[3] See for example, the Indian Penal Code, 1860; the Hindu Adoption and Maintenance Act, 1956; the Code of Criminal Procedure, 1973; the Pension Act,1871; the Income-Tax Act, 2014 and privileges and benefits given under different schemes of the governments.

[4] National Policy on Senior Citizens, 1999, 2011 and 2013.

[5] C.M. Jariwala, The Older People's Law in India: A Critical Overview, "Indian Bar Review" Vol.XL11(2) 2015,New Delhi p.4

emotional, social and economic support[6]. The ability of the aged persons to cope with the changes in health, income and social activities etc. at the older ages depends to a great extent on the support of the person gets from his/her family members.[7] Today the prime necessity is to reform the existing law and see that the implementing agencies become more functional and age-old friendly towards the schemes related with Geriatric Population .I would like to conclude the paper with the words of Roscoe Pound -

"Every individual in civilized society must be able to take it for granted that society will bear the burden of supporting him when he becomes aged."

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[6] Soldo, Beth J. and Agree, Emily M. (1988) : "America's Elderly", Population Bulletin, 43(3), Population Reference Bureau, Inc., Washington D.C. the Philippines Demography, 26(4).

[7] Jayasankar K.I., Senior Citizens in India a Probe on their Plights and Rights ,"Indian Bar Review" Vol. XL11(2) 2015, New Delhi p.101 also see Dr. Taj Mohammad: Senior Citizens : A Socio-Legal Appraisal , Law Review ,Vol. 35/2015 p93.

A RELOOK ON CONCEPT OF POSSESSION

Meenal Chawla* & Ashutosh Tiwari**

Salmond states in **Jurisprudence** (12th edition) 'few relationships are vital to man as that of possession, and we may expect any system of law, however primitive, to provide rules for its protection.... Law must provide for the safeguarding of possession .Human nature is being what it is, men are tempted to prefer their own selfish and immediate interest to the wide and long-term interest of society in general. But since an attack on man's possession is an attack on something which may be essential to him, it becomes almost tantamount to an assault on the man himself; and the possessor may well be stirred to defend himself with force. The result is violence, chaos and disorder.'

A Society to stay civilized must afford protection to a person in settled possession in complete disregard of his title over the property. Otherwise we will shift back to the primitive age, when the society happened to be unorganised, and when there was no security of life, liberty and of property, resulting into breach of duty of state derived from social contract to provide a well protected society with effectively established law and order.

After state was conceptualised one of the problem, the state was confronted, was to ensure effective protection to proprietary interests. To prefer possession over the ownership and vice versa, was like a rashomon effect. It is at this juncture, the juristic principles such as, inadmissibility of defence of jus tertii, non recognition of res *nullius*, and possession as nine points of ownership, were conceived. These principles aimed towards maintenance of law and order in the society.

Thus settled possessor is being protected by law from antiquity, though the protection was conditional. That is to say, a person in possession is entitled to remain as such, against all except against the true owner, irrespective of the fact that he himself has no proof of title or that he is a sheer trespasser. Thus such person in possession could claim injunction before he is dispossessed or could seek relief of restoration of possession

* Judicial Magistrate, Almora
** Judicial Magistrate, Bageshwar

if he is forcefully evicted. Such person could be evicted only by resorting to due process of law by a person on proof of settled possession prior in time to that of the trespasser, so as to attract presumption of ownership much prior in time to that of the trespasser.

The judicial trend have always been to protect the possession zealously against all except the true owner. So, the legal position to this extent is well settled.

When comes the question of protection of a trespasser against the true owner, then law to this effect, though varies, but not to the extent as understood by our courts in practice. Let me put forth my points: A trespasser is always of 2 kinds. **Rank one** is that whose entry into the property in question had from the very inception been lawful, though because of some cause occurring subsequently, his continuance into the property, becomes a case of trespass, and law treats him a trespasser. For example - Tenant/Lessee remaining into possession even after termination or expiry of tenancy or lease. On such trespasser hon'ble apex court has categorically ruled in ***Krishna Ram Mahale V. Shobha Venkat Rao - AIR 1989 SC 2097***, that once the person is found to be in settled possession, even on the assumption that he further has no right to remain into the property, the true owner cannot dispossess him except by recourse to due process i.e. by filling Civil suit based on title. So such trespasser can seek all reliefs against the true owner in the event if true owner threatens him to dispossess, i.e., temporary injunction in perpetual injunction suit if likelihood of dispossession persists imminently or otherwise he can seek relief of restoration of possession if he is actually dispossessed through undue process by the owner. Here due course of law, for the purposes of owner, would mean either to file a separate Civil suit based on title or to make counter claim in the very same suit brought against him by the trespasser, but he, in no case, has liberty to resort to force to evict the trespasser and then thereby jeopardise law and order in the society.

Now come to the case of **Rank-2** trespasser. He is the person whose very entry into the property from the very beginning had been unlawful, i.e. he came into possession by resorting to force or by taking advantage of true owner's indifference towards his property. Point is, what if such Rank-2 trespasser perfects his possession making it settled as opposed from just acquired or in the process of acquisition of the possession? What if such person brings a suit for perpetual injunction

aimed to ward off the genuine apprehension of forceful dispossession and what if such person in such suit claims temporary injunction? what if such person brings suit for restoration of possession after he is evicted by the true owner by taking recourse to undue process?

Judicial trend, more specifically among subordinate courts, have been disadvantageous to the Rank-2 Trespasser, although our Apex court have taken quite favourable view to such Rank-2 trespasser. Such approach of lower Courts, is either because of prevailing pre-disposition that such person is outlaw or became of ignorance or incorrect appreciation of Apex Court dictum. In my opinion Rank-2 trespasser deserves as much of protection as the Rank-1 trespassers have been availing, because of following reasons:

1. The Courts below have more and often relied upon Hon'ble High Court verdict in ***Shivnath V. D.J. Nainital -LAWS(ALL)-1990-12-55,*** wherein the view taken by learned single judge, was that no temporary injunction can be granted against the true owner at the behest of a trespasser whose entry into the property from the very beginning had been unlawful. Noticeable fact in that case was that land was owned by the state government and even if the relief of temporary injunction or final relief of perpetual injunction was denied, still the state certainly not given free hand to resort to undue process to evict him. Owner being the state, so it is always expected from the state to take recourse to due process of law to evict him , which may be either Civil suit or executive action is conformity with law. Had the true owner been a private individual Hon'ble High Court would have taken a contrary view as private individual is more prone to be influenced by illegal measures to ensure expeditious eviction.

2. Courts below have also often relied upon Hon’ble Apex Court verdict in ***Mahadeo Savala ram Shelke v. Pune Municipal Corporation (1995),*** wherein the division bench held that where ejectment proceedings initiated by the executives resulted into order of eviction, then continuance into possesion by the person amounts to being in illegal possession as such person cannot now claim any kind of injunction against the true owner. Distinguishable facts in this case were that by executive action in conformity with law plaintiff had already been ordered to vacate the property. Thus the true owner had already discharged his duty to resort due process of law, and

despite that the plaintiffs initiated a Civil proceeding before Court seeking perpetual injunction, which was rightly refused by the court. Because once the true owner takes recourse to due process, the trespasser cannot insist on the true owner to seek eviction only by filling Civil suit. Where there are several processes recognized by law making it due process , it is upto the true owner to decide which one he opts keeping in mind his own convenience and expediency. Thus in this case court in para-6 and 9 itself has conceded the view that a true owner is always expected to resort to due process of law to seek eviction of the Rank-2 trespasser and should refrain from taking law into his own hand by user of force. Thus court's jobs must be to ensure that its decision of refusing relief to the trespasser does not virtually gives the true owner, the right to resort violence to seek eviction, otherwise such decision would be nothing but a charter of lawlessness having potential to use as tool for brokerage of law and order thereby putting security of life and peace at stake.

In ***Munsi Ram V. Delhi Administration (1968) 2 SCR 455***, it was held that no one including the true owner has a right to dispossess the trespasser by force if the trespasser is in settled possession of land, and in such case unless he is evicted in due course of law, he is entitled to defend his possession even against the rightful owner.

3. Section 6 of SRA confers a right on settled possessor to seek restoration even against the true owner not being state on mere proof of his dispossession by undue process. U/S: 6 no distinction is made between Rank-1 and Rank-2 trespasser. Purpose of S.6 is that settled possession of every individual has to be respected even by the true owner, who if wishes to evict him, then he must refrain from taking law into his hands rather should resort to civil processess for the same. Thus again the emphasis here is on importance of ‘due process’ of law. Question arises that, if a trespasser being in settled possession has remedy in law against the true owner in the event he is dispossessed by undue process, will it not be preposterous if he is left remedy less in the event he entertains a genuine apprehension of immediate eviction by true owner by resort of undue process, which is the stage of preparation, a quite prior stage to that of actual dispossession. To put it differently, law will come to help the Rank-2 trespasser only when he is actually dispossessed and will undo what have been done by the true owner, but the very same law will leave

the Rank-2 Trespasser helpless in terms of remedies despite there being well founded belief of likely dispossession by the true owner by resorting to undue process. Such a law is outrageous and irreconcilable to the conscience. It virtually induces the true owner to resort to force for eviction and at the same time compels the Rank-2 Trespasser to exercise his Right to self defence to meet the challenge. Such a law is outrightly an anarchy promoting lawlessness and breakdown of societal peace and stability. So Court must adopt pragmatic approach while dealing with the case of such trespasser and should make best efforts in protecting the trespasser form illegal eviction by grant of temporary and permanent injunction.

