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DEHRADUN law REVIEW

(A Peer Reviewed Journal)

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EDITORIAL

People across the world strive for a workable system with its own perfection and preferences, palpably enshrined in our constitutional and civilization ethos, resulting into evolution of interactive platforms & coexisting with respective autonomies. Our scholastic endeavor translating into a substantive form as Dehradun Law Review, a law journal of Law College Dehradun, a flagship offshoot of Uttaranchal University appears to reflect the same. It is purely coincidental that Dehradun Law Review with its 14th edition is an active quantum participant in the twentieth anniversary of mentor-Law College Dehradun and mother-Uttaranchal University achieving a splendid NAAC A+ accreditation by U.G.C. (the first in Uttarakhand).

As such it is a moment of immense exaltation to place Vol. I, Issue – 14 of Dehradun Law Review at the disposal of legal academia with certain novel reflections concerning with pressing contemporary legal issues. Post-pandemic global legal constitutional contexts are witnessing paradigmatic shifts necessitating fresh inquiries and analyses in the contemporary socio-legal constitutional domain. Here, our sincere academic efforts are to channel through the same and cater to the intellectual-cum-scholastic needs of the legal fraternity.

Some of the thought provoking issues in legal science which are covered under the present edition of this journal are relating to climate change, which despite enormous contemplations at national and international level still need lot of more work to be done. Controversial and highly debatable topic of death sentence, especially from the lens of feminism in-sipping the inflow of new dynamism in the field of gender equality demands and gender neutral laws. Applications of AI in the assessment of OMR sheets in competition exams have merits and demerits, which emerging as new hope for aspirants in terms of unbiased evaluation, yet, it is a new challenge for existing legal system. Consumer friendly legal system has become stronger with the passing of new consumer legislation in India but a lot still need to do for the elimination of domestic violence and dynamic role of courts are highly expected. Adding to this, proper enforcement of laws has been the constant and continuous task of police and courts from the prospects of administration of justice to the common citizens of India. Concept of Transformational government to serve the citizens more better way is also highlighted in this edition.

Any academic endeavor, though stumbling in the beginning, aspires to leave an indelible imprint in the long run. Only readers can judge the effectiveness of our efforts. Quoting Socrates in this context, "To know is to know that you know nothing. This is the secret of true knowledge", we always solicit the constructive criticisms from the readers. At length, we are extremely grateful to the contributors of articles to this current issue and look forward to their incessant association and cooperation.

God Speed!

Prof. Rajesh Bahuguna
Editor-in-Chief

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DEATH SENTENCE IN INDIA: EXPLORING FEMINIST PERSPECTIVE

Prof. Bibha Tripathi*

"Death penalty is the rarest of all punishments. Attitudes toward it are rooted deep in the sentiments of people and arouse powerful emotions whenever its justification is questioned. So long as the status quo is undisturbed nothing happens, but the moment it is attacked either by abolitionists or by retentionists, the debate begins".

Thorsten Sellin

Abstract

In India, Death sentence is the most severe punishment accorded on the most serious crimes since time immemorial. However, with the passage of time it has been viewed and interpreted differently by different organizations, institutions and authorities. Death sentence has been debated, delayed and denied in number of cases. It has often been alleged to be imposed arbitrarily and whimsically. There is no settled law on sentencing. Feminist scholars have highlighted that the authorities in general, and the judiciary in particular have shown biases if death sentence is to be imposed on female offenders. The gendered dimension on female offending becomes instrumental while imposing death sentence on them. Therefore, the paper makes an attempt to explore the allegations on capital sentencing from feminist perspective to determine up to which extent the allegations are true mainly in Indian context. The thematic aim of the paper however stresses on a de – facto moratorium on death sentence.

Key words

Death Sentence, Female Offender, Feminist Criminology, Theories of Female Criminality.

I Introduction

The paper is divided in VI parts. First part introduces the theme of the paper. Second part deals with death sentence in India. Death sentence has a protracted and grisly history in India. No other issue has been as contentious as the death sentence has been. It becomes divisive while discussing theories of punishment.[1] The correlation between deterrence and severity of punishment is complicated. It cannot be assumed that severity of punishment correlates to deterrence to an extent which justifies the restriction of the most fundamental human right, the right to life, through the imposition of death penalty. At times, it becomes contentious on the basis of new horizons of

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[1]Law Commission's 262nd Report on Death Sentence, Chapter IV, Penological Justifications for the Death Penalty, at 83, August (2015).

criminal acts to be treated as capital offences. Whereas, some other times it becomes an agenda of vote bank politics.[2]

In short, the discretionary Death sentence and mandatory Death sentence, the Constitutionality of Death sentence, the Crime test[3] (aggravating circumstances), the Criminal test (mitigating circumstances) and the perception of society (collective conscience) test (Rarest of Rare, hereinafter ROR), the abolitionist's and retentionist's arguments, the delay in execution, the per-incuriam judgements, the supervening circumstances and alike are a few examples of incessant debate. It seems that authors writing on Death sentence use to set their mind prior to down their pen as to whether they should be tagged as retentionists or abolitionists.[4]

Third part attempts to discuss theories of female criminality developed in due course of time by classical thinkers and feminist scholars respectively. Feminist scholars have criticised mainstream criminology[5] as male stream criminology because of its prejudiced and biased notion of gender when female criminality is questioned.[6] It is also blamed for viewing male and female criminality with different lens and angle where women are awarded harsher punishment in comparison to their male counterparts[7] because of some classical notions which does not suppose females as offenders. Feminist criminology, deals with all three dimensions ie; female offenders, female victims and female in criminal justice systems.[8] It emphatically submits on the one hand that the violent women should not be cast as cold, callous, calculating, and vicious as an

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[2]In a time frame continuum, different political communities have dealt with it differently and its have and have not depends on the socio economic conditions, state structure and political milieu of a particular society. A proper treatment to capital punishment depends also on the degree of scientific approach with human content of the societal reaction towards this diabolic penalty. Mahendra P. Singh, "Capital Punishment: A Political Compromise", Banaras Law Journal, 92-101 (1981). See also, Law Commission's 262nd Report, at 20

[3]In Santosh Kumar Satishbhushan Bariyar, S. B. Sinha J. felt that 'public opinion' hardly fits in the rarest or rare matrix. People's perception, according to him, is neither an objective circumstance relating to crime nor to the criminal. Infra note 15

[4]V.R.Krishna Iyer, Death penalty: an unmitigated evil?, "Perspectives in Criminology, Law and Social Change", Allied Publisher Private Limited, New Delhi, (1980)

[5]The facts about crime tend to be based on the sex of the offender and not the crime itself. This 'sexism' in criminology also influences the sentencing, punishment and imprisonment of women who are not expected to be criminals. Gender role expectations continue to define acceptable behaviours and attitude for female and males' deviation. Researchers have shown that when cases of male aggression reach the court, gender is not marked. But this is not the case, however, when the defendant is a female. See, Bibha Tripathi, "Feminist Criminology : Some Reflections", Vidhigya, , 1-6, Vol.9, Issue 1(2014)

[6]Meda Chesney-Lind, Girls' Crime and Women's Place: Toward a Feminist Model of Female Delinquency. Crime and Delinquency 35(1):5-29.1989, Morris Allison and Ania Wilczynski, Rocking the Cradle: Mothers Who Kill Their Children. In Moving Targets: Women, Murder, and Representation, ed. Helen Birch. Berkeley: University of California Press. (1994)

[7]Daly, Kathleen and Meda Chesney-Lind, Feminism and Criminology, Justice Quarterly 5:497-538.(1985)

[8]Amanda Burgess, "Intersections of Race, Class, Gender, and Crime Future Directions for Feminist

Criminology" Feminist Criminology 2006; 1; 27 http://fcx.sagepub.com, see also, Richard A. Wright, "Women as "Victims" and as "Resisters": Depictions of the Oppression of Women in Criminology Textbooks",

Teaching Sociology, Vol. 23, No. 2, Teaching about Inequality and Diversity: Age, Class, Gender, and Race/Ethnicity (Apr., 1995), pp. 111-121, American Sociological Association http://www.jstor.org/stable/1319341 .Accessed: 30/08/2013 04:14 (last visited on 2-09-2021)

antithesis of the caring, nurturing wife and mother[9] and on the other hand it opines that female offenders should be considered "doubly victimised" in spite of "doubly deviant"(as considered by classical thinkers).

It has been hypothesised in the paper that the female offenders are being sentenced with capital punishment with prejudice and biases and apart from established grounds (the triple test) for inflicting death sentence, when it has to be implemented on a female offender, her educational status and role as daughter/wife is significantly marked and becomes a determining factor for sentencing.

Fourth part of the paper deals with imposition of death sentence on female offenders to explore the gendered dimensions of Death sentence from feminist perspective.[10] Though the paper has been written in an Indian context but two random cases have been chosen from USA and Iran respectively to lay bare that had they been committed in India the Supreme Court of India would have inflicted death sentence on them or not? The second last part of the paper consciously discusses an Indian case where death sentence has not only been imposed rather death warrant has also been issued.

Therefore, the paper attempts to explore and compare the cases on the basis of facts and circumstances. The judicial drift though shows a chequered history on the functioning of death sentence and has been tagged as judge centric in place of principle centric[11] approach. The cases of female offenders have been analysed in the paper from the principle centric approach and attempt has been made to reach on a fair and just (gender just) conclusion. Last part concludes the paper with some viable suggestions.

II Death sentence

In India, death sentence has been the sternest punishment applied on most sombre crimes since time immemorial. With the passage of time it has been viewed and

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[9]Infra note 26

[10]Feminism is a technique of objectivity in epistemological, psychological and social- as well as legal terms. See, Ann Acales, "The Emergence of Feminist Jurisprudence: An Essay" 95 Yale L J 1373(1986), Feminism does not refer to a unitary theory. Rather, there are multiple perspectives that fall under the rubric of feminism, each of which involves different assumptions about the source of gender inequality and women's oppression. See, Jane Freedman : Feminism, at 2, Viva Books Private Limited, New Delhi, First South Asian Edition, 2002

See also, Caroline Ramazanoglu, Feminism and the Contradictions of Oppression, at 6, Routledge, London and New York (1989). All versions of feminism assert that the existing relations between the sexes, in which women are subordinated to men, are unsatisfactory and ought to be changed; Feminist proposals for change always encounter resistance although the nature and strength of this resistance is variable; Even the most moderate advocates of women's right must take the view that men have rights which are unjustly denied to women.

[11]Retribution, deterrence, incapacitation, collective conscience and social justice are some important principles adopted by the Courts while awarding death sentence. It is pertinent to note that in the recent past the Supreme Court, on occasions more than one, has admittedly highlighted the fact that sentencing in capital offences has become 'judge-centric' rather than 'principle-centric'. In Swamy Shraddananda (2) @ Murali Manohar Mishra v. State of Karnataka (2008) 13 SCC 767, it, in no unclear terms, has admitted that the question of award, confirmation or commutation of a death sentence by the apex court, as a matter of truth, is 'not free from the subjective element' of the deciding judge/bench and it depends on his/their 'personal predilection'. In Sangeet v. State of Hariyana (2013) 2 SCC 452 the court observed that to award death sentence, the aggravating circumstances (crime test) have to be fully satisfied (i.e., 100%) and there should be no mitigating circumstance (criminal test 0%) favouring the accused. K I Vibhute, Choice Between 'Death' and 'Life' for Convicts, Journal of the Indian Law Institute , July - September 2017, Vol. 59, No. 3 (July - September 2017), pp. 221-264 https://www.jstor.org/stable/10.2307/26826606, visited on 22 July (2019)

interpreted differently by different organizations, institutions and authorities. Death sentence has been debated delayed and denied in number of cases, it has often been alleged to be implemented arbitrarily, randomly and whimsically. There is no settled law on sentencing.

It is worth noticing that certain period in the penal history of India has been referred to as de- facto moratorium of death sentence.[12] Latest Law Commission[13] in its 262nd report on death sentence[14] recommended for abolition barring for terrorism and national security offences.[15] However, the legislature intends to retain Death sentence in not only the traditional offences of murder rather awarding in cases of human trafficking too.[16] The three tier of judicial system has witnessed maximum imposition of Death sentence by the Trial Courts gradually condensed by the High Courts and Supreme Court respectively.[17] It seems that the executive, the legislature and the judiciary have retained it and applied it with different objectives and justifications.

