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RESEARCH ARTICLE

FEMALE CRIMINALITY AND INTERNATIONAL CRIMINAL JUSTICE ADMINISTRATION: JURISPRUDENTIAL EVOLUTION THROUGH THE INTERNATIONAL AD HOC CRIMINAL TRIBUNALS

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Abstract

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Introduction:-

The notion of female criminality under the Criminal Justice system is still now a single faced issue. Gender factor plays a vital role in sentencing pattern in the judicial system. Though the fundamentals of the Criminal Law are not a gender biased one either in the substantive or the procedural law, the judicial discrimination classifies shows such leniency while awarding the penal sanction. The interpretation of mens rea and the actus reus should determine the guilt or innocence and not based on any other factors. Most of the domestic criminal justice systems are lenient towards the female criminals even for the graver offence. The dark side of inequality based on gender should be removed. The protection provided to the disadvantaged or vulnerable groups who is none other than women and children is the most celebrated human rights without understanding that sometimes the women gender itself indulging in heinous crimes against women. In the Indian Criminal Justice system, under Indian Penal Code (herein after referred to as 'IPC'), some offences are exclusively considered to committed against women only. Apart from the protection through the IPC, special laws are also there to protect women rights and safety. On the other hand, the perpetrators of the crimes under any of these provisions or legislatures are gender biased. The Criminal Justice Administration is providing maximum concentration on the commission of the crime rather than the conspiracy or abetment part. Though the offence of rape is committed by male, is there any trace for either conspiracy or abetment of rape by a woman. Only in limited provisions of laws for heinous crimes such as murder, causing miscarriage to an unborn child, bigamy, acid attack women may be charged. Though they charged with, what sort of penal sanction is awarded for them is debatable issue. The notion of application criminological view while deciding a case is either or partly absent in our criminal system. But the study about the criminological behaviour of the perpetrator is being carried out in a systematic way under the International Criminal Justice System. In this paper the author will discuss about the contributions of International Ad Hoc Criminal Tribunals in interpreting every case with specific reference to women criminality.

International Ad Hoc Criminal Tribunals:

International Criminal Tribunal for Former Yugoslavia (herein after referred to as the "ICTY")

Due the massive human rights violation committed within the territory of the Former Yugoslavia, the United Nations Security Council (herein after referred to as the 'UNSC') voiced alarm based on the reports of the permanent representatives of Yugoslavia. The reports alerted UNSC about widespread and methodical violations of international humanitarian law (herein after referred to as 'IHL'). Further the report includes the atrocities such as mass killings, organised and systematic detention and rape of women and continuance practise of ethnic cleansing. In this regard, the UNSC to react and bring out the peace decided to establish an international ad hoc criminal tribunal according to Chapter VII of the Charter of the United Nations (herein after referred to as 'the UN'). The

decision enables the tribunal to achieve and restoration of peace and to prosecute and punish the perpetrators responsible for such serious violations. International criminologist commented that the establishment of ad hoc international criminal tribunal will address the redressal for serious violations of IHL without any immunities and discretions. Though there was difference of comments and objections arose with respect to such establishment, some commenters supported the view with the aid of Art.41 of the Charter of the UN. The International Court of Justice in its Advisory opinion case, "Effects of Awards of Compensation Made by the United Nations Administrative Tribunals (Advisory Opinion) approved the powers of the UN organs to entrust their powers to subsidiary bodies including tribunals, which authorises the UNSC under Art.29.

The constitution of the ICTY includes Registry (administrative head of the Tribunal), the Office of the Prosecutor (organ responsible for investigation, framing indictments and conducting trials) and the Chambers (main organ of the Tribunal which includes Trial and Appeal Chambers). The Tribunal had its own Charter with 34 Articles and the jurisdiction of the Tribunal was for Grave Breaches of the Geneva Convention, 1949 (War Crimes), Violations of the laws or customs of war, crime of Genocide and Crimes against Humanity. The number of cases indicted before the Tribunal for the prosecution of the above crimes were totally 160- 90 were sentenced, 18 were acquitted, 3 pending before the Appeal Tribunal, 13 referred to National jurisdiction and 37 perpetrators indictments were withdrawn and some died. The Tribunal was officially completed its task and closed on 27.12.2017. From the 160 perpetrators indicted before the Tribunal only one women offender was found guilty as many as 20 perpetrators pleaded guilty. The only one women offender was Biljana Plavsic who was indicted for the alleging crimes such as crime of genocide, punishable acts under the Crimes against Humanity inter alia persecution, extermination and killing; deportation and inhumane acts. She initially refused to plead guilty and on 2 October 2002, pleaded guilty for persecution and Crimes against Humanity. The Tribunal satisfied about the voluntariness of the guilty plea and unequivocal consent. Plea agreement was entered on 30 September and based on the guilty plea, the prosecution agreed to withdraw the remaining counts of indictments. But the Tribunal refused. She was sentenced to eleven years of imprisonment.