4. One may argue that perpetual injunction is granted after full fledged trial and only after the plaintiff establishes his title to the suit property, while in Rank-2 trespasser's case, he has no such title, so perpetual injunction should naturally be refused to him. To this argument, it can be said that equitable remedies cannot be put in watertight compartment. It must be used in such a manner so as to meet the ground realities of life even if by strict construction of section 37 and 38 of Specific Relief Act perpetual injunction for limited period is not permissible, but S.151, section 9, order 7 rule 7 of CPC in such case can be used as a tool to further substantial cause of justice, whereby the true owner can be restrained from taking recourse of unlawful force to evict the trespasser and so long as does not opt to file Civil suit to seek eviction, to ensure that the possession of trespasser must remain intact. Thus equitable remedy of injunction can certainly be modified to above said extent. This is not impractical as Apex court in ***Krishna Ram Mahale*** case has protected the trespassers settled possession so long the true owner does not wish to resort to due process by filing a civil suit. In ***Pratiksha v. Pravin Dinkar Tapaswi (2002) DMC-242, 2002(1) MPHT-276***, M.P. High Court granted injunction by invoking its inherent jurisdiction (sec. 151 cpc) in favour of a Hindu wife restraining the Hindu husband to not to marry during life time of first spouse or during continuance of legal wedlock with his first spouse. In this case, the High Court too took a similar view to the effect of modifying equitable remedy of perpetual injunction which is to be operative not for perpetuity but for fixed time or till a contingent event happens. Here it is also relevant to mention that it would be wrong to say that Rank-2 trespasser has no right in law to

be protected. Settled possession for long time user by itself creates possessory right and title to be protected. his right is certainly feeble in comparison with that of true owner, but he has every right to entertain legitimate expectation to not to be ousted out of property by resort to criminal force.

5. Gone are the days when courts used to grant relief only in recognition of One's right. Today we have much developed justice delivery system, where traditional Conceptions have undergone magnificent changes. One such paradigm is recognition of doctrine of legitimate expectation. There are cases, viz ***Motilal Padampat Sugar mills v. State of U.P., Razia Bagum v. Sahebjada Anwan Begum- SC-1958, Pratiksha v. Pravin Divkan Taparvi***, and so on, where courts have given due adherence to this principle. The Rank-2 trespasser has not only a recognizable legal right but also has legitimate expectation from the true owner that he will not take recourse of illegal force to evict him. The owner of any property may prevent even by using reasonable force a trespasser from an attempt of trespass, when it is in the process of being committed or of a flimsy character or recurring, intermittent, stray or casual in nature or has just been committed, while the rightful owner did not have enough time to have recourse of law. Because in the last of the cases, the possession of the trespasser just entered into would not be called as one acquiesced by the true owner. But once true owner acquiesces the trespass and the time lapses so as to make the possession of the trespasser as settled one, the true owner have lost every right to use force and resort undue course to dispossess him. He is now left with only one option, i.e. to institute civil process recognized by law. Thus it is the settled possession or effective possession of person without title which would entitle him to protect his possession even as against the true owner.

Observance of due process can prevent the society to fall into the wrath of violence, chaos and disorder. Our courts must be conscious enough while dealing with the case of Rank-2 trespasser. In a suit where the trespasser in settled possession seeks prohibitory injunction against the true owner so as to require him to resort to due process for eviction, then courts should normally allow such relief including the relief of temporary injunction prior to final disposal of the suit. Mere taking defence of good title and proving the same is not enough for dependant to acquire

liberty of using force for eviction, even in such case court goes on to dismiss the suit of the trespasser. True owner, specifically when he is a private individual, must either make a counter claim in the very same suit instituted by the trespasser or must bring a separate regular civil suit based on title. Here it becomes incumbent on our part to remind ourselves, the famous quote of great realist Oliver Wendell Holmes, Jr., that ***'The Life of the law has not been logic. It has been experience.'*** Hon'ble Justice P.N. Bhagwati in Maneka Gandhi has further added to above said quote by saying. ***'And that every legal principal must be tested upon the touchstone of pragmatic realism before it is acted or relied upon.'*** Thus the courts must ensure that it has not made itself a party responsible indirectly for brokerage of law and order and loss of societal peace and stability, and its decision is not used as license to commit crimes.

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MEDICAL NEGLIGENCE AND COMPENSATION IN INDIA : AN OVERVIEW

Alok Ram Tripathi* et.al.

Abstract

There is no denying the fact that human life is precious and in cases of medical negligence, the judges find it extremely difficult to decide on the quantum of compensation as the quantum is highly subjective in nature, and despite the best efforts of the legislature to enact certain laws which can somehow provide a framework for arriving at a quantum, and also interpretation by the judiciary for so many decades, it has not yet been finally settled as to what should be the method used for determining compensation in cases of medical negligence.

This paper examines the issues related to just, adequate and effective compensation in cases of medical negligence and provides certain suggestions.

INTRODUCTION

It is well known that a doctor owes a duty of care to his patients. The duty can either be a contractual duty or a duty arising out of tort law. The duty owed by a doctor towards his patient, in the words of the Supreme Court is to 'bring to his task a reasonable degree of skill and knowledge' and to exercise 'a reasonable degree of care'.[1] A doctor doesn't have to ensure that every patient who comes to him is cured. He only has to ensure that he confers a reasonable degree of care and competence.

The liability of a doctor arises not when the patient has suffered any injury, but when the injury has resulted due to the conduct of the doctors, which has fallen below that of reasonable care. In other words, the doctor is not liable for every injury suffered by a patient. He is liable for only those that are a consequence of a breach of his duty.

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* Civil Judge (J.D.), Champawat
Mithilesh Pandey, Judicial Magistrate, Pauri
Mamta Pant, Addl. Civil Judge (J.D.), Rishikesh

[1] Dr. L.B. Joshi v. Dr. T.B. Godbole, A.I.R. 1989 P. & H. 183.

MEDICAL NEGLIGENCE AND COMPENSATION

Medical negligence by doctors and hospitals, once established by the trial court, very well conveys that the conduct of the medical professionals, doctors, hospital administration, other hospital staff, etc. was not up to the mark and hence, they must be held liable for deficiency in service, as entailed in the consumer law in India.

What was the degree of this deficiency depends on the degree of negligence, which can either be slight, normal, or gross. If the negligence was gross, it almost borders with intentional conduct which may be even penalized under the criminal law of the country, however, under the civil law for award of compensation, the quantum has to be determined by the consumer courts. By no stretch of imagination, the court should award a paltry sum for gross negligence. And, the same is true the other way round exemplary compensation need not be awarded in case of slight or normal negligence.

In *Charan Singh vs. Healing Touch Hospital*,[2] the Appellant had brought a claim of Rs. 34 lakh for removal of one of his kidneys without his consent during the course of the operation, which resulted in the loss of his job and huge expenses for his treatment and upkeep. The National Consumer commission dismissed his complaint on the reasoning that his claim was excessive, exaggerated and unrealistic. This was because a consumer is required to approach the District, State or National Commission directly depending on the compensation claimed... the complainant was drawing a salary of Rs. 3000 plus allowances... This is his allegation, which is not admitted by the opposite party. The Court further held,

"*Even if we accept his contention is correct and even if we accept that as a result of wrong treatment given in the Hospital he has suffered permanent disability, the claim of Rs. 34 lakhs made by the complainant is excessive. We are of the view that this exaggerated claim has been made only for the purpose of invoking the jurisdiction of this commission...*". The Supreme Court opined that the quantum of compensation is at the discretion of the Forum irrespective of the claim. The legislative intent behind the Consumer Protection Act is to provide speedy summary trial and the Commission should have taken the complaint

[2] (2000) 7 SCC 668

to its logical conclusion by asking the parties to adduce evidence and rendered its findings on merits.

a. While quantifying damages, Consumer Forums are required to make an attempt to serve the ends of justice so that compensation is awarded, in an established case, which not only serves the purpose of recompensating the individual, but which also at the same time aims to bring about a qualitative change in the attitude of the service provider.

It is not merely the alleged harm or mental pain, agony or physical discomfort, loss of salary and emoluments etc. suffered by the Appellant which is in issue here. It is also the quality of conduct committed by the Respondents upon which attention is required to be founded in a case of proven negligence.[3]

In *Spring Meadows Hospital vs. Harjo Ahluwalia*[4] the Supreme Court was concerned with the rights of a parent when a child dies due to medical negligence. "*Even delegation of responsibility to another may amount to negligence in certain circumstances. A consultant could be negligent where he delegates the responsibility to his junior with the knowledge that the junior was incapable of performing his duties properly*."

The Court ordered Rs. 17.5 lakhs as compensation in this case.