III Theories of female criminality: from classical thinkers to feminist scholars

The entry of feminist scholars in the field of law has turned law as not only a tool of struggle but also a sit of struggle too. There are various shades of feminism. Liberal,

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[12]2004 to 2012 has been an execution free zone and accordingly viewed as de - facto moratorium on death sentence. However, it has been argued as to what is meant by de- facto moratorium. When there is no execution, or when there is no offence punishable with death is committed or where judiciary has not given the death sentence to any offender? Obviously only an execution free zone is termed as de- facto moratorium. The UNGA adopted a resolution in 2007 to call upon countries that retain death sentence to establish a world wide moratorium.

[13]Arghya sengupta, Ritwika Sharma Death Penalty in India: Reflections on the Law Commission Report, Economic and Political Weekly, Vol. 50, No. 40 pp. 12-15 (OCTOBER 3, 2015),

https://www.jstor.org/stable/24482617,visited on 19-02-2021 17:00 UTC, see also https://www.thehindu.com/opinion/editorial/the-case-against-death-penalty/article7608365.ece

[14]2015, the Supreme Court in Santosh Kumar Satish Bhushan Bariyar v. State of Maharashtra (6 SCC 498) and Kisan Rao Khade v. State of Maharashtra asked the Law Commission to resolve the resolve the issue of death sentence by examining whether it is deterrent? Or retributive or serves incapacitative goal? The commission in its 35th report (1963), recommended for retention of death sentence in view of the condition of India variety of social upbringing of its inhabitants to the disparity in the level of morality and education in the country. Here, it is also submitted that the condition has considerably been the same even today. Again in its 42nd report (1971) recommended for retention not because of retribution but because it shows societies anger towards criminal. The 187th report of Law Commission on Mode of execution and incidental matters, (2003) upholds hanging as constitutional mode of execution. Permanand Katara v. U.O.I AIR 1989, 2039 case held that the hanging beyond a reasonable time is violation of dignity of person.

[15]Law Commission of India, "Chapter VII: Conclusions and Recommendation," Report No 262 on the Death Penalty, 2015, Ministry of Law and Justice, New Delhi, (2015): "Chapter IV: Penological Justifications for the Death Penalty," Report No 262 on the Death Penalty, 2015, Ministry of Law and Justice, New Delhi. Available at http://lawcommissionofindia.nic.in/reports/Report262.pdf. (Last visited on 4-08-2020)

[16]https://theprint.in/theprint-essential/what-is-draft-anti-trafficking-bill-2021-and-how-it-is-different-from-the-201bill/ 692096/#:~:text=According% 20to%20the %20draft% 20bill,who% 20has%20residence %20in%20India. https://wcd.nic.in/sites /default/files/DRAFT% 20TRAFFICKING%20IN %20PERSONS %20%28PREVENTION%2C%20CARE%20AND%20REHABILIT ATION%29%20BILL%202021%20%281%29.pdf (last visited on 2-08-2020). section 26(4)

[17]https://www.thehindu.com/opinion/editorial/death-sentences-trial-and-error/article7448579.ece (last visited on 1202-2018)

Radical, Marxist and Post- Modern feminism are few of them. The liberal feminist scholars demand equality even in sentencing too. They demand no chivalry towards women on the ground of sex. Whereas, the radical feminists demand that men should be replaced by women from position of power.

Feminist criminology also deals with theories of Female criminality to highlight the gendered dimension of main stream classical criminologists who intend to make female offenders as doubly deviant. Number of studies has been done to discern the role of gender in sentencing jurisprudence.[18]

The theories of Female criminality can mainly be divided into two groups. First, theories propounded by classical or mainstream criminologists like Cesare Lombroso, Otto Pollock, Sigmund Freud etc. and second, theories propounded by feminist criminologists as a reaction on mainstream criminology. The theories propounded by feminist criminologists can also be divided into two groups, first, early feminist theories and second, late feminist theories.

Cesare Lombroso

Cesare Lombroso described female criminality as an inherent tendency of women who are biological atavists. Female offenders were characterized by physiological immobility, psychological passivity, and amorality featuring a cold and calculating predisposition. Criminal women, then, were in fact more masculine than men in some ways. Lombroso observed that criminal women could adjust more easily than men to mental and physical pain. He argued that criminal women often adjusted so well to prison life that it hardly affected them at all. For Lombroso, criminal women were abnormal.[19]

W. I. Thomas

W. I. Thomos has put emphasis on physiological explanations of female crime. In his book on The Unadjusted Girl,[20] Thomas shifted his position on female criminality in two directions. First, he argued that female delinquency was normal under certain circumstances given certain "assumptions about the nature of women". However, Thomas did not specify the nature of these assumptions. Second, Thomas shifted his focus from punishment of criminals to rehabilitation and prevention as a radical departure from the Lombrosian approach of locking away the criminal or sterilization as a preventive strategy. Thomas relied on the dichotomy of good and bad women.

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[18]Laura M. Argys and H. Naci Mocan, Who Shall Live and Who Shall Die? An Analysis of Prisoners on Death Row in the United States, The Journal of Legal Studies , Vol. 33, No. 2 (June 2004), pp. 255-282 Available at, University of Chicago Press for The University of Chicago Law School Stable URL: https://www.jstor.org/stable/10.1086/421570, See also, Julian Abele Cook, Jr. Gender and Sentencing: Family Responsibility and Dependent Relationship Factors, Federal Sentencing Reporter , Nov. - Dec., 1995, Vol. 8, No. 3, Gender and Sentencing (Nov. - Dec., 1995), pp. 145-147 , University of California Press on behalf of the Vera Institute of Justice available at, https://www.jstor.org/stable/20639878, See also, Etta A. Anderson, The "Chivalrous" Treatment of the Female Offender in the Arms of the Criminal Justice System: A Review of the Literature, Social Problems , Feb., 1976, Vol. 23, No. 3 (Feb., 1976), pp. 350-357 Oxford University Press on behalf of the Society for the Study of Social Problems, Available at https://www.jstor.org/stable/799780

[19]Infra, note, 58 Lilly, Cullen and Ball, 210, See also, Lombroso C and W. Ferrero, La Donna Delinquente, Torino, Roux, (1893). 37. Lombroso, "Crime, its Causes and Remedies", Boston, 1911. 38. Cited in, Frances Heidensohn, The Deviance of Women: A Critique and an Enquiry The British Journal of Sociology, Vol. 19, No. 2 (Jun., 1968), pp. 160-175, See also, Lombroso C and W. Ferrero, "The Female Offender", London, Fisher Unwin, (1895)

[20]Thomas W. I., The Unadjusted Girl New York: Harper and Row, Infra note, 58 Lilly, Cullen and Ball, 211,

Sigmund Freud

Freud has also been considered to be a mainstream classical criminologist who emphasized upon anatomical inferiority. According to Freudian theory of female criminality, the deviant woman is one who is attempting to be a man. Female aggression and rebellion, for example, were expressions of longing for a penis, and if not treated, women would only end up neurotic.[21] Freudianism has been used for decades to maintain female sexual repression, sexual passivity, and the woman's place in the nuclear family. Although he has been considered as a very controversial and discredited theorist, his early legacy influenced the writing of many scholars including Pollak.[22]

Otto Pollak

Pollak extended the idea that women were inherently deceitful because of physiological reasons. This deceitful nature permitted them to commit undetectable crimes. False accusation and shoplifting are the crimes which are mainly committed by women.[23] He failed to consider that female criminals often were poor or were women who had stepped outside of chauvinistic, classist, and racist definitions of women's proper roles.

Emancipation theory

The Emancipation theory appeared in 1975, with the publication of Freda Adler's Sisters in Crime and Rita James Simon's Women and Crime.[24] Adler and Simon both contended that women's lower rates of participation in criminal activity could be explained by their confinement to domestic roles and by the discrimination they faced which limited their aspirations and opportunities.[25] However, with the advent of the women's movement, the situation could be expected to change. Adler saw increasing participation in violent crime as inevitable as women became more like men as a result of their social and political emancipation. Simon believed that opportunities created by women's higher levels of formal labour market activity would lead to higher arrest rates for property and occupational crimes, such as fraud, larceny, and embezzlement.

While this argument has an obvious appeal for opponents of the feminist movement, even empirically, the theory has received very little support.[26] There is now a fairly broad consensus that Adler and Simon's work would not fall within the purview of feminist

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[21]Klein, D. "The Etiology of Female Crime: A Review Of Literature," Issues In Criminology, 1973 , cited in, J. Robert Lilly, Francis T. Cullen and Richard A. Ball, Criminological Theory context and consequences, Sage Publications, 2007 See also, S. Freud, "Some Psychical Consequences of the Anatomical Distinction between the Sexes" [1925], in Standard Edition of the Complete Psychological Works of Sigmund Freud, ed. J. Stachey (London: Hogarth Press, 1964). 5. H. Deutsch, "The Psychology of Women: Motherhood" (New York: Grune & Stratton, 1944).

[22]Ibid, Lilly, Cullen and Ball, 212-13

[23]Supra note 20

[24]Adler, Freda. Sisters in Crime: The Rise of the New Female Criminal. New York: McGraw-Hill.(1975)

[25]Daly, Kathleen and Meda Chesney-Lind, Feminism and Criminology, Justice Quarterly 5:497-538.(1985), See also, Judith Resnik, Sentencing Women, Federal Sentencing Reporter , Nov. - Dec., 1995, Vol. 8, No. 3, Gender and Sentencing (Nov. - Dec., 1995), pp. 134-136 Published by: University of California Press on behalf of the Vera Institute of Justice, Available at https://www.jstor.org/stable/20639875 (last visited on 15-01-2019)

[26]Dana M. Britton, "Feminism in Criminology: Engendering the Outlaw", Annals of the American Academy of Political and Social Science, Vol. 571, Feminist Views of the Social Sciences (Sep., 2000), pp. 57-76 Sage Publications, Inc. in association with the American Academy of Political and Social Science, http://www.jstor.org/stable/1049134 Accessed: 06/07/2010 00:47

criminology.[27] This raised an important question that if increased occupational opportunities do not explain increased female crime, then what does. Steffensmier and Cobb[28] provided data indicating that law enforcement and court attitudes toward female offender are changing and that now there is a greater willingness to arrest and prosecute women.

However, in addition to documenting the levels of women's criminal offending, feminist criminologists have drawn attention to women's (and men's) treatment by police, courts, and the prison system. Contradicting popular stereotype, studies of women's experiences with the criminal justice system have revealed that women do not benefit, at least not uniformly, from chivalry at the hands of police, prosecutors, and judges. In some instances, such as juvenile offenses, girls are subject to much harsher treatment than boys.[29] Feminist studies have shown that women who are married and have children do sometimes receive more leniency than other offenders. This effect, however, is double edged since women who do not conform to traditional stereotypes of wives and mothers or who are perceived to shirk their responsibilities may be dealt with especially severely.[30]

Robert Agnew: General Strain Theory

He opined that men and women react differently in general stress situation. Men become angry and commit crime whereas women become sad and depressed resulting in self destruction or drug abuse. When women commit crime, strain theory views it as some sort of "weakness" which betrays the double standard.

John Hagan: Power-Control theory[31]

This theory suggests that family class structure shapes the social reproduction of gender relations and in turn the social distribution of delinquency. Different work patterns for mothers and fathers lead to different levels of gender authority in workplace and power in the home resulting in different parenting styles for boys and girls combined affecting free-floating patriarchal ideologies of control generating different patterns of delinquency. Evelyn K. Sommers[32] has been supportive of Hagan's theory. He has used common themes to explain women criminality, such as:-1) Economic, 2) Drug involvement, 3)personal anger, 4)Fear or need etc.

Sommers concluded that women's criminality is based on two underlying issues: 1) the effort to maintain connections within relationships (such as mother and child, sometimes fiancé- murder of husband), 2) as a personal quest for empowerment (as

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[27]Morris and Gelsthorpe, cf. Brown, Beverley. Women and Crime: The Dark Figures of Criminology. Economy and Society 15(3): 355-402 (1986),

[28]Steffensmier, D.J and Cobb, M.J, "Sex difference in urban arrest paterns", 1934-79, Social Forces1981,

[29]Chesney-Lind, Meda, Girls' Crime and Women's Place: Toward a Femi-nist Model of Female Delinquency. Crime and Delinquency 35(1):5-29.(1989)

[30]Morris Allison and Ania Wilczynski, Rocking the Cradle: Mothers Who Kill Their Children. In Moving Targets: Women, Murder, and Representation, ed. Helen Birch. Berkeley: University of California Press. (1994)

[31]John Hagan, Structural Criminology, New Brunswick, N. J. Rutgers University Press,1989 Cited in Frank Schmalleger, Criminology Today, New Jersey, Second Edn, (1999)

[32]Evelyn K. Sommers, Voices from Within: Women Who Have Broken The Law Toranto, University Of Toranto Press, (1995) Cited in Schmalleger, (1999)

single mothers are expected to be independent and capable of providing for themselves and their children).

