

STUDY ON DISCRIMINATION AND VIOLENCE AGAINST WOMEN

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Abstract

Discrimination and violence against women consists of sexual abuse, rape, and forced marriage, trafficking in women, education, and social, economic and other sectors. This discrimination and violence must be prohibited under Convention on the Elimination of All Forms of Discrimination against women (CEDAW). Thus; this discrimination must be protected by human rights under international law and humanitarian law. The role of women in sustainable development and protecting the environment emerged out of global Conference. Women must be protected for entitle of human rights against women that is to ensure the protection, promotion and fulfillment of women's and girl's economic, social, cultural, civil and political right.

Keywords: Discrimination, violence, against women.

Introduction

The term violence against women means any act of gender-based violence that is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. Prohibition of violence and discrimination against women is based on the Beijing Platform for Action and the Principles of the Convention on the Elimination of All Form of Discrimination against Women (CEDAW) and human rights of gender declaration which International Women and Myanmar Women have been protected under laws and regulations.

According to humanitarian law, series of measures are set out to be taken by states to prevent and eliminate such violence against armed conflict. The Declaration on Elimination of violence against women states that violence and discrimination against women are unequal relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women.

During armed conflict, women experience all forms of physical, sexual and psychological violence perpetrated by both State and non- State action. In developing countries and developed countries, women are forced to face from violence and discrimination such as education, employment, sex worker, rape, and prostitution and so on. Therefore, international law must be prohibited from violence and discrimination against women. Myanmar women are enjoying their rights fully, bestowed upon by the State Constitution as well as the Myanmar Customary Law. Women must be protected with the provision of scholarship and the rights to free education for established practical training,

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vocational training and skills building support for them. So, everybody must be prohibited from violence and discrimination against women under International Law.

1. Fundamental Feature and Concept in Human Rights

Every citizen of a country has right to freely follow one's custom, culture and traditions and profess their religion of his choice subjects to certain limitations. These fundamental rights are expressly granted by the Constitution.

Human rights have a small number of features which distinguishes them from other rights, and also which are necessary to protect and empower people. The features give human rights a special and unique status, setting them apart from other types of rights, such as universality, inherent, inalienable, dignity, and equality. In general, rights are limited as to where and when they apply. However, human rights do not have this limitation-they are universal. The fact of being human on this earth is enough to gain human rights. Human rights are not dependent on citizenship, or living in a territory that recognizes such rights. Universality ensures that each person has human rights which are always available to them everywhere. Human rights also guarantee people the means necessary to satisfy their basic needs, such as food, housing and education, so they can take full advantage of all opportunities. Finally, by guaranteeing life, liberty, equality and security, human rights protect people against abuse by those who are more powerful.

1.1 The meaning of Human Rights

The term human rights are rights a person has because he or she is a human. In other words, human beings deserve certain levels of freedoms or standards of living simply because they are human. The complex answer is that human rights entail an internationally recognized standard of how all humans should be treated, regardless of situation, or where they live. Under this definition, human rights are legal in basis, and they ensure governments and other parties do not limit freedoms or impose unnecessary suffering on people. If these rights are upheld, people should be also to live a life of dignity. The number of internationally recognized human rights is still expanding in on-going debates at the United Nations and other organizations.

Human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education and many more.

Human rights are moral principles or norms that describe certain standards of human behavior and are regularly protected as nature and legal rights in municipal and international law.

Human rights are important in the relationship that exists between individuals and government that has power over them. The government exercises power over its people. However, human rights mean that this power is limited. States have to look after the basic need of the people and protect some of their freedom.

Dignity is one of the main objectives of human rights which are to ensure people can live with dignity. In other words, that they are respected, treated well, and have a sense of worth. If a person has their human rights, then they are not treated with dignity. Dignity is not only about making sure laws are not broken, but it is about treating people in such a way that they are respected as humans like any other human.

Human rights exist to ensure equality. Indeed, this concept is featured in all human rights documents, emphasizing the equal enjoyment of rights without discrimination. It is important to note that the gendered language of early human rights texts show that true equality between the sexes had not yet been reached, men were equal to other men but it would take some time before women were similarly regarded. Equality ensures people receive the same treatment, whether before the law, at work or in a marriage.

Equality means the state of being equal. It's one of the ideals a democratic society, and so the fight to attain different kinds of equality, like racial equality, gender equality or equality of opportunity between rich and poor, is often associated with progress toward that idea of everyone being truly equal.