COMPENSATION MUST BE JUST AND ADEQUATE

It is difficult to define 'just compensation', however; in *Sarla Verma's* case[5] the Supreme Court discussed it with a lot of clarity and precision. However, it still is open to interpretation. It was observed:

"Compensation awarded does not become 'just compensation' merely because the Tribunal considers it to be just... Just compensation is adequate compensation which is fair and equitable, on the facts and circumstances of the case, to make good the loss suffered as a result of the wrong, as far as money can do so, by applying the well settled principles relating to award of compensation. It is not intended to be a bonanza, largesse or source of profit... Assessment of compensation though involving certain hypothetical considerations,

[3] Ibid., (para 13, p. 673)
[4] (1998) 4 SCC 39
[5] AIR 2009 SC 3104

should nevertheless be objective. Justice and justness emanate from equality in treatment, consistency and thoroughness in adjudication, and fairness and uniformity in the decision making process and the decisions"[6].

The courts were grappling with serious issues of inconsistency. In the same case, the Supreme Court also observed that different courts and tribunals in the country after exercising judicial discretion in determining the amount of compensation in an inconsistent manner, which led to uncertainty and unpredictability, causing anxiety to the claimants and also leaving room for arbitrariness. The Supreme Court emphasised that there was a need to have just, fair, and adequate compensation. It observed:

"*The lack of uniformity and consistency in awarding compensation has been a matter of grave concern...If different Tribunals calculate compensation differently on the same facts, the claimant, the litigant, the common man will be confused, perplexed and bewildered. If there is significant divergence among Tribunals in determining the quantum of compensation on similar facts, it will lead to dissatisfaction and distrust in the system*"[7].

In the Nizam Institute of *Medical Sciences v Prasanth S. Dhananka and Others*[8]; the Supreme Court did not apply the multiplier method. In 1990, twenty-year old Prasant S. Dhananka, a student of engineering, was operated upon at the Nizam Institute of Medical Sciences, Hyderabad. Due to medical negligence of the hospital, Prasant was completely paralysed. Compensation was claimed, and the matter finally reached the Supreme Court. The court awarded a compensation of Rs. 1 crore plus interest.

The compensation must be just and adequate, and keeping that principle in mind, one needs to consider the fact that a person who has lost almost complete control over his body, there is a feeling of helplessness and resignation for the person in the entire family. It is extremely difficult to understand their plight, and the multiplier method can never do justice in determining adequate and just compensation.

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[6] Sarla Verma case, as reported in 2009 Indlaw SC 488, paragraph 8

[7] Ibid.

[8] (2009) 6 SCC 1

The Kunal Saha Case[9]

Anuradha Saha, a 36-year-old Ohio (US)-based child psychologist who was visiting India, approached Sukumar Mukherjee, a doctor at Nightingale Diagnostic Centre in Kolkata, on 7 May 1998 complaining of acute pain, fever and rashes. The doctor's decision to administer a higher-than-recommended dose of a steroid called Depomedrol is at the core of what was wrong with the treatment regimen. According to Kunal Saha, his wife was administered 80 mg of Depomedrol straightaway and prescribed two injections daily for three days. The maximum recommended dose of the drug for any clinical condition is 40-120 mg at a minimum interval of 1-2 weeks between the doses.

When Anuradha's condition did not improve, she was admitted to AMRI Hospitals on 11 May. At AMRI Hospitals, Anuradha was administered another steroid, Prednisolone, in a tapering dose-continuing the treatment for allergic vasculitis, which is an extreme reaction to a drug, leading to inflammation and damage to blood vessels of the skin. Mukherjee then left for US on a pre-arranged visit, leaving Anuradha in the case of dermatologist Balram Haldar and physician Abani Roychowdhury.

The court documents state that while handing over the patient, "most culpably, he (Mukherjee) did not even prescribe I.V. (intravenous) fluid and adequate nutritional support which was mandatory in that condition". By 12 May, Anuradha had been correctly diagnosed by Haldar as suffering from toxic epidermal necrolysis (TEN), but there was no drastic shift in the treatment regimen. TEN is a rare skin condition caused by a reaction to drugs, where the top layer of skin detaches from the lower layer all over the body. With no sign of improvement, Anuradha was taken to Breach Candy Hospital in Mumbai, where she died on 28 May 1998.

The court ordered a compensation of Rs. 5.96 crore, which with interest crosses Rs. 11 crore.

"In the present case, the deceased's annual net income was multiplied by 30 years of loss. Anuradha Saha was 36 when she died and 30 years loss of income is calculated on the assumption that she would have worked at least till 66 if the negligence had not cut off her life. Thus,

[9] Dr. Balram prasad and others v Dr. Kunal Saha and another; (2014) 1 SCC 384

the victim's expected remaining working years is taken as the criteria for calculation of compensation without any arbitrary limits."

The Supreme Court observed:

"*...Therefore, estimating the life expectancy of a healthy person in the present age as 70 years, we are inclined to award compensation accordingly by multiplying the total loss of income by 30.*"[10]

Apart from the above, the time-consuming judicial process has also been a factor in the compensation.

The case has taken into account the delay in judicial proceedings and the decrease in the value of money in the meanwhile. If a person claims Rs. 10 lakh as compensation and the case is decided 15 years latter, even if his entire claim is awarded, in terms of actual value of money, he may not be adequately compensated. The Supreme Court expressly held that in such cases the courts can award an amount beyond what is actually claimed.

It marked the highest compensation ever ordered in a case of medical negligence in India. This judgement is going to have a very significant impact for all compensation cases in future and especially in medical negligence cases.

CONCLUSION

It is true that compensation cannot be calculated in a perfect mathematical sense, cannot be precise and accurate, but has to be within certain broad guidelines, and within certain broad parameters. There cannot be any doubt that the compensation in medical negligence cases has to be just and adequate, but with the changing times and aspirations of the people, also with tremendous advancements in medical science resulting in much better diagnosis and far better treatment as in the yesteryears, it's legitimately expected by the patients and their attendants that the medical professionals need to be accountable to a certain degree, if not fully. The higher the level of hospital specialisation, facilities available and also the cost of treatment the higher is the level of expectation of the people. The same applies to the degree of specialisation of doctors and other medical professionals. Most of the hospitals both government and in private sector treat a large number of patients and must be held accountable in cases of

[10] Kunal Saha case, as reported in 2013 Indlaw SC 696, paragraph 133.

negligence. With the development of consumer law in the country, it is quite natural that the quantum of compensation will increase and more and more hospitals will be brought under the ambit of this law. The judicial officers, especially at the lowest level of hierarchy the District Forum, and thereafter going up in the hierarchy, should be ready to align the quantum of compensation with the real world rather than being tied up in the theoretical concepts and unrealistic and impractical precedents. Only then the victims and their dependents will be able to get just and adequate compensation. Till then, just and adequate compensation shall remain a mirage.

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CUSTODY OF MINORS

Anamika Singh*et. al.

Today's children are tomorrow's future
They hold the future in their little hands
What we give to them today is our tomorrow
Make sure everyone understands.

It's the little things that are important
Like a little seed becomes a tree or flower
Little voices can say some very big things
Like a drop of rain can start a thunder shower.

A child is a nation's future. So it is the collective duty of all the nationals to make attempt to enable each child to survive and reach his full potential.

The worst effective in proceedings of divorce and family breakdowns are the children. Maintaining the central importance of the welfare of child in the proceedings of custody will help insure that the child's future is safe and protected, regardless of changing family circumstances.

The Supreme Court of India observed in case of :

Nil Ratan Kundu versus Abhijeet Kundu[1]

That the welfare of the child is not to be measured merely by money or physical comfort, but the word welfare must be taken in its widest sense that the tie of affection cannot be disregarded.

* Addl. Civil Judge, Nainital
Beenu Gulyani, Judicial Magistrate, Haldwani
Dharmendra Shah, Judicial Magistrate, Luxor
Kapil Tyagi, Civil Judge, Krti Nagar

[1] AIR 2009 SC (Supp) 732

BEST INTEREST OF THE CHILD-INTERNATIONAL HUMAN RIGHTS LAW

According to the United Nations Convention on the Rights of Child[2] : in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, the administrative authorities or legislative bodies, the best interest of the child shall be primary consideration (Article 3).

The convention directs the state parties to ensure that both parents have common responsibilities for the upbringing and development of the child (Article 18).

INDIAN LEGAL FRAME WORK GOVERNING CUSTODY:

In India, the law relating to custody of children is closely linked with guardianship. Guardianship is a wider concept referring to a bundle of rights and powers that an adult has in relation to person and property of a minor, while custody is comparatively a narrower concept relating to the upbringing and day to day care and control of minor. The term "custody" has nowhere been defined in any Indian family law. The term "guardian" is defined by the Guardians and Wards Act, 1890 "as a person having the care of the person of a minor or of his property or both of his person and property" (section 4).

STATUTORY PROVISIONS GOVERNING THE LAW OF CUSTODY:

1. Guardians and Wards Act, 1890 (GWA)

The GWA is secular law regulating guardianship and custody for all children within the territory of Indian. This Act is an umbrella legislation which supplements the personal laws in issues relating to guardianship under every religion. Section 7 of the Act authorises the court to appoint a guardian for the person or property or both of minor if it is satisfied that it is necessary for the "welfare of the minor". Section 17 clarifies that in determining what is for the welfare of minor, courts shall consider the age, sex and religion of the minor, the character and capacity of the proposed guardian and how closely related is the proposed guardian to the minor, the wishes, if any, of the deceased

[2] CRC 1989

parents, and any existing or previous relations of the proposed guardians with the person or property of the minor. The section further states that if the minor is old enough to form an intelligent opinion, the court may consider his/her preference.