Blurred boundary theory

It believes that women's offending is intimately linked to their previous victimization. Victimization during childhood or adolescence is a risk factor for both male and female.[33] However, it is a stronger predictor among females. Studies have shown that women in prison are six times more likely to report prior sexual abuse than their male counterparts.

IV Female offenders and death sentence

It is simply a matter of fact that there has been diminutive research on death penalty and gender discrimination.[34] In general, it is presumed that if there has been gender discrimination on capital punishment it would have favoured female offenders either by not awarding them death sentence or by not executing a female death row prisoner. It has even been submitted by some scholars that as a matter of both logic and political necessity, feminists must embrace either gender-neutral even handedness or abolitionism.[35]

The present paper does not compare the total number of capital offences committed by men and women, rather randomly picks some cases attracting the glare of media at global level to test the hypothesis.

Case of Kelly Rence Gissendaner

The execution of Kelly Rence Gissendaner, an American woman, in U.S State of Georgia was a first case of its own since 1945. She conspired to kill her husband with her paramour. He received life imprisonment for killing and Kelly was executed for conspiring. It has been observed that her execution was scheduled for February 25, 2015, then after, due to whether delay it was rescheduled on September 29, 2015, but delayed again and finally she was executed on September 30, 2015.[36] Since the rate of execution of female offenders happens to be lower in comparison to their male counterpart therefore; it has been viewed as favourable treatment to women.[37]

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[33]Elizabeth Cauffman, Understanding the Female Offender, The Future of Children, Vol. 18, No. 2, Juvenile Justice (Fall, 2008), pp. 119-Princeton University, http://www.jstor.org/stable/20179981 .Accessed: 30/08/2013 05: see also, Sibylle Artz, Sex, Power, and the Violent School Girl, New York: Teachers College Press, (1999),

[34]Elizabeth Rapaport, The Death Penalty and Gender Discrimination, Law & Society Review , 1991, Vol. 25, No. 2, Special Issue on Gender and Sociolegal Studies (1991), pp. 367-384, Wiley on behalf of the Law and Society Association, available at, https://www.jstor.org/stable/3053803, mates. The question of the death penalty and gender discrimination appears to be fundamentally a question of social ideology. At p.382, See also, Timothy F. Hartnagel, Modernization, Female Social Roles, and Female Crime: A Cross- National Investigation, the sociological quarterly 23 (Autumn 1982): 477-490

[35]Elizabeth Rapaport, The Death Penalty and Gender Discrimination, Law & Society Review , 1991, Vol. 25, No. 2, Special Issue on Gender and Sociolegal Studies (1991), pp. 367-384, Wiley on behalf of the Law and Society Association Stable URL: https://www.jstor.org/stable/3053803 (Last visited on 15th may 2021)

[36]https://en.m.wikipedia.org/wiki/Kelly_Gissendaner, see also, http://news.bbc.co.uk/ 2/hi/middle_east/ 4172551.stm, visited on 07 July 2021. When the Supreme Court of USA lifted the moratorium on capital punishment in Gregg v.Georgia, 17 women have been executed in U.S.A

[37]Women represent less than 1.2% of the 1,533 executions performed in the United States since 1976, Ibid;

Case of Afsaneh Norouzi

This case has also been deliberately chosen to highlight the Iranian law for women. In Iran, women are persecuted for adultery, witchcraft, and lesbianism. These persecutions of women are not mentioned in history books. This exemplifies the historical silence on women who have been killed by the patriarchal society. From the time of witch hunts to the imposition of death sentence from a court of law, women have been condemned to death, differently with discriminating principles.[38] In Iran,[39] a married woman who is raped, risks the death penalty for adultery if she cannot prove, she was violated. If she kills her attacker, she may also face the death sentence for murder. The instant case was of self defence. The fact of the case was that Afsaneh Norouzi and her family were visiting Mr Moghaddam, an intelligence officer on the holiday island of Kish in the Persian Gulf, in 1997 when her husband was called away. Mrs Norouzi said she had tried to defend herself with a knife when the officer attempted to rape her.

Afsaneh Norouzi was arrested on 10th July 1997 in Tehran along with her husband, Mostafa Jahangiri. As a result of the prolonged physical and psychological tortures, Afsaneh Norouzi repeatedly attempted suicide, once by trying to hang herself with a rubber hose in the toilet and several times by cutting her wrist.

A court in Kish eventually found her guilty of murder and condemned her to death, a sentence initially upheld by the Supreme Court. The prison officials instructed Afsaneh Norouzi to sign her death warrant. Iran's law requires only a 48-hour minimum notification of a death warrant before actual execution.[40]

However, under pressure from women's rights activists and reformist politicians, the head of the judiciary finally ordered a review before the Supreme Court, which in July quashed the death verdict[41] and ordered a new ruling from the Kish court, which could have led to a further sentence for Mrs Norouzi.

Therefore, Behzad Aghdam Moghadam's family (his mother and two children) was requested to forgo Afsaneh Norouzi's qisas-e-nafs death penalty, by offering the family an exorbitant 50 million Tuman in "blood money" (diyeh) (a normal diyeh in Iran is 22 million Tuman). Officials announced on 11th January 2005 that they had obtained their consent. Consequently, Afsaneh Norouzi, like any other murder convict graciously pardoned by the victim's family, became liable for paying the agreed diyeh. As the public once again took action to support Afsaneh Norouzi by making contributions for the payment of the diyeh, judicial officials announced on 26 January 2005 that the state has re-negotiated and paid a lower amount of diyeh (31 million Tumans) to Moghadam's family. A day later, Afsaneh Norouzi was finally released after spending 2760 days in detention. In the court of public opinion, Afsaneh Norouzi's pardon, like her infamous death sentence, epitomizes the disastrous state of the Iranian Islamic justice system, a

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[38]Whitney George, Women on Death Row, Off Our Backs , January 1998, Vol. 28, No. 1 (January 1998), pp. 16-17 , Off our backs, https://www.jstor.org/stable/25775962, visited on 14th July (2021)

[39]Cad , debony heart, jennie ruby and karla mantilla, Iran: woman sentenced to death for killing rapist, Off Our Backs, Vol. 32, No. 5/6 (May-June 2002), p. 5 https://www.jstor.org/stable/20837565,Visited on 12-07-2021 12:57 UTC

[40]https://www.amnesty.org/download/Documents/88000/mde130232005en.pdf visited on 18th July (2021)

[41]http://news.bbc.co.uk/2/hi/middle_east/4172551.stm visited on 18th July (2021)

system riddled with laws that blatantly flout human rights, procedures and practices that contradict standards for fair trial.

V Shabnam v. Union of India and Anr[42]

The case of Shabnam from India is discussed in the second last part of the paper. So far as the theories of female criminality are concerned, the case of Shabnam can be tested on Power-Control theory propounded by John Hagan and duly supported by Evelyn K. Sommers. The first proposition of Sommers that women commit crime to maintain connections within relationship seems appropriate. It was the relationship of Shabnam with Saleem which became the motive of murder.

It is worth mentioning that Independent India has no history of execution of any female offenders, though there are some female death row convicts.[43] The paper deliberately omits to discuss other cases and exclusively deals with Shabnam case because her issue recently simmered when the Trial Court issued a death warrant for her execution.

The chronology of the case tells that Shabnam and Salim were co-accused in a murder case that was tried against them on the allegation that they had committed murders of seven persons, who were the members of Shabnam's family during the intervening night of 14th and 15th April, 2008. They were tried together and after the trial, the learned Sessions Court pronounced death sentence on both vide Judgment and Sentence dated 15.07.2010, subject to confirmation by the High Court. The High Court of Allahabad confirmed the death sentences of both these convicts vide Judgment and order dated 26.04.2013. The Judgment of the High Court was challenged in Supreme Court and on 15.05.2015 appeals of the convicts was dismissed by the Apex court and death sentence imposed on them was confirmed.

Subsequently, writ petitions were filed on the allegation that the death warrants issued by the learned Sessions Judge on 21.05.2015 are impermissible in as much as various remedies which are available to the convicts, even after the dismissal of the appeals by this Court, are still open and yet to be exercised by them. In these circumstances, the execution of the death warrants within six days of the dismissal of the Criminal Appeals was challenged as illegal and contrary to the provisions of Article 21 of the Constitution of India.

In light of this, Justice A.K.Sikri and Justice U.U.Lalit opined that the death warrants were signed by the Sessions Judge in haste, without waiting for the exhaustion of the remedies on the part of the convicts and are therefore liable to be set aside and quashed.

On February 18, 2021, Shabnam's now 12-year-old son who was born in jail following which her friend took his custody as guardian, appealed to the President of India to "forgive" her. Despite having her mercy plea rejected the first time, the same day, Shabnam moved a second mercy petition before the President as well as the Governor of Uttar Pradesh.[44]

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[42]27 May, 2015, Indian Kanoon - http://indiankanoon.org/doc/46910974/ (Last visited on 14-07-2020)

[43]http://images.assettype.com/barandbench/import/2016/05/Death-Penalty-India-Report-Volume-1.pdf. (Last Visited n 22-08-2020)

[44]There have been many cases of pardon. In Govindasamy v President of India, Government of India, the then President of India Pratibha Patil pardoned a condemned prisoner Govindasamy who murdered his five relatives brutally in their rest in 1984. In June 2010, when Dharmender Singh and Narendra Yadav of Uttar

The gendered dimension in Shabnam case

The Trial Court while convicting Shabnam and Saleem focussed mainly on the role and responsibility of the daughter. The society perceives love /affair / pregnancy as an illicit relationship if happening between an educated girl and an uneducated boy. The Trial Court observed that of all the crimes that shock the souls of men, none has ever been held in greater abhorrence than parricide,[45] which is by all odds the most complete and terrible inversion, not alone of human nature but of brute instinct. Such a deed would be sufficiently appalling were the perpetrator and the victims were uneducated and backward, but it gains a ghastly illumination from the descent, moral upbringing, and elegant respectful living of the educated family where the father and daughter are both teachers. Here is a case where the daughter, appellant-accused Shabnam, who has been brought up in an educated and independent environment by her family and was respectfully employed as a Shikshamitra (teacher) at the school, influenced by the love and lust of her paramour has committed this brutal parricide exterminating seven lives including that of an innocent child. Not only did she forget her love for and duty towards her family, but also perpetrated the multiple homicide in her own house so as to fulfill her desire to be with the co-accused Salim and grab the property leaving no heir but herself. The appellant-co-accused Salim hatched the intricate plan with her, slayed the six deceased persons with an axe, escaped the crime scene, hid the murder weapon and supported the false story of occurrence. Both the appellants-accused wrench the heart of our society where family is an institution of love and trust, which they have disrespected and corrupted for the sake of their love affair.[46]

The Allahabad High Court too upheld the decision of the Trial Court, stating that the nature of the crime was "diabolical and calculated with methodical planning". The three Judge Bench of H.L. Dattu, C.J., S.A. Bobde and Arun Mishra, JJ., observed that Parricide is one of the most heinous crimes and in the case at hand the crime has been committed in the most inhuman and grotesque manner by the appellant- accused, which shows their lack of remorse, kindness and humanity. Therefore death sentence for them is the only punishment which is in proportion to their crime.[47] Chief Justice of India HL Dattu said, "You (Shabnam) are also a mother. But you didn't show any mercy or affection to your family. Even you killed 10-month-old baby of your brother. We can't grant any relief."[48]

Pradesh were pardoned, who had slaughtered a family of five, including a 15-year-old girl, three of them were killed while a 10-year-old boy was thrown alive into the fire. See, Devesh Singh, https://feminisminindia.com/2021/03/10/shabnam-amroha-murders-death-penalty/ (Last visited on 1-05-2017)

[45]Number of times the courts have decided cases of female feticide but neither the courts nor the societies ever reacted in the same manner.