Biljana Plavsic:

Biljana Plavsic was aged about 72 at the time of the trial. The background of the accused was that, she was a distinguished academician, Professor of Natural Science and Dean of Faculty at the University of Sarjevo. She joined the politics in 1990. He joined the Serbian Republic Party ('SDS') and soon became a prominent member of the party. She was elected as a Serbian Representative to the Presidency of the Socialistic Republic of Bosnia and Herzegovina. When the sovereign Bosnia and Herzegovina was created, the SDS party voted against the resolution and the party included the accused also and they voted for the creation of Bosnian Serb Assembly. The accused supported the aim of Bosnian Serb, being a co-President, she supported by maintaining the government and military at local and national level, encourages public announcement that justified that genocide was committed against them by Bosnian Muslim and Bosnian Croats, encouraged and invited paramilitaries from Serbia to assist Bosnian Serb Forces to effect the ethnic separation. The act of persecution includes-killing, cruel and inhumane treatment during and after attack, forcible transfer and deportation, unlawful detention, forced labour and use of human shields, destruction of cultural and sacred objects and plunder of property. Though the accused Biljana Plavsic disagree with the allegation of ethnic cleansing but she was aware that she had power to prevent and punish the crime and failed to do so.

In the Plea agreement statement, the accused stated that she accepting her responsibility and remorse unconditionally. She further offered consolation to the innocent victim. She also insisted other accused to come forward to accept their acts and conduct. She realized and understood the nature and gravity of the crime she participated during the conflict.

6Applicable Laws:

The Statute of the ICTY and the Rules of Procedure and Evidence (herein after referred to as the 'RPE') are available with the relevant provisions of law. The imposition of penalties shall be in accordance with the prison sentences of the former Yugoslavia and shall be limited to imprisonment. Further the law insists that while awarding sanction the Chamber should consider both aggravating and mitigating factors. The relatable provisions for pleading guilty is available under the RPE. If the accused person pleaded guilty the Chamber should satisfies that the guilty was made voluntarily, informed and not equivocal. According the relevant provisions of law, the aggravating factors are gravity of the offence and the individual circumstances of the accused person. The mitigating factors are substantial cooperation with the prosecution. The Trial Chambers (herein after referred to as the 'TC') interpreted

the sentencing pattern of this case in comparing with the decision passed in Delelic and Aleksovskias it was held that retribution and deterrence would be the ultimate objective of the sentencing and the consideration should be from the context of the accused. Further it reiterated that the cardinal principle of sentencing should be based on the gravity of the offence.

Gravity of the Offence, Aggravating and Mitigating Factors:

The prosecution submitted the aggravating factors of the accused such as crime of persecution (discriminatory intent) was the result of large scale of campaign in which the accused also participated. The campaign was massive and thousands of the civilians were expelled and killed brutally and includes torture and sexual violence. The act includes killing, beating, rapes at Luka Camp of the Muslim, mass killing of nearly 70 Muslim women and children in a crowded bus with only two windows by setting ablaze the bus. This sort of cruel and inhumane treatment was practised in several municipalities. The Trial Chamber considered and satisfied that the repeated occurrence of the above-mentioned events was enough to establish the gravity of the offence though the accused was not committed the offence. The accused in her guilty plea agreement accepted her involvement in the crime of victimisation and persecution. The TC of the ICTY found guilty and accepts the gravity of the offence of massive campaign on ethnic separation which directly resulted in killing of thousands of innocent Bosnian Muslim, Bosnian Serbs and non-Serbs. The findings of the Chambers to satisfy the gravity of the offence includes: massive scope and extent of persecution; counts of killings; immense inhumane and cruel treatment and wanton destruction of property and religious building. The aggravating factors of the accused as per the findings of the Trial Chamber were: leadership position of the accused; status of the victims (vulnerability) and depravity of the crime.

Further, the Chamber applied the law evolved in Krstić Trial judgement to establish leadership as an aggravating factor. The TC at the same time also found that the accused was not first rank leader as compared to other accused, not involved in conspiracy of planning and execution, but only encouraged and supported through her participation. The discussion of sentencing states that in the absence of the guilty plea agreement, the alleged indictment would have been punished with imprisonment for life.