Thus, from above provisions, it is evident that, in appointing a guardian to the person or property of a minor under GWA, the courts are to be guided by concern for the welfare of the minor, ward.

2. Hindu Minority and Guardianship Act, 1956:

Section 6 (a) of the HMGA provides that :

1. In case of a minor boy or unmarried girl the natural guardian is the father, and after him, the mother, and
2. The custody of a minor who has not completed the age of five years shall ordinarily be with the mother

Gita Hariharan versus Reserve Bank of India[3]

The constitutional validity of section 6 (a) was challenged as violating the guarantee of equality of sexes under Article 14 of the Constitution of India. The court observed that the term "after" must be interpreted in the light of the principle that the welfare of the minor is the paramount consideration and the constitutional mandate of equality between men and women. The court held that the term "after" in this section should not be interpreted as "after the life time of father" but rather it should be taken to mean "in the absence of father". The court further specified that absence could be understood as : temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment.

Thus interpreting section 13 HMGA and Gita Hariharan Case :

Firstly, the father continuous to have a preferential position when it comes to natural guardianship and mother becomes natural guardian only in exceptional circumstances explained in Gita Hariharan. Thus even if a mother has custody of minor since birth, the father can at any time claim custody on the basis of his superior guardianship rights. But section 13 talks about welfare of minor as paramount considerations, in response to stronger guardianship rights of father,

[3] (1999) 2 SCC 228

this is the only provision that a mother may argue for custody/ guardianship in case of a dispute.

3. The Hindu Marriage Act, 1955:

Section 26 of the Act authorises the court to pass interim orders in any proceeding under the Act, with respect to custody, maintenance and education of the minor children in consonance with their wishes.

4. Islamic Law:

In Islamic Law the father is the natural guardian but custody vests with the mother until the son reaches the age of seven and daughter reaches the age of puberty.

5. Parsi and Christian Law:

Under section 49 of the Parsi Marriage and Divorce Act, 1936 and section 41 of the Indian Divorce Act, 1869 the courts are authorised to issue the interim order for custody. Guardianship governed by GWA.

SOME IMPORTANT JUDICIAL DECISIONS - The following decisions show the concern of courts for welfare of child overriding statutory provisions.

Soora Beddi versus Cheema Reddy[4] - The Madras High Court awarded custody to the mother based on welfare principal, even though the father was not found unfit to be a guardian.

L. Chandran versus Venkatalaxmi[5] - In a case where a child was brought up by the maternal grandparents after the death of the mother, the A.P. High Court held that in view of Article 21 of the constitution, children cannot be treated as chattel and father's unconditional right to custody over children cannot be enforced, even if the father was unfit to act as guardian.

THE TWO PROBLEMS WITH THE LEGAL FRAMEWORK :

1. Superior position of the father:

The statutory law recognises the superior position of father in comparison of mother which in the light of constitutional provisions is violative of Article 14 and 15. In *Padmaja Sharma versus Ratan*

[4] AIR 1950 Mad 306

[5] AIR 1981 AP

Lal Sharma[6], the Supreme Court held that mother was equally responsible to pay towards the maintenance of child.

Equality between parents is a goal that needs to be pursued and the law should indeed not make preferences between parents so as to ensure the object of maximum welfare of the child. In words of the child his needs regarding love of both parents can be explained as follows :

Hiding behind the door
He peeped into their bedroom
The innocent eyes
The pain yellow face
yearned to say
mamma, Pappa.....
Please don't fight
I am your ..... your love
I want you ..... both of you!
I am that little rose bud
Which needs lots of wants
And some sun light to groom
Please give me both
Please give me life
for my sake..... please!

2. Indeterminacy of the welfare principals standards:

In *Rosy Jacob versus Jacob A. Chakramakkak*[7], the Supreme Court gave custody of the children to the mother because she was economically well off but in *Ashok S Samji Bhai versus Neeta Ashok*[8], the Bombay High Court held that the affluence of the father is not factor in his favour for giving him custody. Thus the determinants of the welfare standard should therefore be clearly laid down so as to prevent judges from disregarding certain issues while determining custody.

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[6] AIR 2000 SC 1398
[7] AIR 1973 SC 2090
[8] II (2001) DMC 48 Bom

MEDIATION IN CHILD CUSTODY CASES:

In the case of *K. Srinivas Rao versus D.A. Deepa*[9], the Supreme Court stated that, we feel that at the earliest stage when the dispute is taken up by the family court for hearing it must be referred to mediation centers. Matrimonial disputes particularly those relating to custody of child maintenance etc. are pre-eminently fit for mediation.

THE CONCEPT OF JOINT CUSTODY:

Although joint custody is not specifically provided for in Indian Law but just as the basis of dissolving marriage has shifted overtime from fault based divorce to mutual consent divorce, we need to think about custody differenty and provide for a broader frame work within which divorcing parents and children can decide what custodial arrangements works best for them. The best interest of the child could also result from simultaneous association with both the parents.

A MOVE TOWARDS ELIMINATING GENDER BIAS IN INDIA'S CUSTODY LAWS:

In its report no. 257 the law commission recommended in the year 2015 that "neither the father nor the mother of a minor can, as of right, claim to be appointed by the court as the guardian unless such an appointment is for the welfare of a minor". It proposed two drafts to amend the HMGA 1956 and the GWA 1890 that prefer father as a natural guardian. The amendments cover visitation arrangements.

RECENT TREND:

Recently the Supreme Court in its land mark judgment of *Roxxan Sharma versus Arun Sharma*[10], while dealing with interim custody of the child laid down the following points :

I. The custody of minor shall ordinarily be with the mother. However, the use of the word ordinarily cannot be over stretched.

II. In para 10 court clarified that section 6 of HMGA does not disqualify the mother to the custody of child even after the child has crossed the age of five years.

[10] Civil Appeal No. 1996 of 2015

III. Where the age of child is below 5 years the mother is per say the best suited to care for the infant, it is for the father to plead and prove the mother's unsuitability.

IV. The parent who does not have interim custody should be allowed to visit the child without removing him or her from the custody of the other parents.

V. Forum shopping by parties to litigation must be firmly dealt.

The court gave definitions of guardianship, custody and visitation. The feelings of a child can be understood in these words :

?kj ejk ,d cjxn g
ej ikik ftldh tM g
?kuh Nko g ejh ek
;gh g ejk vklek
ek&ikik fcu nfu;k luh
tl rirh vkx dh /kuh
ek eerk dh /kkjk g
firk thu dk lgkjk gA

CONCLUSION:

"There can be no keener revelation of a society's soul than the way in which it treats its children."

– Nelson Mandala

The children of a nation are its assets, and it is rightly said that a home is a child's first school, so the atmosphere which a child gets at home should be the best so as to enable him to reach his potential. The parents are the custodians of a child, both of them are equally responsible and important for a child's growth and upbringing. The Indian Law should in corporate the provision of joint custody/shared parenting so as to fulfill the modern social needs and ensure maximum welfare of the children.

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BAIL JURISPRUDENCE IN INDIA

Ravi Ranjan* & Abhay Singh**

Objectively analyzed the criminal jurisprudence adopted by India is a mere reflection of the Victorian legacy left behind by the Britishers. The passage of time has only seen a few amendments once in a while to satisfy pressure groups and vote banks. Probably no thought has been given whether these legislations, which have existed for almost seven decades, have taken into account the plight and the socio-economic conditions of 70% of the population of this country which lives in utter poverty. India being a poverty stricken developing country needed anything but a blind copy of the legislations prevalent indeveloped western countries. The concept of bail, which is an integral part of the criminal jurisprudence, also suffers from the above stated drawbacks. Bail is broadly used to refer to the release of a person charged with an offence, on his providing a security that will ensure his presence before the court or any other authority whenever required.

Meaning of Bail

Bail, in law, means procurement of release from prison of a person awaiting trial or an appeal, by the deposit of security to ensure his submission at the required time to legal authority. The monetary value of the security, known also as the bail, or, more accurately, the bail bond, is set by the court having jurisdiction over the prisoner. The security may be cash, the papers giving title to property, or the bond of private persons of means or of a professional bondsman or bonding company. Failure of the person released on bail to surrender himself at the appointed time results in forfeiture of the security. The law lexicon defines bail as the security for the appearance of the accused person on which he is released pending trial or investigation.

Courts have greater discretion to grant or deny bail in the case of persons under criminal arrest, e.g., it is usually refused when the accused is charged with homicide.

* Judicial Magistrate, Rudraprayag

** Judicial Magistrate, Pauri

What is contemplated by bail is to "procure the release of a person from legal custody, by undertaking that he/she shall appear at the time and place designated and submit him/herself to the jurisdiction and judgment of the court."

A reading of the above definition make it evident that money need not be a concomitant of the bail system. As already discussed above, the majority of the population in rural India, lives in the thrall of poverty and destitution, and don't even have the money to earn one square meal a day. Yet, they are still expected to serve a surety even though they have been charged with a bailable offence where the accused is entitled to secure bail as a matter of right. As a result, a poor man languishes behind bars, subject to the atrocities of the jail authorities rubbing shoulders with hardened criminals and effectively being treated as a convict.