[46]https://www.lawyerservices.in/Shabnam-and-Another-Versus-State-of-UP-2015-05-15 (Last visited on 12-09-2019)

[47]Shabnam v. State of U.P., 2015 SCC OnLine SC 492, decided on 15.05.2015, https://www.scconline.com/blog/post/2015/05/21/death-sentence-of-the-couple-guilty-of-parricide-upheld/ (Last visited on 5-09-2020)

[48]https://www.ndtv.com/india-news/supreme-court-confirms-death-sentence-of-a-woman-and-her-lover-for-killing-7-members-of-her-family-759604 (last visited on 2-09-2020)

The awarding of the sentence suggests that the punishment is based on a one-eyed-justice principle, which does not comprehend that the fault of the crime lies as much in society as with the criminals.[49]

It has been argued that given the iniquitous gender politics that is practiced in the name of honour, it is time to think about rehabilitative justice, not retributive punishment. If today, Shabnam can teach her fellow inmates how to read and write and Salim can rehabilitate him through, for example reading in jail, and then there is reason to believe that death penalty is not the desired outcome for these two.[50]

Here, the Apex court's decision on commutation of death sentence of Susheel Sharma,[51] who murdered his wife Naina and then cut her body into pieces and burnt it to destroy the evidence, becomes relevant to establish the gendered dimension of the courts approach. The paper does not criticise the commutation of death sentence into life imprisonment but rather criticises the grounds recorded for commutation. His commutation was not only argued on the grounds of mitigating circumstances rather it was recorded that "the deceased was a qualified pilot...She was an independent lady...not a poor illiterate helpless woman...it would be difficult to come to the conclusion that the appellant was in a dominant position qua her. The evidence on record shows that the appellant suspected her fidelity and the murder was the result of his possessiveness".[52] The paper criticises courts' opinion on deceased's ambition and educational status[53] as it should never be recorded either as aggravating circumstances if she is the murderer or when she is a victim.

The Sociology of Shabnam case

The paper attempts to do a sociological analysis of murders committed by Shabnam. Since mainstream society has not acknowledged the horrors of violence against women and children, it is not a surprise that they also silence the women who kill to protect their own or their children's lives.

Shabnam was three months pregnant when jailed and her child lived with her till six years as per the existing provisions of prison manual. The other side of Shabnam case is revealed by her junior Usman Saifi who has adopted her child and his wife decided not to have her own child for the sake of welfare of Shabnam's child.

Mr. Saifi reminded the court that there was no witness to the gruesome murders and it was Shabnam who first raised the alarm. "Police managed to solve the case on the basis of circumstantial evidence, call details, the post mortem report, and the fact that Saleem and Shabnam turned against each other during the trial,"

Mr. Saifi said that the angst against Shabnam is so strong in the region that any relief for Shabnam would not be supported. "Even my relationship with her and my intention for

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[49]Women on Death Row: Death Penalty and Social Politics in ...https://www.epw.in › engage › article › women-death-r. Shikha Vats, Vol. 55, Issue No. 11, 14 Mar, 2020 (Last visited on 12-08-2021)

[50]Ibid

[51]Susheel Sharma v. NCT Delhi MANU/SC/1024/2013 S

[52]Bibha Tripathi, Judicial trend on mitigating circumstances of commutation of death sentence into life imprisonment, BANARAS LAW JOURNAL,VOL 42 NO 1,44-50(2012)

[53]National Law University Death Penalty Research Project 39 a volume 1 , pp. 108-9 (2016)

taking the custody of Taj is questioned,"[54] The people in Bawankheda in Amroha district of western Uttar Pradesh call Shabnam stone-hearted. The judiciary described her crime as "the rarest of rare", particularly because she committed parricide despite being educated. Mr. Saifi remembers Shabnam, a double MA in English and Geography, as a caring senior who used to treat him as her younger brother. "The Shabnam that I knew was very different from the one that the world loves to hate".[55]

VI Conclusion and Suggestions

The last part of the paper draws some concrete conclusions and extends some viable suggestions. So far as the hypothesis is concerned, it can be said that it is proved and clearly be gauged from the Shabnam case. Furthermore, it can also be said that it has been proved on the basis of 'special reasons' extended by the Supreme Court of India either while inflicting death sentence (by highlighting educational background and role of a daughter in Shabnam case) or while commuting it to life imprisonment (by highlighting the educational background, ambition and connection with friend after marriage in Susheel Sharma case).[56] It has also been proved that women offenders enter into the trial procedure with diminished credibility and sympathy, which tends to lead to harsher sentencing.[57]

Though the Supreme Court has implicitly relied upon the triple-test in Shabnam case, authorities have observed that even the triple-test raises few doubts about its claim of ensuring 'principle-centric' sentencing. It has been observed that the triple-test thus, has neither emerged as a viable alternative to the twin-limbs of the ROR case formulation nor received judicial support for further articulation and acceptance.

In media too, when a woman is convicted of murder, it is often portrayed as exceptionally shocking. When a mother kills her children, the public is outraged. Yet the fact that hundreds of women and children are abused and killed by men every day does not ignite the same firestorm and outrage. It is pertinent to mention here that the paper never advocates undue sympathy to women offenders rather it does advocate uniform attitude on sentencing. If a criminal act satisfies all the three tests (the crime, the criminal and the collective conscience) then also the offender can be given life imprisonment for a fixed term.

It is submitted through the paper that time has come to revisit those offences in which the option of reductivism in the name of unconstitutionality can be applied. It is also submitted through the paper that apart from judicial efforts of establishing 'supervening circumstances' two major studies,[58] recently performed, have favoured abolition of death sentence for one reason or the other. Therefore, de facto moratorium (no execution) on death sentence has become the need of the hour. The Supreme Court of India must lead the entire world through its special prerogative of commuting death sentence even

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[54]Supra note 47

[55]https://www.thehindu.com/news/national/other-states/the-shabnam-that-i-knew-was-very-different/article33949536.ece (Last visited on 22-02-2022).

[56]Supra note 47

[57]Supra note 51

[58]Supra note 1 and 53

when the mercy petition is rejected by the President of India if the total period spent in prison is more than 20 years. This submission, if accepted shall also establish a gender neutral approach on administration of death sentence and may bring considerable certainty in the law on sentencing.

ISSUE OF NON-EVALUATION OF ANSWER SCRIPT IN COMPETITIVE EXAMINATION BY ARTIFICIAL INTELLIGENCE (AI) TECHNOLOGY: JUDICIAL APPROACH

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Abstract

Competitive examinations are the regular affair across the nation to search talent suitable to educational or employment standards. The main component in completing the competitive of examination process is evaluation of answer script in which traditional methodology based on human direct engagement were replaced and candidate merits are tested with the help of AI driven technology particularly in Multiple Choice Question(MCQ) pattern with an objective to attain fairness, accuracy, inexpensiveness, reduce manpower, maintain the integrity of the process of evaluation and most importantly declaration of result on time. AI driven technology while rejecting to evaluate answer script has raised legal issue and litigation. Candidates have equal right to competefor selection to public employment or admission to educational intuition is compromised due to commission of technical or accidental error which are non-substantive and not material in nature. Indian judicial trend has seen a shift from humanitarian consideration of technical error committed by candidate to mechanical application of instructions given by the examination conducting authority. Financial disability or legal illiteracy may impede the meritorious candidate to spin the wheel of legal process and secure justice wherein the AI based evaluation process does not evaluate candidate paper due to commission of technical error.

Key words
Artificial Intelligence(AI), Evaluation, Competitive Examination, Technical Error, Judiciary, Natural Justice, Per-incuriam.

Introduction

Digitalization of society has produced a comprehensive influence and infraction on individual and group behaviour. Use of artificial intelligence has made considerable progress in the subject field of education, economics, sociology, political science, and law is not an exception. Advancement in science and technology has replaced the performance of task including 'cognitive task' by human intelligence with AI. In the field of education, its application has transformed the traditional method of teaching,

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evaluation, class monitoring, curriculum framing, with that of technology-intelligence based adoptive learning, smart class room, intelligent tutor system, allowing the students to have twenty four hours learning opportunity, have better engagement with less pressure, manage large number of students.[1] AI has replaced the human experts to provide skills for cracking IELTS or TOFEL examination to have better opportunity to study abroad.[2] During the Covid-19 pandemic most of the education institutions have made a shift to adopt technology in teaching-learning process online and evaluate answer scripts by applying various rubric.

In the era of Information Technology, AI is a competitive advantage for the talent manager in the process of admission to educational institution or recruitment to any public or private offices. Traditional methodology based on human direct engagement were replaced and candidate merits are tested with the help of AI driven technology with an objective to attain fairness, accuracy, inexpensiveness, reduce manpower, maintain the integrity of the process of evaluation and most importantly declaration of result on time. Modern recruitment with AI algorithm based software`s allow the employer or institution to scrutinise the huge volume of applications, filter application with assigning code, conduct examination, evaluation and declaration of result, test skill and experience.[3] This paper highlight only the application of AI in evaluation of answer script for competitive examinations (MCQ based examination) conducted by educational institutions or Public Service Commission's whose aim is to select the most meritorious or talented candidate amongst the competing candidates which will also sub-serve the large public interest and efficacy of the institution would attain the necessary standards.

AI Based Competitive Examinations

Conducting competitive examinations are the regular affair and can be seen throughout the year across the nation. These examinations are conducted for entry into various graduate programmes and employment. The examinations which are very popular among the candidate having high competition are either conducted by the constitutional body like the Public Service Commission at Union[4] having function to conduct examination for appointment to the services of the Union and the State or by statutory body like Universities or SBI etc. Some of the popular examination are Union Public Service Commission(UPSC) for Indian Administrative Services(IAS), Indian Economic Services Examination(IESC), National Defence Academy Examination(NDA), Combined Defence Services Examination etc; Staff Election Commission(SSC); Food Corporation of India,(FCI); National Testing Agency(NTA) for Joint Entrance Examination(JEE), admission to Central University through CEET for under-graduate

[1]SONOO JAISWAL ARTIFICIAL INTELLIGENCE IN EDUCATION, https://www.javatpoint.com (Last visited on Sept. 12, 2022, 1.24 PM).

[2]Atmadeep31, Artificial Intelligence vs Human a Comparative Study for Exam-Preparation,ACCIOLBIS https://www.accioibis.com/artificial-intelligence-for-exam-preparation/ (Last visited on July.29, 2022, 7.14PM),

[3]Berta Melder, The Role of Artificial Intelligence(AI) in Recruitment, TALENTLYFThttps://www.talentlyft.com/en/blog/article/207/the-role-of-artificial-intelligence-ai-in-recruitment (Last visited on Sept. 10, 2022),

[4]INDIA CONSTITUTION, 1950. art. 315 to 323.

and post graduate; National Eligibility cum Entrance Test(NEET); Graduate Aptitude Test in Engineeing(GATE); Law School Admission Test(LSAT); Common Admission Test(CAT); Institute of Banking Personnel Selection Examination for Probationary Officers (IBPS-PO); All Bank of India; and many more conducted by the Central and State Government as well as educational institution for admission to top Universities in India.[5] The preliminary examinations are mostly based on MCQ type question and evaluations are processed either based on human intelligence or artificial intelligence. Andhra Pradesh Public Service Commission (APSC) acclaimed to have successfully completed the evaluation of forty eight thousand scanned answer script digitally by applying AI software and attained fairness, minimise scope of disparity.[6] This examination was an admixture of both human intelligence and artificial intelligence. Paper was evaluated in real sense by the human experts and only the process of recording, identify bar codes, calculation of marks, hint for not evaluated shits etc were done by tech-based software. Till now descriptive answer book evaluation software with fully automated have not been applied.

It is also very important no note that during Covid-19 pandemic and particularly the imposition of lockdown has adversely impacted the life, living standard, economic progress of every individual of the world. It has revealed technology gap in the system due to which many examinations were postponed or cancelled including the joint entrance examination of NTA, NEET PG, UGC NET, UPSC-Enforcement officer, Staff Selection Commission, Indian Air Force automated e-Pariksha, and all the entrance examination announced by various universities.[7] Such a situation have motivated all the sector to adopt technology based scientific means to carry on their regular work and have free and effective communication. Institutions have relied on AI based technology to discharge their function whether it was the field of education, medical, employment in public or private sectors. Jurisprudence has received challenge with socio-economic development, recognition of political rights and most importantly with the advancement in science and technology. Law being a tool of social transformation must take into account the fast scientific and technological development with aim to foster justice while balancing rights and objectives of the competitive examination conducted with AI mechanism.

Patter of Examination/Evaluation and AI Assisted Technology

The pattern of test may be objective type question which is based on Multiple Choice Question (MCQ) or Descriptive in nature. For MCQ OMR sheet can be evaluated with the help of "optical character recognition technology"[8] and for descriptive AI technology

[5]Megha K.S., Competitive Examination in India 2022, GETMYUNI https://www.getmyuni.com/articles/list-of-competitive-exams-in-india (Last visited on Sept.12, 2022)

[6]Amravati, APPSC pioneers digital evaluation for competitive exam, TIMES OF INDIA https://timesofindia.indiatimes.com/education/news/appsc-pioneers-digital-evaluation-for-competitive-exam/articleshow/83142006.cms (Last visited on Jun. 1, 2021, 3:37 PM)

[7]Heeba Hameed, List of major exams postponed due to Covid19, TIMES OF INDIA https://timesofindia.indiatimes.com/education/news/list-of-major-exams-postponed-due-to-covid-19/articleshow/82213367.cms. (Last visited on Apr. 26, 2021 1:49 PM)

[8]S. Impedovo, L. Ottaviano and S.Occhinegro, Optical character recognition, 5 IJPRAI.1, pp. 1- 24 (1991)

which apply segmentation of words, stemming, removal of stop words etc.[9] The MCQ answer sheet is structured in a fashion to be scanned and read by computer with pre-programmed software to use optical character recognition and evaluate the answers of the candidate in comparison with preloaded answers and produce result quickly in a minute. To effectively evaluate answer sheet the machine requires that one option among four beneath each question to be circled with thickness or darkened shades which will be easily recognised by the programmed software.