Human Rights are formed at the intersection of legal, moral, and social rights. These three types of rights need to be examined. First, human rights should be considered a right by law. There are many legal rights, which are protected by law. Governments should respect human rights not merely because it is "right" or "moral", but because they are legally bound to uphold them. Second, human rights are also moral rights; they exist because they are considered moral or proper. However, not all moral rights are based on the law; there are many acts that are seen as immoral but not illegal. Some moral rights have become protected in law; for example, the banning of media classified as pornography in some countries. People usually recognize when a moral right has been violated because within a society people tend to have similar benefits as to what right or wrong. Third, human rights are social rights which ensure people live safely and happily together in society. Again not all social rights are protected by law, but they do ensure the smooth running of society.

1.2 Women's Human Rights

Women face discrimination in a number of ways; women are paid less than men for the same amount of work; women frequently face violence; women and girls are discouraged from going to school; women and girls are not given the same importance as men in history, traditions, and cultural activities.

Women's rights are the fundamental human rights that were enshrined by the United Nations for every human being on the planet nearly 70 years ago. These rights include the right to live free from violence, slavery, and discrimination to be educated; to own property; to vote and to earn a fair and equal wage.

1.2.1 History of Women's Rights

In the ancient Chinese, Greek, Egyptian and Roman societies, women could play significant roles as leaders, Gods, heads of households, though they did not have equal rights to men. 19th century, the first women's rights organizations were in place in the major Western countries. Through the nineteenth and early twentieth century, women held national and international conferences and lobbied around issues of war, equality, the right to vote and the prohibition of alcohol. Moreover, the ILO endorsed the principle of equal pay for work of equal value in the preamble of the ILO's constitution. A provision on women holding positions is repeated in the *Charter of the United Nations* (1945).

Women rights are rights and entitlements claimed for women and girls worldwide and which formed the basis for the women's rights movement in the 19th century and feminist movement during the 20th century. In some countries, these rights are institutionalized or supported by law, local custom and behavior, whereas in others they are ignored and suppressed. They differ from broader notions of human rights through claims of an inherent historical and traditional bias against the exercise of rights by women and girls, in favor of men and boys.

Issues commonly associated with notions of women's rights including the right to bodily integrity and autonomy; to be free from sexual violence; to vote; to hold public office; to play enter into legal contracts; to have equal rights in family law; to work ; to fair wages or equal pay; to have reproductive rights; to own property; to education.

1.2.2 Definition of Discrimination

Discrimination is prejudice treatment or consideration of or making a distinction towards, a being based on the group, class, or category to which they are perceived to belong. In order to understand discrimination, the concepts of sex and gender must be distinguished. In social practice there is a tendency to conflate, or mistake sex for gender, or vice versa. The

result is the belief that inequality between men and women is a natural, biological fact, and not a social construct. By distinguishing these concepts, it can be seen that belief in the superiority of men is primarily a cultural belief, and not a biological fact.

Therefore, the CEDAW convention is an important development in protecting women's human rights. It means that women and men should have equal rights in all aspects of their lives. It presents the different areas where governments should focus on their efforts to achieve equal rights for women. Countries that ratify CEDAW are committed to amend their national laws to guarantee women's equal rights, provide opportunities and remedies where gaps exist, as well as to submit a report every four-years on its progress in implementing their treaty obligations. The treaty establishes the Committee on the Elimination of Discrimination against women to monitor State compliance with the convention. CEDAW is a historical achievement for women around the world because it became the main international standards to measure the treatment of women. During its annual session, the committee members discuss these reports with the government representatives and explore with them areas for further action by the specific country. The committee also makes general recommendation to the States parties on matters concerning the elimination of discrimination against women.

In these ways, the most important basic laws prevent discrimination on the basis of race, color, sex, religion, or national origin. Later, laws prevent discrimination based on more descriptors such as age and disability.

2. Prohibition of Discrimination and Violence against Women

Violence against women may be defined as “any act of gender-based violence that is directed against women that affects Women disproportionately.” It is a form of discrimination and a violation of women's human rights that derives from historically unequal power relations between men and women. Most cases of violence against women involve a male perpetrator and a female victim. The term “violence against women” means any act of gender-based violence that result in or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.

Violence against women continues to be a global display epidemic that kills or tortures, sexually and economically. It is one of the most pervasive of human right violation, denying women equality, security, dignity, self-worth, and their right to enjoy fundamental freedoms. Violence against women is present in every country, cutting across boundaries of cultural, class, education, income, ethnicity and age. Moreover, when the violation takes place within

the home, as is very often the case, the abuse is effectively condoned by the tacit silence and the passivity displayed by the state and the law-enforcing machinery.

2.1 Prohibition of Domestic violence against women

For the purpose of the digest the term "domestic violence" includes violence against women by an intimate partner, including a cohabiting partner, and by other family members, where this violence occurs within or beyond the confines of the home.