Legal Position in India

The Criminal Procedure Code, 1973 (Cr.P.C. hereinafter), does not define bail, although the terms bailable offence and non-bailable offence have been defined in section 2(a) Cr.P.C. as follows: "Bailable offence means an offence which is shown as bailable in the First Schedule or which is made bailable by any other law for the time being enforce, and non-bailable offence means any other offence". Further, ss. 436 to 450 set out the provisions for the grant of bail and bonds in criminal cases. The amount of security that is to be paid by the accused to secure his release has not been mentioned in the Cr.P.C.. Thus, it is the discretion of the court to put a monetary cap on the bond. Unfortunately, it has been seen that courts have not been sensitive to the economic plight of the weaker sections of society. The unreasonable and exorbitant amounts demanded by the courts as bail bonds clearly show their callous attitude towards the poor.

According to the 78th report of the Law Commission as on April 1, 1977, of a total prison population of 1,84,169, as many as 1,01,083 (roughly 55%) were under-trials. For specific jails, some other reports show: Secunderabad Central Jail- 80 per cent under-trials; Surat-78 per cent under-trials; Assam, Tripura and Meghalaya-66 per cent under-trials.

One of the reasons for this is, as already mentioned above, is the large scale poverty amongst the majority of the population in our country. Fragmentation of land holdings is a common phenomenon in rural India. A

family consisting of around 8 ? 10 members depends on a small piece of land for their subsistence, which also is a reason for disguised unemployment. When one of the members of such a family gets charged with an offence, the only way they can secure his release and paying the bail is by either selling off the land or giving it on mortgage. This would further push them more into the jaws of poverty. This is the precise reason why most of the under trials languish in jail instead of being out on bail.

Judicial Trend

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

In the Gudikanti Narasimhulu case Justice Iyer said "The issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process."

The next year, in a landmark judgment that is now commonly referred to as the Jail or Bail judgment, Justice Iyer reiterated that 'If public justice is to be promoted, mechanical detention should be demoted.'

A Supreme Court Bench, headed by the then Chief Justice Y V Chandrachud laid down first principles of granting anticipatory bail in the Gurbaksh Singh v/s State of Punjab[1], reemphasizing that liberty… - 'A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, in so far as one may, and to give full play to the presumption that he is innocent.'

All these landmark cases established a liberal bail philosophy in India's jurisprudence or as Supreme Court Justice D A Desai put in Bhagirath Judeja decision "The trend today is towards granting bail because it is now well-settled by a catena of decisions of this Court that the power to grant bail is not to be exercised as if the punishment before trial is being imposed. The only material considerations in such a situation are

[1] 1980 Cri LJ 417 (P & H)

whether the accused would be readily available for his trial and whether he is likely to abuse the discretion granted ill his favor by tampering with evidence."

The balance of personal liberty and societal impact has always a tough one to achieve. To conclude, in the words of Justice Chandrachud, in Gurbaksh Singh v/s State of Punjab, 9 April, 1980 '…no hard and fast rules can be laid down in discretionary matters like the grant or refusal of bail…'

An overview of the following cases highlight the adverse condition of the poor with regard to the unjust bail system in India. In State of Rajasthan v Balchand[2], the accused was convicted by the trial court. When he went on appeal the High Court, it acquitted him. The State went on appeal to the Hon'ble Supreme Court under Art. 136 of the Constitution through a special leave petition. The accused was directed to surrender by the court. He then filed for bail. It was then for the first time that Justice Krishna Iyer raised his voice against this unfair system of bail administration. He said that though while the system of pecuniary bail has a tradition behind it, a time for rethinking has come. It may well be that in most cases an undertaking would serve the purpose.

In Moti Ram and Ors. v State of M.P.[3] the accused who was a poor mason was convicted. The apex court had passed a sketchy order, referring it to the Chief Judicial Magistrate to enlarge him on bail, without making any specifications as to sureties, bonds etc. The CJM assumed full authority on the matter and fixed Rs. 10,000 as surety and bond and further refused to allow his brother to become a surety as his property was in the adjoining village. MR went on appeal once more to the apex court and Justice Krishna Iyer condemned the act of the CJM, and said that the judges should be more inclined towards bail and not jail.

In Maneka Gandhi v Union of India[4], Justice Krishna Iyer once again spoke against the unfair system of bail that was prevailing in India. No definition of bail has been given in the code, although the offences are classified as bailable and non-bailable. Further Justice P.N. Bhagwati also spoke about how unfair and discriminatory the bail system is when looked at from the economic criteria of a person this discrimination arises even if

[2] AIR 1977 SC 2447

[3] AIR 1978 SC 1594

4 AIR 1978 SC 571

the amount of bail fixed by the magistrates isn't high for some, but a large majority of those who are brought before the courts in criminal cases are so poor that they would find it difficult to furnish bail even if it's a small amount.

Further in Hussainara Khatoon and others v. Home Sec, State of Bihar[5], the Court laid down the ratio that when the man is in jail for a period longer than the sentence he is liable for then he should be released.

Need for reforms:

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

This particular provision assumes huge significance in light of the statistics revealed by the **National Crime Records Bureau (NCRB)** in 2006. That our prisons are overflowing is well known (1336 prisons across India house a total population of 3,73,271 prisoners as against a stipulated capacity of 2,63,911 prisoners). But what is not so well known is the nature of the inhabitants of these prisons. Some 67% of India's prisoners are under trials, individuals as yet not held to be guilty by any Court of law. With our legal system having a presumption of innocence, we effectively spend 70% of our prison-space and resources for prison maintenance and development on innocents. The NCRB data reveals that 2, 45,244 of Indian prisoners are under trials. These under trials languish in jail due to inadequate legal aid, unsympathetic judges, a bail-system linked inextricably to property & financial wellbeing and a general lack of awareness about rights of arrestees. The single largest tragedy is the continued detention of individuals accused of bailable offences, where bail is a matter of right.

Judicial reform:

As per the explanation of Sec 436, if a person is arrested in connection with the commission of bailable offence and if he is not able to show the security for one week, he is has to be presumed an indigent

[5] AIR 1979 SC 1360

person and bail should be granted to him on his personal assurance. It is popularly known as SELF BAIL.

In **Hussainara Khatoon case**[6], the Court laid down an eight point alternative formula to the conventional grounds for grant of bail, usually offence related or finance related :

(1) The length of his residence in the community,

(2) his employment status, history and his financial condition,

(3) his family ties and relationships,

(4) his reputation, character and monetary conditions,

(5) his prior criminal record including any record of prior release on recognizance or on bail,

(6) the identity of responsible members of the community who would vouch for his reliability,

(7) the nature of the offence charged and the apparent probability of conviction and the likely sentence in so far as these factors are relevant to the risk of non appearance; and

(8) any other factors indicating the ties of the accused to the community or bearing on the risk of wilful failure to appear.

In JAYANDRA SARASWATHI SWAMYGAL v. STATE OF TAMILNADU[7] & PRASANTH KUMAR SARKAR v. ASISH CHATERJEE[8], the Apex Court held that even in case of non bailable offences also the court while exercising its discretionary power **under sec. 437 of Cr.P.C.** can grant bail. But that power should be exercised fairly, justly & reasonably.

In 1977, Justice Iyer in the Gudikanti Narasimhulu case said "The issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. 2 years later, a Supreme Court Bench, headed by the then Chief Justice Y V Chandrachud laid down first principles of granting anticipatory bail in the Gurbaksh Singh v. State of Punjab[9], reemphasizing that liberty… - 'A person who has yet to lose

[6] (1980) SCC (Cri) 23

[7] 2005 Cr.L.J. 883 (SC)

[8] 2011 Cr.L.J. 302 (SC)

9 1980 Cri LJ 417 (P & H)

his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, in so far as one may, and to give full play to the presumption that he is innocent.'

All these landmark cases established a liberal bail philosophy in India's jurisprudence.

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

Conclusion:

The setting up of separate jails, or at any rate isolating undertrials from convicts, would prevent hardened criminals from exercising their deleterious influence over undertrials. Such segregation would also change the attitude of jail authorities and society at large towards under trials.

The under trials who have been charged with petty crimes can further be put in reformative homes instead and asked to do community service till the time they are released on bail. Elementary education facilities must be granted to those under trials who are uneducated and illiterate. Thus, I feel that the benefit of bail should not only be in the hands of a few, but, should be available to the masses including those who do not have the financial capacity to afford it.

The balance of personal liberty and societal impact has always a tough one to achieve. To conclude, in the words of Justice Chandrachud, in Gurbaksh Singh v. State of Punjab, '…no hard and fast rules can be laid down in discretionary matters like the grant or refusal of bail also in State of Rajasthan v. Balchan[10]' bail is right and jail is an exception'.

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[10] AIR 1977 SC 2447

WORKPLACE SEXUAL HARASSMENT : A CURSE FOR WOMEN

Samia Khan*

INTRODUCTION

As we look back at the history, it testifies the fact that women have been denied equality in our patriarchal society which has been designed in a way so as to coerce her in accepting subservient role. However, with the passage of time, societies around the world are changing and there is a definite change in the mindset which now lay emphasis on the upliftment and empowerment of women in all spheres of their life. As a result of this changed outlook and the independence and power given to the women, they have started stepping out of their doors and contributing to the family income. As such, with the changing social dynamics and influence of market force on it, women workers are emerging in a new role of working class women. This has posed new challenges to them in the form of their workplace safety and has created newer avenues of exploitations by the opposite sex in their workplace. The rate of growth of women at workplace was directly related to different forms of violence and victimization which is in the gamut of what came to be known as Sexual Harassment at workplace.[1]

Every human has some rights. We have organizations such as the United Nations where we have special bodies which deal with violation of human rights in any part of the world. The Constitution of India also guarantees the equality of rights of men and women in our country. However, when it comes to the women's rights in India, there seems a wide gap between what is written on the paper and what actually exists.