By adopting this method of optic reading, hundreds and thousands of answer sheets can be got evaluated in very quick time. This would also avoid the possible error margin and would also avoid the element of adversely affecting the prospects of any candidate.

Constitutional Rights of Candidates

All persons are having equal right to compete for selection to public employment or admission to educational institution. Constitution of India has guaranteed right to equality in admission and employment.[10] These fundamental rights are not absolute and are subject to constitutional and legal limitations including the eligibility criteria for applying for examination in the nature of age, educational qualification, payment of fees, government reservation guidelines, time limit for making application and appearance in exam, adhering to the code of conduct and clear direction issued by the examination conducting authorities. When the mode of conducting competitive examination is AI based which is decided and well informed to the candidate at the time of advertisement then it cannot be prayed to change the mode of conducting such examination. A mixed public view is seen during Covid-19 period for regular examination announced by various universities. All India Forum to Save Education, has criticised the call of Delhi University to conduct teaching and examination online and demanded to cancel all online examination conducted so far and hold offline examination.[11] In contrast to it, the Maharashtra students have demanded online examination.[12] The reasons not to go for online examinations were on the probable ground of economic burden, techno-stress, absence of computer skill knowledge, health issue, non-access to smart phone and internet facilities. But the same logic can not be taken in cases of competitive examinations except training on technology. The contention to arrive at consensual and logical agreement is that the competitive examination is a process to select a meritorious candidate who are competing among other candidate and technology is just providing an assistance to have a more accurate and undisputed result. In the matter of fundamental rights, technology-based impediment which is more in the nature of technicality shall not be allowed to play a

[9]Sk Asif Akram, Mousumi Saha &Tamasree Biswas, Evaluation of Descriptive Answer Sheet Using Artificial Intelligence, IJESRT.184, 184 (2019), http://www.ijesrt.com/issues%20pdf%20file/Archive-2019/April-2019/25.pdf. (Last visited on 20 Sept, 2019)

[10]INDIA CONSTITUTION. art. 14-16.

[11]Atul Krishna, Covid-19: Students Campaign Against Online Exams, Demand Student Welfare, NDTVhttps://www.ndtv.com/education/covid-19-students-campaign-against-online-exams-demand-student-welfare (Last visited on May.20, 2020, 4:57 PM)

[12]Education and Careers Desk, Maharashtra Board Students Protect Demanding Online Exams, Lathicharged, NEWS18 https://www.news18.com/news/education-career/maharashtra-board-students-demand-online-exams-protest-outside-varsha-gaikwads-home-4718096.html (Last visited on Jan. 31, 2022 5:43 PM)

substantive role resulting in denial of right of individual.[13] Artificial intelligence is replacing the human intelligence and in such a development the candidates must be given hands on training to comply with the instruction to nullify the chance of any error or future litigation.

Probable Reasons for Non-Evaluation of Answer Scripts in AI Driven Competitive Examination

It is expected from the candidates that they should adhere to the clear instructions given by the authority. Answer script of the candidate may not be evaluated due to the various reasons: -

Cancellation of Examination: After the completion of examination, the authority has declared cancellation of examination as the question paper came into public domain before the schedule date, day, and time of examination. If the examination is cancelled before the schedule date of examination, then the question of evaluation of answer script does not arises. Based on the three-member committee report, the 67th Combined (Preliminary) Competitive Examination held on 08-05-2022 was cancelled.[14] UPTET 2021examination was cancelled just before few hours for the commencement of Exam.[15] After the date of exam, the Staff Selection Commission cancelled recruitment of Sub-Inspector exam in Delhi due to reported compromised.[16]

Commission of Malpractice: Malpractice means careless, wrong, or illegal behaviour or dishonest behaviour.[17] The act includes tampering (rubbing the circles with chalk powder/scratching the circle with razor), writes irrelevant matter giving indications of his identity, influencing examiner or other who are involved in evaluation process to receive undue advantage/favour, cheating, or copying, and misbehaviour etc. The act of malpractice will result into debarring and cancellation of candidature. Karnataka Public Service Commission has debarred a candidate and cancelled his candidature for competitive examination held in the year 2021.[18]

Non-Adherence to Mandatory Instructions/Guidelines: The Commissions or the institution or the examination conducting authority, do provide certain guidelines to be followed by the candidate while appearing for examination. If the candidate has not

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[13]Union of India v. Guduru Raja Surya Praveen, (2015) SCC Online Hyd 437.

[14]Victor Dasgupta, BPSC Exam Paper Leak: Exam Cancelled After Three-member Committee Submits Report, INDIA.COM NEWS DESK https://www.india.com/education/bpsc-exam-paper-leak-exam-bihar-public-service-commission-cancelled-after-three-member-committee-submits-report-5381147/(Last visited on May.9, 2022, 1:09 AM),

[15]MaitreeBaral, UPTET 2021 exam cancelled due to alleged paper leak, Hindustan Times https://www.hindustantimes.com/education/competitive-exams/uptet-2021-exam-cancelled-due-to-alleged-paper-leak-101638077477940.html (Last visited on Nov. 28, 2021, 11:16 AM)

[16]Zee News Reporter, Paper leak forces cancellation of SSC CPO (SI/ASI) examination - re-exam date inside, ZEE NEWS https://zeenews.india.com/news/education/paper-leak-forces-cancellation-of-ssc-cpo-si/asi-examination-re-exam-date-inside_1868318.html (Last visited on Mar. 22, 2016, 12:45 PM),

[17]Oxford Learner`s Dictionaries, https://www.oxfordlearnersdictionaries.com (last visited Sept. 9, 2022)

[18]Daiji world Media Network, Bengaluru: Competitive exam - Candidate debarred for rule violation, DAIJIWORLD (Sept. 29, 2021, 12:11 PM) https://www.daijiworld.com/news/newsDisplay?newsID=878181 (Last visited on Sept 9, 2022).

followed the mandatory instructions intentionally or committed gross violation of instruction or unintentionally forget to write roll number in numeric and also not circled the roll number in the OMR sheet, then the answer sheet cannot be evaluated.

Technical Error/Accidental Error: Technical error like not mentioning the paper number or roll number or paper series and other details which are necessary for computer to read and identify the candidate preliminary information before evaluating the answers to the question in the booklet. Technical error may or may not be fatal for conducting AI driven evaluation process and each case must be given treatment based on the nature of error committed, its free flow effect and impact. Candidates appearing for examinations may be induced by enormous pressure, lapse of concentration and due to which they may commit technical error in filling OMR sheet including darkening/shading circles representing their roll number, paper series code, paper code etc. Technical error does not include non-attempting any question in the booklet. Technical error is not a deciding factor of the merit of the candidate or knowledge or competitiveness of the candidate rather, it is an error which AI driven technology will not read and therefore, does not further the process to evaluate main part of answers to the questions, the result of which is inability to determine merit of candidate. Technical error which is substantive, and material will lead to non-evaluation of answer script.

Commission of Technical Error and Issue of Evaluation of Answer Script - Shifting of Judicial Trend from Humanitarian Consideration to Mechanical Applications

Once, the AI based system was deployed for evaluation, can the authority at later stage allow human intervention in evaluative of answer script for any reason? Whether the technical error (materially or substantially) committed by the candidate cause hardship in evaluating the answer script? The judicial attitude in the early days of application of AI in evaluation of answer script was based on humanitarian ground, to scrutinise each case based on the nature of mistakes committed, reasons behind commission of such mistakes, impact of mistakes committed, balancing the rights & interest of candidate and the objective of competitive examinations. The past couple of years have witnessed shift in judicial trend from humanitarian to just mechanical (adherence to instruction given to candidate). Before 2019, on the above issue the decision of the High court of various states were divided. In the case of Union of India v. Guduru Raja Surya Praveen,[19] a candidate who failed to shade/blacken the test form number in the answer sheet while appearing for Tier-II examination of Combined Graduate Level Examination-2014, prayed before the High Court of Hyderabad to declare non-evaluation of answer script as bad in law and issue a direction to the Staff Selection Commission to evaluate and declare result at the earliest. It was noticed that the candidate has secured overall 73.5% score in all two evaluated paper and was a meritorious candidate and failure to shade/blacken the test form number was a technical error which has no direct bearing upon the issue of undertaking the evaluation of non-evaluated paper. The Court has given direction the Staff Selection Commission to undertake evaluation of the answer sheet of all candidates who have committed technical error in not thickening/blackening roll number or hall ticket number or roll number and declare the

[19] Union of India v. Guduru Raja Surya Praveen, (2015) SCC Online Hyd 437

result at the earliest. Such technical error will not in any manner materially or substantially alter or cause hardship in evaluating the answer sheet. The non-substantive and non-material irregularities shall not result in denying the benefit of evaluation of the answer sheet of a candidate. The element of flexibility to ignore non-substantive and non-material technical error committed by the candidate would only enhance and promote the larger public interest.

In the case of State of Andhra Pradesh v. A. Vijayalakshmi[20] the court while examining the technical error committed by the candidate appeared for entrance examination for the MBBS course in the medical college has taken into consideration minor age of the candidate into consideration and stated that mistakes committed are accidental error. The court examine the fairness and justification on the part of Commission to totally reject the answer script without looking into the mistakes and merit of the candidates. The Court has further observed that when the candidate after realising his mistakes has demanded fresh answer booklet to correct the same, they have not been served fresh booklet rather, an assurance was given that their answer book will be evaluated. Students are bound to commit error out of anxiety and emotional excitement. Their future career and satisfaction/happiness of their parents must be taken into consideration which ultimately promote the growth of the students. The major objective of the test is to measure the ability of the students and secure social justice which will not be attained if the authority take stand not to evaluate the answer script due to technical error or accidental error of the candidate. Even the Supreme court has provided one time relaxation when the candidate has disregarded the clear instructions issued by the Service Commission and written hall ticket number at other places of answer script.[21] Ratio of this case was followed by the Division Bench of Andhra Pradesh high Court on similar issue. The have stated that the objectives of the instruction and demand of its rigorous compliance are necessary to have fairness in the examination process, but it cannot be said that there are no exception to it. Examination is undertaken by the young individuals and there are possibility that they may commit mistakes accidently. If the candidate has taken all the measures to correct the mistakes beyond the scope of recognition or identification, then there is no injury is said to have been done. Mechanical compliance of the instruction that in case of non-adherence to instruction will result into non-evaluation of answer script may deny justice.[22] During the competitive examinations the candidates are bound to commit mistake due to their mental condition and state of pressure. Unless those mistakes relate to the merit of the candidates and are material- Substantive in nature recourse is to condone it give a fair-equal opportunity to the candidate to compete along with others. In such cases answer scripts can easily be identified though it cannot be processed by the computers. Human interventions are necessary, and evaluation of answer scripts does not depend on adherence to mechanical exercise.[23]

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[20]State of Andhra Pradesh v. A. Vijayalakshmi, AIR 1983 A.P. 321

[21]Karnataka Public Service Commission v. B.M. Vijalakshmi, (1992) 2 SCC 206; AIR 1992 SC 952.