In other words, the term "domestic" here refers to the types of relationship involved rather than the place where the violent act occurs. The Digest attempts to set out the magnitude and between stakeholders, setting up mechanisms for monitoring and evaluating programmes and policies, implementing existing legislation and ensuring greater transparency and accountability from governments in order to eliminate violence against women.

Domestic violence is in most cases violence perpetrated by men against women. Even at the very beginning of life, a girl may be the target of sex-selective abortion or female infanticide in cultures where son-preference is prevalent. During childhood, violence against women may include enforced malnutrition, lack of access to medical care and education, incest, female genital mutilation, early marriage, and forced prostitution or bonded labor.

Traditionally, in most cultures, men had a legal right to use violence to "discipline" their wives. Although in the US and many European countries this right was removed from them in the last 19th/early20th century, before the 1970s criminal arrests were very rare (occurring only in cases of extreme violence), and it was only in the 1990s that rigorous enforcement of laws against domestic violence become standard policy in Western countries.

The Convention on preventing and combating violence against women and domestic violence states that "domestic violence" shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has a shared residence with the victim. Family violence is defined as follows "physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation".

Domestic violence, whether it is perpetrated by private or state actors, constitutes a violation of human rights. It is the duty of states to ensure that there is no impunity for the perpetrators of such violence. They are not only required not to commit human rights violation, but also to prevent and respond to human rights abuses. The concept of state

responsibility has now developed to recognize that states also have an obligation to take preventive and punitive steps where rights violations by private actors occur.

Domestic violence, also known as domestic abuse, spousal abuse, battering, family violence, dating abuse and intimate partner violence (IPV), is a pattern of behavior which involves the abuse by one partner against another in an intimate relationship such as marriage, cohabitation, dating or within the family.

“Domestic violence” varies, depending on the context in which it is used. It may be defined differently in medical, legal, political or social contexts. The definitions have varied over time and vary in different parts of the world. Traditionally, domestic violence was mostly associated with physical violence. However, domestic violence today, as defined by international conventions and by governments, has a much broader definition, including sexual, psychological and economic abuse.

2.2 Prohibition of violence in Sexual Abuse against women

Sexual abuse and rape by an intimate partner is not considered a crime in most countries and women in many societies do not consider forced sex as rape if they are married to, or cohabiting with, the perpetrator. The assumption is that once a woman enters into a contract of marriage, the husband has the right to unlimited sexual access to its wife.

Sexual abuse is any situation in which force or threat is used to obtain participation in unwanted sexual activity. Coercing a person to engage in sexual activity against their will, even if that person is a spouse or intimate partner with whom consensual sex has occurred, is an act of aggression and violence.

Accordingly, any law that aims at eliminating one or more take into account the inequality between men and women. As a consequence, the law must acknowledge that the perpetrator and the victim of the aggression are not on an equal footing; they do not have the same power or the same freedom to decide to put an end to the abuse.

The law aimed at penalizing gender violence that takes the form of sexual harassment, for example, should not only institute a new category of offense but also should establish conditions in which working women and students do not see their employment or their studies endangered because they filed a complaint against the perpetrator.

Under law must be prohibited violence of sexual abuse against women. Sexual exploitation use of forced prevention of women’s right, rape must be helped under the rule of law. If only laws could be prevented the violence against women. Sexual exploitation in all its forms, including forced pregnancy, reverberates through generations, most specifically in the children who are born of such exploitation.

2.3 Prohibition of violence in workplace against women

A growing number of initiatives focus on engaging men in gender equality efforts through the workplace (in companies, organization, cooperatives, factories and unions). Senior sectors must put in place workplace policies and enforcement mechanisms on gender discrimination in hiring pay, working conditions and promotions. Strong leadership from senior management levels in all sectors is required to bring about positive change in corporations and organization with deeply entrenched cultures of male privilege. There is need to work with male leaders in government institutions, the corporate sector, trade unions and non-governmental organizations to ensure that they can provide positive role models on gender equality by introducing fair employment practices, anti-discrimination measures and gender-inclusive decision-making.

In order to protect women from sexual harassment in workplace, Slovenia adopted an act obliging employers to take towards that end, and Malta carried sensitization programmes for employees and employers and trade unions and private companies. Mexico reformed internal procedures to ensure that public sector workplaces respected gender equality.

The Ninth Conference of American States Members of the International Labor Organization (1970) considering that the inequalities in the wages and social benefits enjoy by the workers of the American countries contribute to economic instability, and that their influence on general economic development should be examined urges each country of American, within the framework of overall policies for economic and social development to adopt policies that apply to all workers without discrimination and violence. Stresses that the following principles should be fully observed and applied in devising and implementing such wage policies. The integration of wages policies into broader policies are covering all other types of incomes.