Women's full enjoyment of equal rights is, however, underminded by the discrepancies between some national legislations, international law and international instruments on human rights. Lack of awareness within

* Research Scholar (Ph.D.), Faculty of Law, Jamia Millia Islamia, New Delhi. The author's Ph.D. focuses on the problems of Sexual Harassment of Women at workplace with focus on Hospitals in Delhi-NCT. This paper is based on and is part of the author's Dectoral Research work.

[1] Gousia Latif, "Note on Nature, Meaning and Consequences of Sexual Harassment" XVI *Kashmir University Law Review 276 (2009).*

the judicial process and inadequate monitoring of the violation of the human rights of all women, coupled with the under representation of women in justice systems, insufficient information of existing rights and persistent attitude and practices perpetuate women's de-facto inequality. De-facto inequality is also perpetuated by the lack of enforcement of inter alia family, civil, penal, labour and commercial laws or codes or administrative rules and regulations intended to ensure women's full enjoyment of human rights and fundamental freedom.[2]

Sexual harassment of working women amounts to violation of their rights of gender equality, right to life and liberty and right to practice any profession, trade or business as provided under Article 14, 21 and 19 of the Constitution. Though Legislation in this context of sexual harassment has been enacted yet its implementation and the mechanism suggested in the Act is far to see the light of the day.

This article attempts to explain the concept of sexual harassment, its impact on women and their rights. It looks at the several reasons due to which most of the cases of sexual harassment at workplace go unreported thereby making women 'silent sufferers'. Unfortunately, those who dare to speak out are often treated worse than the culprit. It is argued that sexual harassment operates as a barrier making it that much more difficult for women to realize their potential. How legislature and judiciary have tried to address the issue is also analysed.

DEFINING SEXUAL HARASSMENT

What is sexual harassment and what conduct or behavior amounts to sexual harassment at workplace has been the subject matter of discussions and debates since long. Several authors have tried to define and explain the phenomenon. The term "sexual harassment" itself is of relatively recent origin even though the phenomenon itself is not new.

It has been stated that the term was first coined in 1975 by college students in USA to describe their experience of losing jobs as a result of refusal to respond to male co-workers' sexual advances[3]. Before this there was no term to describe this kind of harassment even though the

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[2] Dr. Krushna Chandra Jena, "Sexual Harassment of Women in the Workplaces - A Human Right Violation" 459 (39) *Labour Industrial Cases* 68 (2006).

[3] See, Pheobe A. Morgan, "Sexual harassment" in Nicole Hahn Rafter (ed.), *Encyclopedia of Women and Crime* 24 (Arizona Oryx Press, 2000).

experience was quite common for women. It was only later that the term came to be used in public media4.

Sexual harassment is usually defined as un-welcome sexual advances and includes animosity that is gender based as well as a sexually charged work environment. It is also stated that sexual harassment is a gender-based violence. It is gender-based because "it is directed against the women because she is a woman or which affects woman disproportionately"[5]. This includes "acts which inflict physical, mental or sexual harm or suffering, threats of such acts and coercion'[6]. The Recommendation also defined the term "sexual harassment" as,

> "Sexual harassment includes such unwelcome sexually determined behavior as physical contacts and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and constitute a health and safety problem; that it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment"[7].

In India, in the absence of any statutory definition of the term sexual harassment, it was left to the Supreme Court to do the needful. Relying on the International conventions and norms, the Supreme Court defined the term sexual harassment for the first time in the year 1997 in *Vishaka v. State of Rajasthan*[8]. The definition, similar to the one proposed by CEDAW, reads :

"Sexual harassment includes such unwelcome sexually determined behavior (whether directly or by implication) as :

a) Physical contact or advances;

b) A demand or request for sexual favours;

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[4] International Labour Organization (ILO), conditions of Work Digest, Vol. 11, 1/1992, "Combating Sexual Harassment at Work", pg. 160.

[5] United Nations Committee on the Elimination of Discrimination Against women, "Violence Against women" (constituted by General Recommendation No. 19 (January, 1992), No. CEDAW/1992/Add. 15.

[6] *Ibid.*

[7] *Ibid.*

[8] (1997) 6 SCC 241

(c) Sexually coloured remarks;

(d) Showing pornography;

(e) Any other unwelcome physical, verbal or non-verbal conduct of sexual nature"

The Indian Sexual Harassment Act enacted in 2013 has also adopted this definition[9].

In context of sexual harassment at workplace, The supreme Court further stated that the aforementioned acts are committed "...in circumstances where-under the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work, whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory, for instance, when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work-environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto"[10].

KINDS OF SEXUAL HARASSMENT

Sexual harassment has traditionally been divided into two well-known forms :

(a) Quid Pro Quo and (b) Hostile Work Environment

Quid Pro Quo :

In implies something for something. It refers to those situations where an employer or superior at work makes tangible job-related promises of promotion, higher pay, academic advancement etc. conditional upon obtaining sexual favours from employee or sub-ordinate[11].

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[9] See, section 2(n), The Sexual harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

[10] *Supra note* 8

[11] "Sexual Harassment in the Workplace: Opportunities and Challenges for Legal Redress in Asia and the pacific", *International Women's Rights Action Watch Asia pacific (IWRAW)* Occasional Papers Series No. 7 at 8.

Hostile Work Environment:

Sexual harassment also occurs when an individual experiences unwelcome sexual advances, requests for sexual favours or other verbal or physical conduct of a sexual nature where such conduct has the purpose or effect of unreasonably interfering with that individual's work performance or creating an intimidating, hostile or offensive working environment. This type of sexual harassment does not include a demand for an exchange of sex for a job benefit. It is the creation of an uncomfortable environment[12].

These two kinds of harassment are not isolated and may occur together. One may even lead to the other. The ingredients of all the types overlap and there is no straitjacketed distinction possible[13].

REASONS FOR OCCURRENCE OF SEXUAL HARASSMENT

Although women are now entering domains traditionally reserved for men and are breaking more and more glass ceilings everyday but men have sadly not been able to accept them as their equal counterparts. This is easily attributable to existing patriarchy in the society. The male dominance is so ingrained in the psyche of men and women that they are not able to completely break out of their traditional roles. Discomfort with new changes brought about by education, economic factors and urbanization can lead to dangerous situations. Sexual Harassment is nothing more than a response of some men who have not been able to come to terms with women liberalization.

The seeds of this are sown right from the time when parents differentiate between the male and the female child and bring them up in an atmosphere where the sociologically created distinctions between male and female genders are deeply ingrained into young and impressionable minds. Male ego is seldom able to recognize or view woman as an equal human being. The reason for sexual harassment also contains indications for its cure - the best and lasting cure is to change mindsets so at the enable men to accept and respect women as equal human beings.

EXTENT OF THE PROBLEM

It has been reported that "from 1977 to 1989, there was a 24% increase in the number of working women in the rural and urban sectors.

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[12] *Supra* note 1 at 283.

[13] Ritu Gupta, *Sexual Harassment at Workplace* 25 (Lexis Nexis, Gurgaon, 2014)

Between 1983 and 1993, the number of cases workplace molestation increased from 75 to 20,194. Although information is limited, some surveys show high occurrences of sexual harassment of women working in villages, particularly those working in the field of family planning, or as gram sewaks, or those working as nurses"[14]. For the same period, data for urban areas is limited. However, a survey conducted by SAKSHI in 1997 showed that 54% of 67 women from a cross-section of industries have experienced some form of sexual harassment[15].

A recent survey by Oxfam India, found that 17% of working women have experienced Sexual Harassment at workplace[16]. In a survey conducted in 23 countries, it was revealed that 15-30% of working women had been subjected to Sexual Harassment which varied from explicit demands of sexual intercourse to offensive remarks[17]. Moreover, it is also reported that in India, a woman is sexually harassed every 12 minutes[18].

Also, times of India reported that there were about sixty cases of sexual harassment against Delhi Police itself-a force that is supposed to work for, inter-alia, safety and security of women in the city[19]. It was recently reported that the number of Sexual Harassment complaints in the National Commission for women had doubled in two years - from 167 in 2012 to 336 in 2014[20].

EFFECTS : VIOLATION OF RIGHTS OF WOMEN

Sexual harassment leads to some negative and adverse effects on women workers. They are forced to resign or fired by the company just because the "man" who harassed her happens to be a higher official with lots of influence and value. They may also experience lower

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[14] Hunny Matiyani, "Sexual Harassment At Workplaces: A Menace In the Society" XXVII *The Indian Journal of Criminology & Criminalistics* 42 (2006)

[15] *Ibid.*

[16] The survey was conducted in Delhi, Mumbai, Bangalore, Chennai, Kolkata, Ahmedabad, Lucknow and Durgapur by Oxfam India and the Social and Rural Research Institute, Reported on November 27, 2012, *available at :* http://towcricles.net/node/307393#.VLAxS9KUeSo (visited on January 2, 2015).