[22]The Convener EAMCET-93, Andhra University College of Engineering, Visakhapatnam v. Divyash K. Shah, 994 SCC OnLine AP 434 : (1995) 1 An WR 289 (DB)

[23]Smt. Sujata Cheruku v. The State of Telangana, 2017 SCC OnLineHyd 408

Unlike the decision in Guduru Raja Case, the High Court of Assam has taken contrary stand upholding the mechanical application of instruction or guidelines is mandatory and the candidate will not get benefit on humanitarian ground if they have committed technical error even though non-substantial or not material in nature. In Assam Public Service Commission v. Izaz Yusuf Ahmed[24] a candidate who appeared for the Assam Civil Services (Junior Grade) prelims examination and his result was declared as invalid candidate due to not mentioning of the question paper series in General Studies paper. Assam Public Service Commission contended that the candidate was well informed with a clear instruction to mention the appropriate series in the OMR answer sheet otherwise the paper will not be evaluated as the entire process of evaluation of OMR sheet is computerised with no scope of human intervention. A single Judge bench of Gauhati High Court held that when the artificial intelligence does not work, there should be human intervention and directed the APSC for evaluation by human agency as the mistakes on the part of the candidates were unintentional and bona fide. In appeal the Division Bench of Gauhati High Court relying on the ratio given in State of Uttar Pradesh v. Upendra Nath Yadav[25] has set aside the High Court Decision while upholding that when the entire examination was designed on evaluation of the OMR answer script by computer then human intervention is not permissible.[26]

To have a clarity on the point of law it is apt to refer Supreme Court decision in a matter arising out of review jurisdiction under Art. 142. The background of the case is that there was an allegation of commission of massive corruption and fraud in the examination and recruitment process conducted by the Tamil Nadu Public Service Commission for Group-1 Services for the year 2000-2001. The advocate commissioner appointed by the court revealed that except eight candidates' others candidate answer scripts were found in gross violation to clear instruction. Violation to instruction were of the nature of using sketch pen, pencil, two colour pen, irrelevant marking, writing name or number in answer script, first page kept blank. The Single Judge Bench of the Madras High Court given relief to the candidate while holding that the violation of instruction and memorandum of admission would not result in the invalidation of answer scripts and answer script must be evaluated. In appeal, the Division of the High Court set aside the single judge decision take note that violation of instruction given to the candidate, their scripts are liable to be rejected for evaluation by the TPSC. As the TPSC proceeded to evaluate those script, an inference is towards fact that illegality was committed. Therefore, the selection of 83 candidates were set aside as they have indulged in malpractices and gross violation of instructions to the candidates and directed the TPSC to evaluate only those eight candidate answer script who have not indulge in malpractices and prepare the merit list a fresh.[27] Division Bench of the Supreme Court of India while affirming the Division Bench of High Court decision taken note that the

[24]Assam Public Service Commission v. Izaz Yusuf Ahmed, 2019 SCC OnLineGau2415 : (2021) 5 Gau LR 158 at page 160

[25]Civil Appeal No. 3899/2019 [SLP (C) No. 35187/2017]

[26]Assam Public Service Commission v. Izaz Yusuf Ahmed, 2019 SCC OnLineGau2415 : (2021) 5 Gau LR 158 at page 160

[27]A. B. Natarajan v. The Secretary, Tamil Nadu Public Service Commission, 2011 SCC OnLine Mad 346: (2011) 4 Mad Lj 417.

material irregularities were committed by the selected candidates which were serious in nature. The core aim of having competitive examination based on impartiality and transparency was impeded due to misconduct of candidates. Candidate who are reckless to his own interest cannot be expected to be a good officer.[28] Hearing the review petition by the Division of Bench of the Supreme Court, certain facts was appraised to the court that the candidates whose appointments were set aside were already appointed and were in service for nearly 10 years and their superior reports about them were also good. These candidates have not been given sufficient time to present their case and therefore, principle of Natura Justice was denied. Within two days from the date of issue of returnable notice to them the matter was disposed of. Granting relief to the candidate allowing them to continue their service, the court stated that "mistakes committed by the candidates were very often ignored and it would be not just and proper to take such harsh view in the matter so as to render several reasonably good officers working for several years jobless".[29]

Per-incuriam

Doctrine of precedent is embodied in Article 141 of the Indian Constitution which states that "the law declared by the Supreme Court shall be binding on all courts within the territory of India." Stare decisis provides settled basis for legal reasoning, curb arbitrariness of judges, promote efficient judicial administration, and give human sense of justice.[30] It introduces a modicum of certainty and calculability as to how once rights, duties, interest, and obligation will be applied. According to William Hocking, stare decisis is an ethical principle,[31] therefore, the judgement pronounced the apex court should not be ethically or legally be ignored unless substantial reasons exist to depart from the earlier decision.[32] Supreme court is having power to review its earlier decision to give beneficial effect to public interest, or to remove any conflict to the Constitution.[33] Decision is binding not because of it conclusiveness but due to ratio (reason) and principle laid down. Thus, Judicial Precedent is cited as an authority to decide a similar set of facts, and which can be used by the courts as a source for future decision making. Decision of a court is said to be per-incuriam if it was delivered in ignorance of relevant statutory provisions or in disregard to the decision of higher court/higher bench.[34] When the High Courts or subordinate court have not taken due care to refer decision of Supreme Court or higher Bench of the High Court or statutory provision then the decision of such high court or subordinate court would be regarded as decision in per-incuriam (lack of Law) and is not a good decision to be followed.

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[28]Secretary, Tamil Nadu Public Service Commission v. A. B. Natarajan, (2014) 14 SCC 95.

[29]The Secretary, Tamil Nadu Public Service Commission v. A. B. Natarajan, (2016) 16 SCC 144.

[30]EDGAR BODENHEIMER, JURISPRUDENCE THE PHILOSOPHY AND METHODS OF THE LAW, 426-427 (Harvard University Press 2018)

[31]William E. Hocking, Ways of Thinking About Rights: A New Theory of the Relation Between Law and Morals,LAW: A CENTURY OF PROGRESS Public Law and Jurisprudence 259(New York, 1937).

[32]Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.

[33]Sambhu Nath Sarkar v. State of W.B., (1973) 1 SCC 856.

[34]Indore Development Authority v. Shailendra, (2018) 3 SCC 412.

The decision of Gauhati High Court delivered in Assam Public Service Commission v. Izaz Yusuf[35] Ahmed was delivered on 04.06.2019 in ignorance to Supreme Court decision in The Secretary, Tamil Nadu Public Service Commission v. A. B. Natarajan[36] in as much as the error or mistakes not material to the merit of the candidate was taken very harshly and denying the candidate a fair and equitable opportunity to compete among the other candidate and therefore was not just and proper. High Court of Assam decision was given in reliance to decision of Supreme Court in the case of Upendra Nath Yadav,[37] which has set a precedent to adhere strict compliance to the instructions issued to the candidates in much mechanical way without refereeing to the A. B. Natarajan case which was made on humanitarian ground.

Application of Principle of Natural Justice

The basis of procedural law and process to make "fair play in action" is the Principle of Natural Justice. It is the basic requirement of rule of law. It relates fact and decision and provide protection against arbitrariness, non-application of mind and uphold faith in judiciary. The principle is applicable for judicial as well as quasi-judicial function and based on the latin maxim "nemo judex in re sua causa and audialterm partem" It do have corelation with article 14 and 21 of the Indian Constitution to ensure procedural fairness, just and reasonableness. In S. Obula Naidu Case[38], the Division Bench of Andhra Pradesh High Court have not provided reasons to its decision while confirming the Tribunal order negating relief to candidates who have improperly written their register number/optional code which resulted into non-evaluation of their answer scripts. Such judicial trend may also be seen in the year 2017 wherein technical error committed by candidate in bubbling the hall ticket number were not given relief without assigning any reason by the high court except confirming the Tribunals order against which the appeal was made.[39] In the case of Shiramdas Mahesh v. Telangana State Public Service Commission[40] the court have not followed the principle of reason decision and has based its decision referring to A. B. Natarajan case decided by the SC ignoring the decision in review petition.

Litigative Ability and Free Access to Justice

In the process of talent hunt through competitive examination, possibility of litigation in the Court cannot be ignored. Litigative ability and access to justice depends on the knowledge and awareness of the candidate on that matter of his rights, interest, available remedies in case of violation of his rights, appropriate legal forum from where justice may be obtained and financial ability to bear the expenses to move the process of court. Students appearing for examination to seek admission or unemployed young candidate may not have adequate financial ability to sustain the litigation cost. Financial disability or legal illiteracy may impede the meritorious candidate to spin the wheel of legal process and secure justice.

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[35](2019) SCC OnLineGau2415 : (2021) 5 Gau LR 158.

[36](2016) 16 SCC 144

[37]State of U.P. v. Upendra Nath Yadav, Civil Appeal No. 3899/2019 SLP[C] No.35187/2017.

[38]W.P. No.20088/2003

[39]B. Deepkumar v. Secretary, Telangana State Public Service Commission, W.P. No. 41273/2016.

[40]W.P. No. 3862/2017.

Conclusion

Artificial Intelligence and human reliance on its application have become inexorable. The algorithms technology hasrevolutionised all the sector with efficiency and accuracy in results. With all its merits, we cannot avoid the other side of AI which pose threats and legal issues among others while applying it in evaluation of answer scripts based on MCQ patter. Human agencies act humanly with humanity considering all factual state in existence, apply its skill based on reasoning power for all course of action otherwise the same may be held in conflict of Natural Justice principle. During the competitive examination, the state of mind in which the candidate is situated, aspiration of their parents and society are often a driving factor due to which a candidate commits technical error while filling the first page of answer script. Equal right of the candidates to compete with others are denied due to commission of accidental error which are non-substantive in nature and expected to be ignored. The judicial approach in Upendra Nath Yadav and IzazUsuf Ahmed reflected a shift from humanitarian consideration to mechanical application of instruction given to candidate. In a state of legal administration of justice where there is disagreement on the legal definition of Artificial Intelligence, scope of AI is not clearly defined, no hands-on training on computer and computer-based evaluation mechanism is provided to candidate, in such state of affair, giving mechanical application of instruction to candidates and complete denying human intervention to resolve the evaluation of answer script issue is denial of the very concept of equality. Competitive examination is a process to select a qualified and meritorious candidate who will bring laurels to the institution to which selected. Such selection can only be judged based on performance of candidate which he has answered to the given question in the booklet. Denying an opportunity at the initial stage solely on technical or accidental error committed by him while not circling or not darkling the appropriate column in the first sheet representing his or her roll number or paper code when there is other mechanism i.e. "Human Intervention" to resolve the issue and uphold the interest of the students and aim of the competitive examination, denies justice. All candidate who has not been given relief by the educational institutions or constitutional or legal body conducting examination, may not have financial resources or legal awareness to litigate and have access to justice. Before giving effect to mechanical application of instructions to candidates or denying human intervention in resolving issue relating to evaluation of answer script due to commission of technical error, the authority must assure to provide hands-on training on technical aspect which needs to be followed and expected to be adhered by a candidate in competitive examination.

ENVIRONMENTAL REFUGEES – A QUEST FOR JUSTICE

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Abstract

Climate Change has been significant factor to demonstrate jurisprudential values in our legal System. There are some unanswered questions that are still have to answer such is the quest for Justice for Climate Refugee in Indian Legal Regime. There are some international initiative taken to address the issue of Climate Change and its mitigation affection but refugee status is silent. The article try to analyse from the legal angel point of view as part of constitutional values and ethos from Human Rights Perspective.

Key words-
Climate Change, Climate Refugee, International Law, Policy, Migration)

I. Introduction

The most nascent fashionable debate in the multi-layered world of climate change is not about science and technology. Rather, it is about considering suggestion regarding the risk of large-scale human migration caused by climate change. This leaves us significant scope for comprehensive study.

In 2014, the IPCC (Inter Governmental Panel on Climate Change) came up with an unsettling oracle) that millions of people would be made homeless as a result of climate change in coming days. In the worst-case scenario, climate change will lead to approximately 200 million homeless, 20 times more than currently protected by the United Nations (UN).[1] The consequences will be grim. Mass movements of refugees most likely will lead us to constrained natural resources, overpopulated areas, and may exacerbate socio-economic and political tensions.

Despite the fact that climate change is a worldwide issue, its consequences are widely dispersed. Developing countries that have large dependence on natural environment for

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[1]Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees, Frank Biermann and Ingrid Boas, Global Environmental Politics 10:1, February 2010, by the Massachusetts Institute of Technology.

basic existence often have fewer resources to adjust to and reduce climate crisis.[2] Climate refugees, requires a supranational consciousness and the dynamic involvement of international society is essential in providing assistance to this vulnerable group.[3]

In India, displacement and climate-induced migration are already a big problem. "Between 2008-2016, over 200 million people have been displaced worldwide as a result of natural disasters and in India, close to 1.5 million people are classified as internally displaced (1.3 million in 2017) every year".[4] Adding to this is the growing concern about cross-border migration of homeless people, mainly from Bangladesh. As per the GRID 2020, India and Bangladesh rank amongst the top five countries where the maximum number or displacement has occurred. Besides, the geographical position of Bangladesh is such that migration to India is sometimes the only option available to the victims of disastrous climate change.[5] This problem is unique with Bangladesh because the other countries with which India shares is borders are not face such imminent threats of climate change at present.

However, there is currently no comprehensive international structure in place to handle the issue of climate-related human exodus. It is also underdeveloped in most part of the world where nations often are reluctant to extend any meaningful protection to these people domestically.

The following sections will capture the severity and urgency of the issue in more detail.