According to CEDAW, Convention must be produced from violation in workplace of women. AS for combat exploitation of labor force and violation of commercial sex workers have been needed. Employees must be safeguarded for non-violation against women. Within the rule of law must give the opportunity of work for women.

3. Safeguarding for Peace and Security against Women

The concept of peace and security should be seen by the Fourth World Conference on Women as a major challenge to be met in this century. More importance should be laid on prevention through substantial economic and social investments and reforms and through long-term sustainable development. Peace and Security, seen in the light of global commitment and cooperation, should be founded on the interests of rich and poor countries

alike and not on beggar-giver relationship. The concept should be reviewed from the perspective of protecting the national potential of future generations through the prevention of natural system.

3.1 Safeguarding from Arm Conflict against Women

Conflicts worldwide, international humanitarian law applies from the initiation of such armed conflict and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that movement, international humanitarian law continuous to apply in the whole territory of the warring states or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place.

These indicators should be considered in the light of the Universal Declaration of Human Rights, the International Agreement on Civil and Political Rights, the International Agreement on Economic, Social, and Cultural Rights, and in accordance with the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).

Violation of human rights in situations of armed conflict and military occupation are violations of the fundamental principles of international human rights and humanitarian law as embodied in international human rights instruments and in the Geneva Conventions of 1949 and the Additional Protocols thereto. These practices have created, civilian victims, mostly women and children, often outnumber casualties among combatants and find themselves, as a result of conflict, unexpectedly cast as role manager of household, sole parent, and caretaker of elderly relatives.

It is impossible for a single state or people to resolve the problems of peace and security. It is therefore essential to banish suspicion, confrontation, and isolation, and to make every possible effort to establish human solidarity in the event of a civil war or during political and armed conflict.

During times of armed conflict and the collapse of communities, the role of women is crucial. They often work to preserve social order in the midst of armed and other conflicts. Women make an important but often unrecognized contribution as peace educator both in their families and in their societies. It should be included elements of conflict resolution, mediation, reduction of prejudice and respect for diversity. In addressing armed or other conflicts, an active and visible policy of mainstreaming a gender perspective into all policies and programmes should be promoted so that before decisions are taken an analysis is made on the efforts of women and men, respectively.

During armed conflict, women experience all forms of physical, sexual and psychological violence perpetrated by both State and non-State actors. These forms include murder, unlawful killings, torture and other cruel, inhuman or degrading treatment or punishment, abductions, maiming and mutilation, forced recruitment of women combatants, rape, sexual slavery, sexual exploitation, involuntary disappearance, arbitrary detention, forced prostitution, forced abortion, force pregnancy and forced sterilization.

Armed conflicts have been major causes of disease, suffering and death for much of human history. The fatalities, injuries and disabilities suffered on the battlefield are obviously direct effects of conflict. But there are also health consequences from the breakdown of services and from population movements. The diverting of human and financial resources away from public health and other social goods contributes to the spread of disease. These indirect consequences of war may remain for many years after a conflict ends.

Hence, international law resolves to safeguard women's human rights from conflict within the war. During armed conflict, women combat all forms of physical, sexual and psychological violence, torture, murder and other cruel and so on. Therefore, women must be safeguarded from violation of armed conflict under humanitarian law.

3.2 Safeguarding by Human Rights against Women

International Humanitarian Law consists of both conventional and customary rules, the principal conventional instruments of relevance to the protection of victims of armed conflict being the four Geneva Convention of 1949 and their two Additional Protocols of 1977, which deal with international armed conflicts and non-international armed conflicts respectively. International Humanitarian Law is binding on both States and organized groups. Many of rules provided by these treaties form part of customary international law, and are thus binding on all States.

The establishment of Working Group by The Human Rights Council at its 15th Session in September 2010 was a milestone on the long road towards women's equality with men. Discrimination against women persists in both public and private spheres in times of conflict and peace. It transcends national, cultural and religious boundaries and is often fuelled by patriarchal stereotyping and power imbalances which are mirrored in laws, policies and practice.

The working Group focus is to identify, promote and exchange views, in consultation with States and other actors, on good practices related to the elimination of laws that discrimination against women. The Group is also tasked with developing a dialogue with States and other actors on law that have a discriminatory impact where women are concerned.

The five members of working group were appointed by the Human Rights Council in March 2011 and assumed their functions on 1st May 2011.

The promotion and protection of all human rights and fundamental freedoms must be considered as a priority Objective of the United Nations, in according with it is purpose of international cooperation. The international community must treat human rights globally, in fair and equal manner, on the same footing and with same emphases. The Conference reaffirmed that the human rights of women and the girl-child are an inalienable and integral and indivisible part of universal human rights. The full and equal enjoyment of all human rights and fundamental freedoms by women and girls is a priority for Governments and the United Nations and is essential for the advancement of women.