[17] ILO, Research Report : *Sexual Harassment At The Workplace in Vietnam : An Overview of the Legal Framework* (Ministry of Labour-Invalids and Social Affairs, March, 2013).

[18] D.K. Srivastava, "Progress of Sexual Harassment Law in India, China and Hong Kong: Prognosis of rfurther reform" 51 *Harvard Internaional Law Journal* 172 (2010).

[19] "Over 60 Sexual harassment cases against Delhi Police" *The times of India*, April 24, 2014.

[20] *The Times of India*, December 20, 2014.

productivity, less job satisfaction, reduced self-confidence and a loss of motivation and commitment to their work and their employer[21].

The emotional effects can vary from anxiety, low self-esteem, confusion and embarrassment to fear, depression, humiliation, shame, etc. and may also lead to suicide. The problem is further aggravated due to indifferent attitude of the society towards them where women are accused of having invited the attention through their dresses and behavior. This creates mental disturbances, which manifest as psychosomatic disorders. Women develop blood pressure, headache, backache, insomnia etc.[22].

As a whole, sexual harassment at workplace serves as a hidden occupational hazard and it also affects women's personal lives in the form of physical and emotional illness and disruption of marriage or other relationships with men.

WHY WOMEN AVOID REPORTING SEXUAL HARASSMENT

Women have, hitherto, remained as silent sufferers. They have endured this cruel treatment and it is not difficult to see why. Patriarchy and deeply ingrained social roles have seldom allowed women to express themselves even when they are subjected to less than human treatment. This leads to under reporting of cases of sexual harassment. One can enumerate the following reasons for non-reporting or under reporting;

Fear of Stigma : Many women choose to remain silent or even endure sexual harassment because they know that society is going to label them as the instigator or accomplice in any case. Surprisingly, patriarchy tends to blame women alone even for crimes against them. Often, instead of the harasser, it is the woman who gets labeled as 'loose' or as a trouble creator in the office. This has serious repercussions on their physical and mental health as well as careers.

Fear of Reprisal : Women often do not report due to fear of consequences. Other men in the office and even women colleagues view them with suspicion; the lengthy enquiries subsequent to complaint can also turn out to be an equally humiliating experience and in any case, the woman's career as well as family life is torn apart.

Lack of Support Systems : Surprisingly a woman who complains runs the rusk of being isolated at the workplace. Colleagues often would not

[22] *Ibid.*

corroborate incidents about which they are aware and there is no mechanism to help such women psychologically. Infact, before the enactment of the 2013 Act there was no direct law dealing with the problem - a brute indicator of the patriarchic influences on law which fails to recognize an important women problem.

All in all, the consequences of reporting can be as severe as the problem itself.

JUDICIAL RESPONSE TO THEIR SUFFERING

It was only gradually that women managed to raise their voice. What started as tentative first steps soon turned into a movement for women rights with *Vishaka*[23] as a milestone in this struggle.

Even though the legislative response was slow, the judiciary showed exemplary activism in the matter by laying down the almost the entire law for the first time in *Vishaka*[24].

Every woman has a constitutional right to participate in public employment and this right is denied in the process of sexual harassment, which exposes her to a big risk and hazard and places her at an inequitable position vis-a-vis other employees and this adversely affects her ability to realize her constitutionally guaranteed right under Article 19(1)(g). following this line of argument, the Courts in India have time and again come to the rescue of women who have suffered from sexual harassment at workplace.

In *Apparel Export Promotion Council v. A.K. Chopra*[25], the Supreme Court observed that,

> "There is no gainsaying that each incident of sexual harassment at the place of work, result in violation of the Fundamental Rights to Gender Equality and the Right to Life and Liberty - the two most precious Fundamental Rights guaranteed by the Constitution of India."

For the meaningful enjoyment of the right to life under Article 21 of the Constitution, every woman is entitled to the elimination of obstacles

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[23] *Supra* note 8.

[24] *Ibid.*

[25] AIR 1999 SC 625. See also, bodhisatwa Gautam v. Subhra Chakraborty (1996) 1 SCC 490, the Supreme Court declared that the women have 'right to life and liberty' under Article 21 of the Constitution.

and of discrimination based on gender.[26] Since the 'Right to Work' depends on the availability of a safe working environment, the hazards posed by sexual harassment need to be removed for this right to have any meaning.

ILO also recognizes sexual harassment at the workplace as a violation of fundamental rights of workers and declares it a problem of discrimination, an unacceptable working condition, and a form of violence (primarily against women). CEDAW[27] also recognizes the right of women to equality at the workplace and it states that women shall not be subjected to sexual harassment at the workplace. It also states that equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace. Also, in 1993 at the ILO Seminar held at Manila, it was recognized that sexual harassment of woman at the workplace was a form of gender discrimination against woman[28].

These international developments along with the mandate of Article 14, 19 and 21 of our Constitution led the Supreme Court to recognize and define sexual harassment and develop a set of guidelines to deal with this menace in *Vishaka*[29]. In this case, the Supreme Court commented : 'Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognized basic human right'.

In another case, *Rupan Deol Bajaj v. K.P.S. Gill*[30], Supreme Court observed that the sequence of events culminating in slapping on the posterior of a woman in a public function disclosed in the FIR amounted to prima facie offence under Section 354 of the Indian Penal Code, 1860.

Post *Vishaka*[31], a plethora of other decisions have reinforced the right of women to be free from sexual harassment at workplace[32].

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[26] *C. Masliamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil* (1996) 8 SCC 525. See also, *Madhu Kishwar v. State of Bihar* (1996) 5 SCC 125.

[27] Convention on the Elimination of All Forms of Discrimination against Women, 1979. India retified the same on 9 July, 1993 with certain reservations.

[28] *Supra* note 26 at 634.

[29] *Supra* note 8.

[30] (1995) 6 SCC 194.

[31] *Supra* note 8.

[32] See, for example, *Apparel Export Promotion Council v. A.K. Chopra*, AIR 1999 SC 625; Medha Kotwal Lele & Others v. UOI, 2004(5) SCALE 573 and (2013) 1 SCC 297; *Saudi Arabian Airlines, Mumbai v. Shehnaz Mudbhakal*, (1999) 2 LLJ 109 (Bom).

The Courts have also continuously tried to make the process of reporting and dealing with the problem smoother and less tedious for the woman. In *Samridhi Devi v. UOI & Ors.*[33], the Delhi High Court held that in the case of sexual harassment complaints, by their very nature, and the public interest element involved, the employer is under a duty to ensure that the workplace is kept safe, and free from sexual harassment. The Court observed that if action is not taken, or taken belatedly, or taken in a casual or inappropriate manner, the confidence and morale of female employees as a class is undermined.

In *Rinchu v. Govt. of NCT of Delhi & Ors.*[34], the Court held that in the present times, where women are increasingly being deployed in carrying out diverse assignments, the employer is under an obligation to provide safe working environment and directed the grant of Rs. 7.5 lakhs as compensation to the victimized nurse.

It is amply clear that the Indian Courts have tried to make the law and procedure relating to sexual harassment more responsive and sympathetic to the plight of women. This vindication of the special rights of women by the judiciary has helped women articulate their suffering and seek redressal from the administration.

LEGISLATIVE FRAMEWORK

Apart from the Constitutional mandate of Article 14, 19 and 21 which has been interpreted by the Higher Judiciary as ensuring to women a workplace free from sexual harassment, there have been other laws and regulations in India which indirectly deal with the problem.

Apart from the Sexual Harassment Act, 2013, the Indian Penal Code also defines sexual harassment and makes the same an offence[35].

Sixteen years after the Vishaka judgment, the legislative wing woke up from its slumber and finally, 'The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013' received the President's assent on 22nd April, 2013[36].

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[33] 125 (2005) DLT 284.

[34] MANU/DE/3718/2006

[35] See Section 354A, Indian Penal Code, 1860 (as amended by the Criminal Law Amendment Act, 2013)

[36] Came into force on December 9, 2013.

The Act not only symbolizes India's commitments under CEDAW but also reflects culmination of the Apex Court's initiative for a safer workplace for women. This reflects the constant toil, and relentless efforts by various organizations and public spirited individuals. It is a positive step towards recognition of women's basic rights as human rights as included in the Vienna Accord 1994 and the Beijing Women's Conference 1995.

The objective of the Act is "to provide safe, secure and enabling environment to every woman irrespective of her age or employment status free from all forms of Sexual Harassment by fixing the responsibility of the employer as well as the District officer (District Magistrate or Additional District Magistrate or the Collector or Deputy Collector of every district) by laying down a statutory redressal mechanism"[37].

CONCLUSION

Sexual harassment of women at workplace is a grave offence against the universal concept of human rights which advocates against any discrimination between the two sexes.

The urgent need of the hour is to change the social attitude towards working women. Law alone is not enough to uproot this menace. Massive awareness and sensitization of this social evil is necessary. Society has to understand that both men and women are like two wheels of a chariot and accordingly has to change its attitude so that women can come out and participate in public life without feeling threatened and vulnerable. There should be a sense of mutual respect between men and women. Women should no longer remain as silent sufferers to this problem they should express strong resistance and shed her mentality of tolerance.

Sexual harassment deprives women right to life and liberty which includes right to live with dignity and work in a profession of one's choice. So it is our utmost duty to protect such precious rights of women workers in all vistas of society and provide them a 'safe environment' to live with human dignity.