The mitigating factors which helped the accused are: entry of guilty plea; remorse; voluntary surrender; post-conflict conduct; previous good character and age. The Chambers has discretionary powers to consider further factors as mitigating factor as the facts and circumstances of the case differ. The jurisprudence on guilty plea as a mitigating factor evolved in various cases *inter alia* by both the Criminal Tribunal for Former Yugoslavia and Rwanda (the discussion on creation, jurisdiction, Statute and Procedure of the African Criminal Tribunal will be discussed in the next part of the article). The evolution of jurisprudence on guilty plea as a mitigating factor justified as demonstration of honesty, to assist the Tribunal to achieve the ultimate objective of its creation, it plays a vital role as a fact-finding tool which contributes for the peace-building process, it may reduce the cost and time of the Tribunal and some time it might relieve the stress of the victim witnesses. Further the prosecution in its argument stated that the guilty plea is two-folded principles, expression of remorse and steps towards reconciliation. In this case, the accused expressed her remorse “fully and unconditionally”. Though the guilty plea would lead to discount in the sentencing, the significant circumstance of the same is establishment of truth and reconciliation. This was made by the Biljana Plavšić in her guilty plea statement as follows;

“...There is a justice which demands a life for each innocent life, a death for each wrongful death. It is, of course, not possible for me to meet the demands of such justice. I can only do what is in my power and hope that it will be of some benefit, that having come to the truth, to speak it, and to accept responsibility. This will, I hope, help the Muslim, Croat, and even Serb innocent victims not to be overtaken with bitterness, which often becomes hatred and is in the end self-destructive. To achieve any reconciliation or lasting peace in Bosnia and Herzegovina, serious violations of humanitarian law during the war must be acknowledged by those who bear responsibility—regardless of their ethnic group. This acknowledgement is an essential first step”

The guilty plea statement was acknowledged by an expert witness Dr. Alex Boraine, an expert on reconciliation and accountability issues. Another witness Mr. Mirsad Tokaca, noted that refusing or failure to speak up about the crime impedes the establishment of the truth and reconciliatory process and the courageous move of the accused by admitting the allegation was,

“...an extremely courageous, brave and important gesture and that it represents support to what is the ultimate aim of all of us [...]; that at one-point normal conditions of life should be resumed in Bosnia-Herzegovina [...] and in the entire region as well”

The object expressed by the UNSC in its Resolution 827 while creating the ICTY stressed the importance of the ICTY to achieve the process of reconciliation and maintenance of international peace and security. The other mitigating factors other than guilty plea agreement are voluntary surrender, Post-Conflict conduct, age factor. With respect to age factor, the Trial Chamber referred the decision passed by the European Court on Human Rights (herein after referred to as 'ECHR'). In Papon v. Francecase the appellant was 90 years old who found guilty of abetting and aiding of crimes against humanity by the French Court. The court referred Art.3 of the European Convention for the Protection of Human Rights and Fundamental Rights regarding rights against torture or inhumane or degrading treatment or punishment. The ECHR observed that,

“...advanced age is not a bar to sentence...However, age in conjunction with other factors, such as health, may be taken into account either when sentence is passed or while sentence is being served...”

With the advancement of the argument, the Chamber expressed that the accused who was 72 at the time of the trial proceedings, any imprisonment imposed on her, must considered of her age. The Defence has submitted several other countries sentencing pattern and consideration of age as a mitigating factor. The decision passed by the Trial Chamber in Erdemoviccase the penalty was imposed in confirmation with the minimum principle of humanity, dignity which was guaranteed by various human right instruments. Though the Prosecution agreed with the contention of the Defence regarding age as a mitigating factor but disagree with the fact that in the referred decision of Erdemoviccase, though the TC considered age as a mitigating circumstance, what is the deciding factor of “advanced age” was not evolved in the said case. So, the TC moves outside the jurisdiction of the ICTY and applied jurisprudence evolved by ECHR in Popancase and an English case R. v. C.. From the above discussion of the decisions, the TC considered advanced of age as a mitigating factor.

Jurisprudential Evolution:

The gravity of offence was established from the participation of the accused and misuse of her status. The Chamber opined that the leadership position should either prevent the crime or mitigate its gravity. But the accused supported and encouraged the crime. This will act as an aggravating factor. The TC appreciated the mitigating factor such as acknowledgement of crime, acceptance of responsibility; remorse and repentance were balanced against the aggravating factor. The Prosecution submitted appropriate sentence for the alleged indictment against the accused as imprisonment not less than 15 years, but which may not more than 25 years. The Chamber considered both mitigating and aggravating circumstances along with the principle of retribution and deterrence. The TC preferred guilty plea as a prominent mitigating factor rather than the advanced age. The point to be noted from the above discussion, nowhere either the accused nor the defence or the Chamber raised any arguments based on gender. The Trial Chamber sentenced the accused to undergo eleven years of imprisonment.