In Myanmar, women's rights are given under Myanmar Customary Laws, under the Constitutions, National Laws and International Instruments. These rights are inheritance rights, the rights to own property, rights to education, rights to vote and so on. Today, Law on Elimination of all forms of discrimination and violence against women has been drafted by the Pyidaungsu Hlattaw.

The key objective is to develop and strengthen systems, structures and practices for the media to promote the advancement of women, and to raise public awareness about women's rights and their contribution to society.

Therefore, women must be safeguarded by human rights from discrimination against women. Discrimination is in areas of education, social, cultural, race and other sectors. For these reasons, this discrimination must be protected by human rights under national laws, international law, humanitarian law and international instruments.

Finding and Conclusion

In conclusion it is important to protect the violence and discrimination against women. In the society there should be no discrimination based on caste, class or color. Furthermore, there should be no gender disparity in personal relationships. Women are accorded equal rights with men. Women enjoy rights without loss in those areas and even have greater freedom in other areas, according to Beijing Declaration on and Convention on the Elimination of All forms of Discrimination against women (CEDAW) and human rights of gender declaration. The communication activities include educational, social, cultural, health, racial, religious, violence and discrimination against women including disarmament of armed conflicts.

According to civil war, women combat of armed conflict. So, women shall be enjoyed the consequence of rape and unwanted damage of health, education, sexual harassment and

forced marriage by civil war. At the International level, the issue of violence and discrimination against women came into the gender in the concept of women's rights at United Nations. And then, women must be protected from discrimination of workplace together with men. Governments have the primary responsibility for implementing under sustainable development of women such as education, social, economic, culture, non-discrimination and non- violence.

So, women are struggling with consequence of rape and unwanted pregnancies. Therefore, international rules and laws shall be protected against women. Government must prohibit violence and discrimination against women. The Myanmar women are protected under Myanmar National Committee for women Affairs, Myanmar Maternal and Child Welfare Association, Convention on Elimination of all forms of violence and discrimination against women such as economic, social, race, cultural, and education.

State parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Government at the international level and to participate in the work of international organizations. Especially, women are needed for safeguarding because of future maternal. So, according to international convention and local laws, women are safeguarded and protected as for future generation.

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Differences between Criminal Breach of Trust and Cheating under Penal Code

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Abstract

Penal Code (Criminal Law) is one of the most attractive subjects of all Laws. Under Penal Code, there are two kinds of offences. One is the offences against human body and the other is offences against property. Offences against human body are death, culpable homicide not amounting to murder, rape, hurt and so on. Offences against property are theft, extortion, robbery, dacoity, criminal misappropriation of property, cheating and criminal breach of trust and so on. Criminal breach of trust applies to one who is in any manner entrusted with property of or dominion over property. In the case of cheating, takes possession of the property by deception. Criminal breach of trust and cheating, in both cases there is an inducement to deliver property.

Key words: dishonestly, fraudulently, wrongful gain, wrongful loss, inducement, breach of trust, cheating.

Introduction

Crime is criminal wrong which concerns with the breach of public rights, duties and affects the community at large. Criminal law is concerned with the right to life personal freedom and the restrictions placed on those rights.

A dishonest intention is an essential requisite both in the offence of a criminal breach of trust as well as an offence of cheating. It is the dishonest intention which converts the acts of person into a criminal offence so far as these two offences are concerned. The word “dishonestly” is defined in section 24 of the Penal Code, “whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that act dishonestly.

1. Criminal breach of trust

Criminal breach of trust is provided in section 405 of the Penal Code. “Whoever, being in manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law contract, express or implied, which he has made touch the discharge of such trust, or willfully suffer any other person to do so, commits criminal breach of trust.

Illustrations –A is a warehouse-keeper. Z going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse-room, A dishonestly sells the goods. A has committed criminal breach of trust.

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1.1 criminal breach of trust as an offence

To constitute the offence of criminal breach of trust, there must be dishonest misappropriation by a person in whose confidence is placed as to the custody or management of the property in respect of which the breach of trust is charged. There must be an entrustment; there must be misappropriation or conversion to one's own use or use in violation of any legal direction or of any legal contract; and thirdly the misappropriation or conversions or disposal must be with a dishonest intention. Every breach of trust gives rise to a suit for damage; but it is only when there is evidence of a mental act of fraudulent misappropriation that the commission of embezzlement of any sum of money becomes a penal offence punishable as criminal breach of trust. It is this mental act of fraudulent misappropriation of criminal breach of trust.