I.II Climate change and Human Displacement: A Perilous Problem to Reckon

Climate change perhaps is the most debated spectacle among all disastrous consequences that our planet is facing at present. Climate change has impacted almost everyone and everything in the world - humans, animals, trees or bio-diversity. It initiates a vicious cycle impacting the environment which in turn impacts the mankind.

The adverse impact of climate change has been predicted since 1990.[6] However, once there had been debate regarding whether climate change could be a reason for migration or displacement. This might lead to political, economic and social tension between the countries, unless cross-border migration of these people is not managed.

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[2]Reuveny, Rafael. ?Eco-migration and Violent Conflict: Case Studies and Public Policy Implications. Human Ecology, vol. 36, no. 1, 2008, pp. 1-13. JSTOR, available at: www.jstor.org/stable/27654252. (Visited on July 25, 2021).

[3]Bonnie, Docherty & Tyler, Giannini. (2009). Confronting A Rising Tide: A Proposal For A Convention On Climate Change Refugees. The Harvard Environmental Law Review: HELR. 33. 349-403. Also see Goodwin-Gill & McAdam, 2007 3d ed. (Toronto: Oxford University Press, 2007) 848 pages also see Sumudu Atapattu, Climate Change: Disappearing States, Migration, and Challenges for International Law, 4 Wash. J. Envtl. L. &Pol'y 1 (2014).

[4]Global Report on Internal Displacement Report, 2021, Internal Displacement In A Changing Climate, available at: https://www.internal-displacement.org/global-report/grid2021/ (Visited on July 25,2021).

[5]Neha Choudhury, "Environmental Refugees: A Humanitarian Crisis in India and Bangladesh", Das, S.K. and Chowdhary, N. (Ed.) Refugee Crises and Third-World Economies, Emerald Publishing Limited, Bingley, pp. 37-43.

[6]Oli Brown, Migration and Climate Change, International Organization for Migration, Geneva, 2008 available at: https://www.ipcc.ch/apps/njlite/srex/njlite_download.php?id=5866 (Visited on 26 August, 2021).

Such unplanned migration is bound to increase the human density of a particular region which in turn will create a pressure on the existing natural resources.[7] According to Professor Myers 'estimate this planet will have approximately 200 million climate migrants by 2050.[8]

Small Island Developing States (SIDS) are mostly exposed to global climate change because of their geographical location, often having low coastlines that are threatened by the raging seas and oceans. Countries like Kiribati and Tuvalu are striking examples of such effects of climate change, which are on the verge of wiping out from face of this planet because of increased sea-level rising.[9]

India, unfortunately, is also experiencing this effect of climate change. Till December, 2020 there are 55 million people living in displacement out of which 7 million are out of Disaster.[10] India ranks fourth in the list of most displacement in the year 2020. India alone has 9, 29,000 internally displaced people. India, Myanmar and Bhutan and is ranked as the largest disaster displacement of the year.[11]

Last year, Cyclone Amphan had caused nearly 5 million evacuations across Bangladesh. After this incident, within merely two weeks, Gujarat and Maharashtra was struck by another massive storm, Cyclone Nisarga, which caused 170,000 evacuations, many of them could not get back to their homes again as those were completely destroyed. Subsequently, Cyclone Yaas and Taukte has displaced about 2 million people respectively.[12]

Change in the climatic condition has forced the Indian Metrological Department to revise the dates for onset and off set of monsoons. The date for withdrawal of monsoon has been extended for more than two weeks.[13] It is causing direct impact on people 's life and livelihood. In 2020 about 763,000 people were displaced due to southwest monsoon between early June and late October.[14]

The situation is also not very encouraging in neighboring areas of India. Since 1988 the pattern of monsoon in Bangladesh has undergone a sea change. Last year it witnessed the longest monsoon of the decade since 1988. Just at start of July, satellite data

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[7]Supra note 3.

[8]Stern, N., (Ed.), The Economics of Climate Change: The Stern Review, Cambridge University Press, Cambridge, 2006, p. 3. See, also Lovell, J., 2007, ?Climate change to make one billion refugees-agency?, Reuters, 13 May 2007, available at: http://www.reuters.com/article/latestCrisis/idUSL10710325 (Visited on 26 August, 2021).

[9]Eleanor Ainge Roy, ?One day we'll disappear': Tuvalu's sinking islands, The Guardian, May 16, 2019 available at: https://www.theguardian.com/global-development/2019/may/16/one-day-disappear-tuvalu- sinking-islands-rising-seas-climate-change (Visited on 26 August, 2021).

[10]Nandan Sharalaya, Taking India's Climate Migrants Seriously available at: https://thediplomat.com/2018/08/taking-indias-climate-migrants-seriously/ (Visited on 26 August, 2021).

[11]Supra note 2.

[12]PTI, Cyclone 'Yaas' ravages West Bengal, Odisha as over 20 lakhs evacuated; four dead? available at: https://economictimes.indiatimes.com/news/india/cyclone-yaas-ravages-west-bengal-odisha-as-over-20-lakh- evacuated-four-dead/articleshow/82976106.cms?from=mdr (Visited on 26 August, 2021).

[13]India Meteorological Department, ?New Normal Dates of Onset/Progress and Withdrawal of Southwest Monsoon over India 2020; India Meteorological Department, ?Statement on Climate of India during 2020, 5 January 2021.

[14]Supra note 4.

revealed that approximately a fourth of the nation had already been submerged.[15] By August the flooding was at its peak and about 5.4 million people were affected.[16]

It is clear from above facts that changing climate is a massive problem. Along other impacts, it is bound to create severe displacements in years to come. Hence there is an urgent requirement to mitigate and manage this situation at the earliest. The subject of climate change and environment displacement, on the other hand, is not given attention since the effects of climate change are noticed in nations depending on their geopolitical position.

I.III Who are Climate Refugees?- A Normative Debate:

Considering the fact that the problem of climate refugee has been a matter of open debate since 1980s, the existing definitional discontent is somewhat undesirable.[17] Several terms like climate migrant, climate refugees and climate displaced persons are used to characterize those who have been uprooted from their homes as a result of climate change's causal factors. Some are over lapping and some are used interchangeably. It is, however, makes sense to understand the specific applications of these terminologies.

In 1970, Lester Brown of the World Watch Institute coined the term "environmental refugee" or "climatic refugee" the term began to gain popularity in the 1990s.[18] Simply stating climate refugee means a person or a group of persons who become stateless due to anthropogenic or natural climate change.

However, one can argue that climate refugee is basically a subset of the climate induced migration 'or displacement'. As it suggests, climate induced migration or climate induced displacement can be categorized further based on the extent of the displacement caused. In a sense it is more specific. It can be further categorized into internal migration and cross border migration. By the term internal migration, the researcher means that the migration which causes the person to migrate with in the nation for example a shift from rural to urban regions. In fact, migration is a phenomenon that exists numerous push factors such as better job opportunity, health care facility, education system, political stability, religious freedom etc.[19] But one reason precedes all

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[15]Earth Observatory, NASA, ?Intense Flooding in Bangladesh 1 August 2020.

[16]United Nations Resident Coordinators Office Bangladesh, Humanitarian Response ?HCTT Response Plan Monsoon Floods 2020 available at: https://www. humanitarianresponse. info/en/operations/bangladesh/document/hctt-response-plan-monsoon- floods-2020 (Visited on 29 August, 2021).

[17]This perhaps came in the limelight when Essam El-Hinnawi of UNEP called environmental refugees 'as: ... those people who have been forced to leave their traditional habitat, temporarily or permanently, because of marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life'

[18]James Morrissey, Rethinking the ?Debate on Environmental Refugees': From ?Maximilists and Minimalists' to Proponents and Critics 19(1) JPE 36, 49 (2012); See, also Dr. Camillo Boano and Professor Roger Zetter , et.al., Forced Migration Policy Briefing 1, Environmentally displaced people, Refugee Studies Centre, Oxford Department of International Development, University of Oxford, (2008), available at: pb1-environmentally-displaced-people-2008.pdf (ox.ac.uk) (Visited on 29 August, 2021).

[19]Castles S, Rajah C (2010) Environmental degradation, climate change, migration and development: Mexico 2010. available at: http://www.nnirr.org/~nnirrorg/drupal/sites/default/files/ pga-paper-on-environment-and- migration-by-castlesrajah.pdf (Visited on 29 August, 2021).

other factors, i.e unexpected and drastic change in weather or the climatic condition of a particular place.

Nevertheless, the expression climate or environmental refugee has largely been criticized as misleading. These criticisms mainly point towards 1951 Refugee Convention and international refugee law where specifically climate refugees as an expression have been preferred. However, definition available under 1951 Convention is considered narrow and misses additional category of persons like the climate migrants. Therefore, according to some critics, instead of climate refugee, environmental migrant or something more contemporary one such as 'displaced person' appears to be more appropriate vocabulary.[20] One can see the 'displaced person' identifier is descriptive in nature and may become susceptible in terms of appealing normative aspect.

Furthermore, some argue that the term "climate refugee" does not exist under international law. Persons forced to escape their country as a consequence of ecological or climatic processes or events will not necessarily meet the definition of a refugee as defined by Article 1A (2) of the Refugee Convention[21] and Protocol.[22] It does not accept climate change to be one of the criteria for creation of refugees. At the academic level also the term climate migrant would be more fitting, as climate change is playing an important role in their migration or displacement.[23] But as far as the present legal position goes the term climate migrant seems to be more appropriate in comparison to climate refugees.

"The movement of a person or groups of persons who, predominantly for reasons of sudden or progressive change in the environment due to climate change, are obliged to leave their habitual place of residence, or choose to do so, either temporarily or permanently, within a State or across an international border."[24]

II. Laws and Regulations:

Professor Walter Kälin, Nina Schrepfer in their pioneering work on the subject had shown that not necessarily climate change itself always trigger the movement of people. In fact, establishment of a direct causal link between a specific climate event (say a major storm) and human displacement is often a daunting task. Similarly, when people are forced to move because of rising sea level (such as Kiribati), there may be multiple reasons involved. The argument here is not single out one specific climate event. Instead, it should be seen as wide- ranging social fallouts where climate change works as a triggering phenomenon. As a result, they believe the relationship among climate-

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[20]Stellina Jolly and Nafees Ahmad, Climate Refugees in South Asia (International Law and The Global South, 2019).

[21]Convention relating to the Status of Refugees, 1951 (adopted 28 July 1951, entered into force 22 April 1954).

[22]Protocol relating to the Status of Refugees, OHCHR 1967, available at:

https://www.ohchr.org/Documents/ProfessionalInterest/protocolrefugees.pdf. (Visited on 29 August, 2021).

[23]IOM, Environmental Migration, available at: https://migrationdataportal.org/themes/environmental_migration_and_statistics (Visited on 29 August, 2021).

[24]J. McAdam, From Economic Refugees to Climate Refugees? Review of International Refugee Law and Socio-Economic Rights: Refuge from Deprivation (2009) 31 Melbourne Journal of International Law 579, available at: https://environmentalmigration.iom.int/glossary (Visited on 29 August, 2021).

induced events and human movement must be investigated from two angles: one, the slow development of climate-change repercussions, and second, unexpected tragedies like hurricanes. They further emphasized on temporal dimension of the problem by considering the opportunities available to the displaced people to return to their original places. This often can be meaningless for those people as on return they may have to face a host of human rights related problems.[25]

Nonetheless, a legal assessment of the UNFCCC, the Kyoto Protocol, the Paris Agreement, and the expanding corpus of principles of law arising from the various COPs that response to global must be the starting point for the conversation. Simultaneously, legislative safeguards underneath the refugee legal system, as well as the implementation for human rights legislation in both the host nation and the country of origin, must be considered.

II.I International Law:

In the early part of 1990s, the IPCC, which is made up of scientists, government officials, and civil society organizations, gave climate change a sense of legitimacy and enhanced scientific confidence. The IPCC's initial evaluation description emphasized on seriousness of climate change, as well as its environmental and socioeconomic repercussions.[26] The IPCC report was put on hold while the UN General Assembly passed Resolution 45/212, which formed the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change (INC/FCCC).[27]

The Kyoto Protocol take effect on February 16, 2005. It strengthened the policy and administrative basis of such climate change regime. Then, after series of meetings and discussions, the international community came together in Paris for COP 21 to establish a historic and with the goal of limiting global warming below 2 degrees Celsius, a legally binding agreement has been reached.[28]

Climate change migration has been recognized at various build-up phases on Paris Agreement. Initial discussions on the wording on damage and loss proposed the creation of a climate change-induced relocation collaborative Centre in the run-up to Paris conference.[29] As a result, two points become critical. To begin with, the word "climate refugees" is absent from the Paris Agreement's. Secondly, the avoiding or tumbling climate-related shift emphasizing on population resilience and livelihood options.