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[37] *Supra* note 13 at 124.

INVESTIGATION OF OFFENCES RELATING TO HUMAN BODY

Hakim Rai*

The offences against human body are defined in chapter 16 of Indian Penal code. The following type of criminal cases may be investigated by a police officer duringhis service as an I.O.

1. Cases which can effect the life of any person (cases u/s 302, 304, 304A, 304B IPC)
2. Cases related to abortion and death of newly born child. (cases u/s 312 to 318 IPC)
3. Cases related to injuries to human body. (cases u/s/ 323 to 338 IPC).
4. Cases related to wrongful restraint and wrongful confinement. (cases u/s 341 and 342 IPC)
5. Cases related to use of criminal force and assault. (u/s 352 to 358 IPC).
6. Cases related to kidnapping and abduction (cases u/s/ 363 to 366 IPC).
7. Cases related to rape. (cases u/s 376 IPC).

Points which are to be kept in mind by the Investigating officer while Investigating any case relating to human body

1. Oral evidence should be collected through the statement of complainant. The complainant should be questioned on the following points if these points have not come in the F.I.R.

A. About the motive of crime.

B. About the source of light if the occurrence of crime took place in the night.

C. About the age group and body built of accused persons if they are unknown to the complainant.

D. About the delay of FIR specially when the accused persons are named.

* Dy. S.P. (Rtd)

E. About any previous incident took place between complainant and the named person or persons.

F. About the names of witnesses if any.

2. Oral evidence should be collected through the statements of witnesses - The investigating officer should take statements of the different type of witnesses on the following points to know the truth of the case.

A. Each witness should be interviewed separately so that no witness may change his mind to hear another witness.

B. All witnesses must be asked as how they came on the scene of crime to know the cause of their presence on the scene of crime. If this question is not made clear at the stage of investigation it may be asked by the defense lawyer at the time of trial in the court.

C. The relationship of witness with the complainant or enmity with the accused persons or person should also be checked from the witnesses in the case of named accused persons just to know whether the witnesses are independent or not.

D. In a case of unknown criminals the witnesses must be asked whether they can identify the accused persons after arrest.

E. The description of the criminals should be checked from the witnesses just to confirm the version of the complainant in those cases against human body in which the unknown accused persons were seen by the complainant and the witnesses.

F. The statements of witnesses should be recorded as early as possible so that no one may change the real version due to any pressers.

3. Action u/s 82/83 Cr.P.C. - If the accused persons are named and they are absconding to avoid their arrest, action u/s 82/83 Cr.P.C. should be taken under order of court as early as possible to avoide any further complaint of slackness of police.

4. The medical examination of victim should be got conducted on the following points.

A. About the injuries present on his body.

B. About the age of the victim in case of kidnapping and rape.

C. About the confirmation of rape in rape cases.

D. About the nature of injuries.

E. About the time of injuries.

5. Action of police to get the dead body identified - If the deceased is unknown all efforts should be done for getting him identified as the further investigation will depend on his identification. It can be done by showing the dead body to the person living near the place of crime. The photo of the deceased person may be published in the local newspaper to give wide publicity of the unknown dead body. The finger prints of the deceased person may be sent to finger print bureau for comparison with the finger prints of convicted persons to ensure whether the dead person is a previous convict of not.

6. The dead body of the deceased person should be sent for post-mortem examination to know the following facts :-

A. The time of death.

B. The number of injuries present on his body.

C. The nature of injuries.

D. The time of injuries.

E. The directionof injuries.

F. The distance of fire.

G.. The condition of food found in the stomach.

H. The cause of death.

7. The scene of occurrence must be inspected to collect physical evidence. In different cases against human body specially in homicidal and rape cases following type of physical evidence may be collected from the scene of occurrence

a. Blood stained articles.

b. Finger prints

c. Foot prints

d. Empty cartridges

e. Any part of cloth or fibre.

f. Any part of weapon

g. Hair

h. Pieces of cigarette

i. Pieces of bangles

j. Suicide note etc

8. Dying declaration of the injured person must be got recorded - If any person is seriously injured it is very necessary to get his statement recorded by the magistrate or doctor so that after the death of the injured person his dying declaration may be proved inthe court. According to section 32(1) of Indian Evidence Act the dying declaration of any injured person about the cause of death is admissible in court after his death if death has occured due to those injuries.

9. Supplementry report of injured person must be obtained - If some injuries of any injured person are kept under observation by the doctor, the supplementary report should be obtained from the doctor and if any injury is found grievous in nature the sections of penal code should be changed accordingly.

10. Medical examination of injured accused person must be got conducted - If the arrested accused person is found injured, he should be got examined by the doctor so that it may be proved in the court that he was involved in the drime of violence if the injuries found on his body correspond with the time of crime incident. It is legal according to section 53 Cr.P.C.

11. Statement of victim should be got recorded u/s 164 Cr.P.C. - The statement of the victim in kidnapping, abduction or rape cases must be got recorded u/s 164 Cr.P.C. by the judicial magistrate and further action should be taken according to the statment of victim. It provides strength to the further investigation.

12. Help of call details of mobile phone may checked to know the involvement of any suspected person in the crime - There is case of murder in which seven persons of the family were killed while sleeping in the house during night and only one unmarried girl survived who raised alarm of murder against unknown criminals. On suspicion she was asked about her presence at the time of crime. She told the police that she was sleeping on the roof of the house and due to rain she came down. She saw everyone killed on the bed. Since there was no rain in the night her mobile phone call details were checked and it was found that she talked with his boy friend so many times in the same night of crime. On the basis of call details the boy friend was arrested and he was interrogated. he confessed the crime with the involvement of the survived girl and on his pointing out the blood stained weapon of murder and blood stained

clothes were discovered by the police. In this way the blind case was worked out with the help of call details of mobile phone.

13. The arrest of accused persons should be made as early as possible - In heinous cases of human body the arrest of accused persons should be made quickly so that no incident of crime in retaliation may occur by the victim or his family members. It has come in notice that delay in arrest gives rise to complaints against police and the victim party may commit some crime with the alleged criminals in retaliation.

14. The statement of the accused person must be recorded - In the course of investigation it is very necessary to record the statement of arrested accused person. He should be interrogated thoroughly. If he confesses the guilt and disclosed that he has concealed the dead body or the weapon of murder, the same should be discovered on the pointing out of the arrested accused person. The discovery of any distinctly related fact of the case is admissible in the court of law u/s 27 of evidence act.

15. The investigating officer must collect the evidence of previous and subsequent conduct of accused person - This type of evidence is admissible in court u/s 8 of Indian evidence act. For example of any accused of murder threatens another person two days before the incident murder and he commits murder after two days. After the murder he ran away to escape and avoid the arrest, the evidence of threatening and escape may be proved in the court against the accused person under the above section.

16. Physical evidence should be sent for comparison and expert opinion to F.S.L. - If in any case against human body any physical evidence is collected from the scene of crime it is necessary to prepare a recovery memo and that article should be sealed at the spot. If any thing related to crime is found from the possession of accused person, it should also be taken into possession by preparing a recovery memo and should be sealed in a bundle. If the articles taken in possession from the scene of occurrence and from the possession of the accused person are to be examined from forensic science laboratory, both the sealed articles should be sent to laboratory for examination and cmparison. If both the articles are found matching, the expert evidence is relevent against the accused person in the court.

17. Identification of recovered or discovered property must be got conducted in murder cases - If any thing of the deceased person is recovered from the possession of the accused person which was taken away by him after the murder, the same should be taken into possession and sealed after preparing a recovery memo. if identification of the recovered article is required it should be got condusted by the family members of the deceased person before the magistrate. The result of identification is relevant in the court against the accused u/s 9 of evidence act.

18. Chargesheet must be submitted to court within the sanctioned remand time - After evaluation of the collected evidence the investigating officer should finalize the investigation early either by charge-sheet or final report and send the same to the concerned court. If the arrested accused person is in jail the charge sheet must be submitted within the maximum remand time otherwise the accused will be entitled for bail.

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Six Little Stories

(1)

Once all Villagers decided to pray for rain,
On the day to prayer all the people gathered but only one boy came with an umbrella.
That's FAITH

(2)

When You Throw a baby in air, she laughs because she knows you well catch her.
That's TRUST

(3)

Every night we go to bed without any assurance of being alive the next morning but still we said the alarm of wake up.
That's HOPE

(4)

We plan big things for tomorrow in spite of zero knowledge of the future.
That's CONFIDENCE

(5)

We See the world suffering.
but Still we get Married.
That's LOVE

(6)

On an Old Mans shirt was Written a cute sentence 'I Am not 60 Year old..' I am Sweet 16 with 44 Year Experience.
That's ATTITUDE

Editor-in-Chief

Acceptance

When we don't accept an undesired event, it becomes 'Anger',

When we accept it, it becomes 'Tolerance'.

When we don't accept uncertainty, it becomes 'Fear',

When we accept it, it becomes 'Adventure'.

When we don't accept other's bad behaviour towards us, it becomes 'Hatred',

When we accept it, It becomes 'forgiveness'.

When we don't accept other's success, it becomes 'Jealousy',

When we accept it, it becomes 'Inspiration'.

Acceptance is the key to handling life well.

Editor-in-Chief