Every offence of criminal breach of trust involves a civil wrong in respect of which the complainant may seek his redress for damages in the civil court, but every breach of trust in the absence of *mens rea*, cannot legally justify a criminal prosecution. In every case of criminal breach of trust, a breach of contract is implicit. The determining factor in judging whether a case is one of criminal breach of trust or of criminal breach of contract is whether the person proceeded against had acted dishonestly.

Section 406 of Penal Code, only provides for punishment of the offence of criminal breach of trust, "Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both".

In relating to section 406 of the Penal Code, in the case of Daw Kyi Kyi Nwe vs The Union of Myanmar,(2002 Criminal special appellate case No.15 and 16, Yangon, 25.10.2002) in a partnership firm run by contributing the shares like a company, if a partner is trusted how to administer the property of partnership firm by executing the contract with other partners, such partner can be taken action under section 406 of Penal Code when such partner misappropriates such property by breaking such contract.

Although she is an executive director of company, she takes out company's money trusted to her without making any notice to remaining directors and she uses it as her own. Thus, she commits an offence of criminal breach of trust and so she can be taken into action under section 406 of Penal Code.

In the case of Saw Tha Oo vs Ma Aye Thi 1957 B.L.R (H.C) 179, this case was held that, if it established that a partner having been entrusted with partnership properties of assets and having dominion over them converts to his own use in breach of specific terms of trust

imposed upon him, he can be protected for criminal breach of trust as laid down in s.405 of Penal Code.

In the absence of such special agreement, a partner cannot be said to have received the property in fiduciary capacity, and be prosecuted for criminal breach of trust. A partner cannot be liable for criminal breach of trust in respect of the partnership property received or held by him on behalf of the partnership in the ordinary course of partnership.

It was also held further that in order to constitute an offence of criminal breach of trust the element of trust must be definitely proved. The very conception of partnership precludes the possibility of entrustment of partnership property by one partner as against the other, unless the provisions of the partnership are subject to any special contract.

In the case of *U Kan Tha vs The Union of Myanmar (U Nyi Lay)*, it was held that, it is only when it is established that a partner who has been entrusted with the partnership assets or with any dominion over property converts to his own use such specific property or assets, in breach of specific terms of the imposed upon him can be prosecuted for criminal dispose of or otherwise deal with specific partnership property in a fiduciary and be prosecuted for criminal breach of trust.

There are three points which must be proved for convicting an accused person on a charge of criminal breach of trust according to above section. These are;

1. That the accused was entrusted with property or with dominion over it.
2. That he dishonestly,
 - (i) misappropriated it or
 - (ii) converted it to his own use, or
 - (iii) used it or
 - (iv) disposed of it,
3. That he did so in violation of,
 - (i) Any direction of law prescribing the mode in which such trust was to be discharged, or
 - (ii) Any legal contract, express or implied, which he had made touching the discharge of such trust.

In the case of *Ma San San Oo vs. The Union of Myanmar (Ko Kyaw Khine) 1956 B.L.R, (H.C), 207*, Ko Kyaw Khine and Ma San San Oo intended to get married, and Ko Kyaw Khine bought the things severally which he kept at Ma San San Oo's house. As their intention did not come true, Ko Kyaw Khine lodged a complaint upon Ma San San Oo mentioning that she failed to return back the things. The case concerns with the things which

have been collected by Ko Kyaw Khine and Ma San San Oo with the intention to get married and live together and it cannot be presumed as a matter of trust. Thus, although Ko Kyaw Khine can claim for damages by way of failing a civil suit, he cannot take action by way of criminal.

In the case of Ba Gyan vs The State 1946, R.L.R, 291, it was not criminal breach of trust for an authorized dealer to sell all the goods to an unauthorized purchaser even though he was only entitled to sell those goods to person, who were duly authorized to buy them, as the goods, obtained from the officer-in –charge of the distribution point were his property.

Under Myanmar Customary Law, the husband and wife have the same right as co-owner upon the joint property. When the husband entrusts such property to his wife or the wife entrusts it to her husband, it cannot be said that such property is entrusted under section 405 of Penal Code. So he cannot be taken into action under section 406 of Penal Code.

Therefore, breach of trust committed with dishonest intention is called criminal breach of trust.

1.2 Ingredients of Criminal Breach Of Trust

In order to constitute the offence there must be;

- (i) An entrustment'
- (ii) There must be misappropriation or conversion to one's own use or use in violation of any legal direction or any legal contract and
- (iii) Misappropriation or conversion or disposal must be with dishonest intention.

The following essential ingredients are absolutely necessary to attract the operation of the section.

1. The accused must be entrusted with property or dominion over property;
2. The person so entrusted must-
 - (a) dishonestly misappropriate or convert to his own use that property;
 - (b) dishonestly use or dispose of that property or willfully suffer any other person to do so in violation of-
 - (i) any direction of law prescribing the mode which such trust is to be discharged, or
 - (ii) any legal contract made touching the discharge of such trust.

This offence consist of any one of four positive acts namely, misappropriation, conversion, use, or disposal of property.

In this case of Daw Aye Kyel vs The Union of Myanmar and one, 1991, M.L.R (S.C) 145, it was arisen that the plaintiff has not been delivered the possession of the disputed

house after they had made sale agreement. It has also arisen that it must be given within the time limitation prescribed in such sales agreement. However, the accused did not deliver the disputed house to the plaintiff within the limited time. On the other hand, it means that the accused did not obey the conditions in the sale agreement. Thus it was found that the plaintiff may sue the accused with a civil suit than prosecution of criminal action.

If the one does not dishonestly obtain property or money and breaches the contracts, action can be taken according to the civil, not a crime. Whether or not he has a dishonest intention depends on many circumstances during the intensification of a case.

The section does not require that the trust should be in further once of any lawful object, offences committed by trustees with regard to trust property fall within the purview of this section. Negligence or other misconduct causing the loss of trust property may make the person entrusted responsible, but will not make him guilty of criminal breach of trust.

2. Cheating

According to section 415 of the Penal Code, whoever, by deceiving any person, fraudulently induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property is said to cheat.

Explanation- A dishonest concealment of fact is a deception within the meaning of this section.

Illustration: A, by putting a counterfeit mark on a article, intentionally deceive Z into a belief that this article was made by a certain celebrated manufacture, and thus dishonestly induces Z to buy and pay for the article. A cheats.

2.1. Cheating by personation

A person is said to “cheat by personation” if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation.- The offence is committed whether the individual personated is a real or imaginary person.

Illustration: A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.

2.2 Punishment for cheating

The definition of the offence of cheating, embraces some cases in which no transfer of property is occasioned by the deception and which such a transfer occurs: for these cases generally a general provision is made S.417 of the Code. For the cases in which property is transferred, a more specific provision is made by S.420. However, in earlier case it appears to be of a serious nature steps must be taken to send it to the Court of Session for trial under S.420

According to section 417, whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Section 419 of Penal Code provided that, whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

According to section 420, whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed and which is capable of being converted into a valuable security shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

The distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction. That is the time when the offence is said to have been committed. Therefore, it is the intention which is first of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time when the offence is said to have been committed and where the party said to have been committed where the party said to have been committed and where the party said to be aggrieved has an alternative remedy in the civil court the matter should not be allowed to be fought in criminal courts.

In *Ma Shwe (a) Ma Kyin Shwe vs The Union of Myanmar*, 1958, B.L.R (H.C) 306, the court was held that to bring an offence of cheating within the ambit of section 415 the Penal Code. There must be two elements;

1. Deception and
2. Fraudulent or dishonest inducement to do or omit to do something.

The deception must precede inducement to deliver any property or to consent that any person shall retain any property, etc.

Until and unless specific facts and circumstance are disclosed that the borrower being not in a position to repay the loan, and not intending to repay borrowed money by practising deception upon the lender, there can be no offence of cheating within the purview of section 415 of the Penal Code.

3. Distinction between Criminal Breach of Trust and Cheating

There are differences between criminal breach of trust and cheating. It is necessary to recapitulate the interpretation of criminal breach of trust and cheating, before making comparative study of cases on criminal breach of trust and cheating.

Every breach of trust gives rise to a suit, for damages, but is only when there is evidence of a mental act fraudulent misappropriation that the commission of embezzlement of any sum of money become a penal offence punishable as criminal breach of trust. It is this mental act of fraudulent misappropriation that clearly demarcates an act of embezzlement which is a civil wrong or tort, from the offence of criminal breach of trust. Every offence of criminal breach of trust involves a civil wrong in respect of which the complainant may seek his redress for damages in the Civil Court, but every breach of trust, in the absence of *mens rea*, cannot legally justify a criminal prosecution.

To understand the distinction between criminal breach of trust and cheating it is desirable of refer to ingredients of section 406 and 415.

The ingredients of section 405 dealing with criminal breach of trust are-

1. Entrusting any person with property or with any dominion over property
2. That person entrusted; (a) dishonestly misappropriating or converting to his own use that property; or (b) dishonestly using or disposing of that property or willfully suffering any other person so to do in violation-
 - (i) of any direction of law prescribing the mode in which such trust is to be discharged, or
 - (ii) of any legal contract made touching the discharge of such trust.
 - (iii) Cheating is the taking possession of the property by deception. There is wrongful gain or loss in both cases there is an inducement to deliver property. Cheating is a complete offence by itself and is not a form of criminal breach of trust. A person who tricks another into delivering property to him bears no resemblance to a trustee in the ordinary acceptance of that term.

- (iv) Further, in case of cheating the dishonest intention starts with the very in caption of the transaction. However in case of criminal breach of trust the person who come into possession of the movable property receives it legally but illegally retain it or converts it to his own use against the terms of the entrustment.

According to the provision of S.222 (2) of the Criminal Procedure Code;-When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross, sum in respect of which the offences is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and charge so framed shall be deemed to be a charge of one offence within the meaning of section 234;

Provided that the time included between the first and last of such dates shall not exceed one year.

Justice U Chit delivered the judgment in the revision case filed by U Thein Zan. The case, was prosecuted under section 240 of the Penal Code but charged under section 406 of Penal Code was framed against the accused U Thein Zan.

The salient facts of the case are that, U Thein Zan was Managing Director of Kyan Taine Aung Company. That company was doing import business of Poplin cloth and the company obtained the import license from government. On 8th December 1962, U Thein Zan Managing Director of the company came to U Than Maung and “showing the license” offered the imported commodities for sale. Believing the offer, U Than Maung made an advance of kyats, 7875. Again on 25th February 1963, U Thein Zan came to U Than Maung saying that the imported commodities were arrived and asked for some more money which was needed for clearance for the goods. U Than Maung gave an additional some of 17500 Kyats to U Thein Zan. U Thein Zan used the advance money in clearance of imported goods but failed to deliver them to U Than Maung and committed breach of contract and sold the imported goods to other person.

The learned lawyer for the applicant argued that U Thein Zan merely committed breach of contract. Therefore the framing of charge by the Lower Court under section 405 of the Penal Code was wrong.

The Court considered that U Thein Zan has committed an offence of breaking the older contract and the framing of charge by the Lower Court could not be considered as erroneous, Moreover the judges was of the opinion that the accused person had failed

opportunity to explain the charge against him. Accordingly the judge of the Lower Court was directed to proceed with the trial of the case according to law.

The offence of criminal breach of trust is committed not only by dishonest conversion, but also by dishonest use or disposition, and there is nothing in the wording of this section to exempt from the definition of criminal breach of trust dishonest use of immoveable property by the person entrusted with dominion over it.

Criminal breach of trust differs from cheating if the fact that, the cheating takes possession of the property by deception. There is wrongful gain or loss in former case, criminal breach of trust and cheating, and in both cases there is an inducement to deliver property. Cheating is complete offence by itself and is not a form of criminal breach of trust.

In case of criminal breach of trust and cheating, it is the dishonest which converts the act of a person into a criminal offence.

The offence of criminal breach of trust closely resembles the offence of embezzlement under the law. Offences committed by trustees with regard to trust property fall within the preview of section 405 of Penal Code.

This section requires:

- (1) Entrusting any person with property or with any dominion over property,
- (2) The person entrusted, (a) dishonestly misappropriating or converting to his own use that property: or (b) dishonestly using or disposing of that property or willfully suffering any other person so to do in violation.
 - (i) of any direction of law prescribing the mode in which such trust is to be discharged, or
 - (ii) of any legal contract made touching the discharge of such trust.

In the case of cheating, deception of any person

- (a) Fraudulently or dishonestly inducing that person-
 - (i) to deliver any property to any person; or
 - (ii) to consent that any person shall retain any property, or
- (b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

In the case of *U Aung Kin vs The Union of Myanmar*, Criminal Special Appeal No. 18 of the 1996, U Aung Kin obtained 14,900,000 kyats from ThisSa Company to install 500 telephones. However, he didn't perform his duties. He disobeyed the direction given by

ThitSa Company. Thus, he committed criminal breach of trust mentioned in section 405 of Penal Code.

Conclusion

There are differences between criminal breach of trust and cheating. In criminal breach of trust, the accused obtained the property legally but later misappropriate for his own use. In case of cheating the accused has intention to inducement at taking of the property.

In these offences one element is common to all, that is the dishonest or fraudulently intention with which the act is done or the offence cannot be committed.

The most important distinguishing features between the offence of cheating and the offence of criminal breach of trust are: in the case of cheating, there must be deception of any person and fraudulently or dishonestly inducing that person to deliver any property or intentionally inducing that person to do anything or to omit to do anything. In the case of criminal breach of trust, the above has to do anything or to omit to do anything. In the case of criminal breach of trust the above ingredients are absent but there must be entrustment of property with any person who misappropriated the property or converted the property to his own use.

Therefore, the offence of criminal breach of trust is a cognizable and warrant case. When a person commits such case, it is non-bailable and not compoundable. In the case of cheating, there is not cognizable and warrant case. If a person commits cheating, he can be bail able.

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