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[25]Walter Kälin and Nina Schrepfer, Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches, Legal and Protection Policy Research Series, United Nations High Commissioner For Refugees (UNHCR), available at: https://www.unhcr.org/4f33f1729.pdf (Visited on 29 August, 2021).

[26]Lorraine Elliott, The Global Politics of the Environment 167 2nd ed, Palgrave Macmillan, 2004.

[27]Protection of global climate for present and future generations of mankind' A/RES/45/212, 1990

[28]UNFCCC. Adoption of the Paris Agreement. Report No. FCCC/CP/2015/L.9/Rev.1, available at: http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf (Visited on 29 August, 2021). (Hereinafter Paris Agreement).

[29]Jessica Wentz and Michael Burge, Designing a Climate Change Displacement Coordination Facility: Key Issues for COP 21, 2015 1-19, 2 http://columbiaclimatelaw.com/files/2016/06/Wentzand-Burger-2015-09-Displacement-Coordination-Facility.pdf (Last visited on 12-02-2029).

The UNFCCC Task Force on Displacement was established inside the Warsaw International Mechanism for Loss and Damage (WIM) in 2015, as part of the Paris Climate Change Agreement. It used a consultative method to make recommendations on in what way to deal with shift towards climate change. The United Nations System, the UNFCCC State Parties, and major shareholders are all addressed in these recommendations. These suggestions aim to address all types of human movement that are connected to climate change's negative effects. This has urged states to implement legislation, programs, and approaches to manage all types of movement related to climate change consequences also while taking into consideration institutions' provisions. Increasing the impact of review and studies on this problem by collaborating with the Global Compact for Climate Change. Members of the Task Force on Displacement taken devoted data products[30] to promote awareness of the several sorts of exoduses that occur of sluggish disasters, and to map existing UN mandates for dealing with relocation induced by climate.[31] The initiative is going to influence government legislation.

For example, the governments of Tajikistan and Kyrgyzstan are examining how closely their national policy frameworks align with the Task Force on Displacement's recommendations in order to identify relevant mechanisms and gaps, as well as formulate particular national suggestions to handle mobility and climate change challenges.[32] It's worth noting that the UNFCCC's migration-related policy work is institutionally linked to tactical team in climate talks which remain extremely relevant to migration.[33]

The Task Force on Displacement was widely acknowledged as having not only fulfilled its goal to make recommendations, but also had other good outcomes, such as providing a forum to debate "tough and sensitive problems associated to loss and harm."[34] As just a consequence of the WIM evaluation workout, the Least Developed Countries Team suggested the creation of a dispersion clinic to aid nations in dealing with specific and cross-border displacement and migration addressing climate change effects, and a direct participation of organizational performers to construct policy frameworks to best utilize awareness leads to lack and damage.[35] Building on the work done under the

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[30]UNFCCC, Fourth Meeting of the Task Force on Displacement (TFD4) Summary 7-9 September 2020, available at: Summary_TFD4_update for Excom 12.pdf (unfccc.int)(Visited on 29 April, 2022).

[31]Reliefweb: IOM to the Special Rapporteur on the Human Rights of Internally Displaced Persons, Internal displacement in the context of the slow-onset adverse effects of climate change available at: https://reliefweb.int/report/world/internal-displacement-context-slow-onset-adverse-effects-climate-change (Visited on 29 April, 2022).

[32]IOM, World Migration Report 2020, available at: https://publications.iom.int/system/files/pdf/wmr_2020.pdf (Visited on 29 April, 2022).

[33]Ibid.

[34]Hantscher, S. (2019). The UNHCR and Environmentally Displaced Persons. In: The UNHCR and Disaster Displacement in the 21st Century. Contributions to Political Science. Springer, Cham. https://doi.org/10.1007/978-3-030-19689-9_5 (Visited on 29 April, 2022).

[35]OHCHR, The slow onset effects of Climate Change and Human Rights Protection for cross-border migrants, available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR_slow_onset_of_Climate_Change_ENweb.pdf (Visited on 29 April, 2022).

UNFCCC, global migration policy talks have increasingly operated in tandem to incorporate climate and environmental issues. The approval New York Declaration for Refugees and Migrants, 2016 (New York Declaration) by United Nations Member States,[36] followed by the ratification of the Global Compact for Safe, Orderly, and Regular Migration by States in 2018.[37] However, it is vital to remember that the Global Compact for Movement primarily addresses international migration, whereas much domestic migration occurs as a result of climatic deterioration, such as from rural to urban regions.

However, completing the tasks of the Global Compact for Migratory, especially that related to tackling migration drivers and increasing adaptability & resiliency within source countries, would have a good influence both on internal and international migration. The Migration Multi-Partner Trust Fund, which had been established to assist in the implementation of the Global Compact for Migration, has started funding joint climatic migration activities.[38] While it is too early to assess practical effects. It is encouraging that governments have backed funding for migration initiatives. The International Migration Review Forum,[39] which will places in 2022 to assess state of the Global Compact for Migration's implementation, providing crucial pointers of situation commitment to execute the Compact's climate migration objectives, via action. The many worldwide proposals and principles emphasize the complicated ways of migration in relation to gradual climate consequences, as well as the necessity for policymakers from other fields to collaborate in order to establish complete solutions. Migration authorities should lead the way in turning advanced functional to global and sub-national policy that provide protection and assistance to disadvantaged migrants & populations.

II.II Human Rights and the Tale of Climate Change:

There is a clear link between climate change and human rights. Time and again climate change has affected several rights of humans and significant are the right to education, housing, health, sanitation and water, food, development, self-determination and life and right to meaningful and informed participation.

The rights violated by climate change and its impact are protected under the several human rights conventions and declarations and they are the UDHR,[40] ICCPR,[41] ICSER,[42] CERD,[43] CEDAW,[44] Convention on Rights of Child ,[45] Convention on protection of Rights of

[36]United Nation, New York Declaration for Refugees and Migrants, 2016 available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/291/97/PDF/N1629197.pdf?OpenElement (Visited on 29 April, 2022).

[37]OHCHR, Global Compact for Safe, Orderly and Regular Migration, 2018 available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/451/99/PDF/N1845199.pdf?OpenElement(Visited on 29 April, 2022).

[38]United Nation Network on Migration, Multi-Partner Trust Fund for Safe, Orderly and Regular Migration available at:https://migrationnetwork.un.org/mptf(Visited on 29 April, 2022).

[39]United Nation Network on Migration, International Migration Review Forum 2022 available at; https://migrationnetwork.un.org/international-migration-review-forum-2022(Visited on 29 April, 2022).

[40]Universal Declaration of Human Rights, 1948.

[41]International Covenant on Civil and Political Rights, 1976.

[42]International Covenant on Economic, Social and Cultural Rights, 1976.

[43]International Convention on the Elimination of All Forms of Racial Discrimination, 1969.

[44]Convention on the Elimination of All forms of Discrimination Against Women, 1979.

[45]Convention on Rights of the Child, 1989

All Migrant Workers and Members of their Families,[46] UN Declaration on the Rights of Development .[47]

However, any generalization should be avoided here. With the careful study, one can identify fault lines in the current legal framework for human rights. The main difficulty about the adequacy of protective net for climate refugees that human rights law tends to cast. It is not very comforting fact that in spite of all noise, the existing international human rights law has failed to delimit in clear language the right to healthy environment. This is important because any work on climate refugee must address the right conundrum at the first place.

A framework, offering a valuable set of legal standards for protecting victims of natural disasters who are internally displaced, is available in 1998 UN Guiding Principles on Internal Displacement. But, like many of the international legal documents, this also leaves a huge discretion in terms of implementation to the national governments.[48] Further difficulty is that it is not legally binding and implemented incoherent manner by the states across the globe. Nonetheless, the Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa was drafted using these ideas. The African Union adopted this agreement in October 2009, and it went into effect on December 6, 2012. This is the first lawful regional agreement in the world to obligate states to protect and assist displaced people, those who have been forced to migrate resulting from natural or man-made disasters or development projects.[49]

Convention on Refugees and its subsequent Protocol also fall short of providing clear guidance on legal foundation to climate change induced migrants. "OHCHR investigated on implications of climate change on human rights in 2008 and discovered trio hurdles that must be over awed before global climate change to be considered a human rights violation:

(a) Establishment of connection between one Nation's releases causing exact effect on additional republic;

(b) Demonstrating that human rights concerns are entirely linked to climate change; and

© Recognizing that the rights paradigm is often applied in reaction to transgressions, while global climate legislation is concerned about future damage."[50]

The Nansen Conference on Climate Change and Migration, held in Norway in 2011, was

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[46]International Convention on Protection of Rights of All Migrant Workers and Members of their Families,1990

[47]UN Declaration on the Rights of Development, 1986

[48]Walter Kälin and Nina Schrepfer, Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches, Legal and Protection Policy Research Series, United Nations High Commissioner For Refugees (UNHCR). available at: https://www.unhcr.org/4f33f1729.pdf. (Visited on 30, April 2022).

[49]African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 2009.

[50]Understanding Human Rights and Climate Change, OHCHR, available at: https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf.(Visited on 30 April, 2022).

a watershed moment, with participants formulating key principles on climate change and inter migration, especially in the event of unforeseeable events.[51]

The Kyoto Protocol acted as a guiding light for the Convention. The guidelines emphasised need for aiding local legal and policy formation in responding to climate changing relocation, with an emphasis on humanity, respect, and civil rights.[52]

Yet these are limited to regional efforts only and thus far, have failed to create any attractive global solution.

II.III Climate Change: India's Historical Perspective and Policy Prescription

India has been a key player in global climate negotiation. Following the passing of United Nations General Assembly (UNGA) Resolution 44/207 in 1989, as member states it urgently put together an outline convention to deal with worldwide problem, India lost zero time in clarifying its views on the issue and forming a strong Southern alliance behind it.[53]

Environmental issues in India have received distinct attention from legislature, executives and judiciary from 1980s. During this era Indian Parliament understood the seriousness of some of the difficult environmental problems and tried to address them by making new laws. But implementation of these laws was not up to the mark and judiciary stepped in to plug the gaps whenever possible. Over the period of time, environmental jurisprudence took a distinct shape in India, much of it molded by active judiciary.[54]

Climate change started to take important place in India 's national policy-making throughout the early Centuries. In 2008, a policy framework laying its National Action Plan on Climate Change (NAPCC) and its subsidiary Eight Missions.[55]

In 2018, India submitted its Second Biennial Update Report (BUR) to the UNFCCC in accordance with the convention's reporting requirements. The research claims that between 2005 and 2014, India's GDP emission intensity has fallen by 21%, and India's climate goal for the period before 2020 is on pace.[56]

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[51]UNHCR, The Nansen Conference Climate Change and Displacement in the 21st Century, available at: https://www.unhcr.org/4ea969729.pdf(Visited on 30 April, 202).

[52]Disaster Displacement, The Nansen Initiative, 2015, available at: https://disasterdisplacement.org/wp-content/uploads/2014/08/EN_Protection_Agenda_Volume_I_-low_res.pdf(Visited on 30 April, 202).

[53]Sandeep Sengupta, "India's Engagement in Global Climate Negotiations from Rio to Paris" India in a Warming World Integrating Climate Change and Development, 115 Oxford University Press, 2019.

[54]MC Mehta v. Union of India WP © 13029/1985, MC Mehta v. Union of India AIR 1987 SC 1086, Godavarman Thirumulpad vs. Union of India and Ors W.P.(C) No. 202 of 1995, Vellore Citizens Welfare Forum v. Union of India AIR 1996 SC 2718, State of Himachal Pradesh v. Ganesh Wood Products AIR 1996 SC 149, Indian Council for Enviro-Legal Action v. Union of India (1996) 5 SCC 281, Enkay Plastics Pvt. Ltd. v. Union of India and Ors 2000(56) DRJ 828, Hanuman Laxman Aroskar v. UoI & Others MANU/SC/0444/2019.

[55]National Action Plan on Climate Change, Government of India, Prime Minister's Council on Climate Change, 2008, available at: https://archivepmo.nic.in/drmanmohansingh/climate_change_english.pdf (visited on 17 June 2021).

[56]Press Information Bureau, Government of India, Ministry of Environment, Forest and Climate Change, 12 February 2019, available at: https://pib.gov.in/Pressreleaseshare.aspx?PRID=1564033 (Visited on 2, September, 2021).

III. India's Position to Address Climate Refugee Problem:

Climate change has already been imaginatively labelled like a "vicious" problem since it lacks a specific explanation, is fractured by scientific ambiguity, and suggested solutions are difficult due to their embeddedness in economic, political, and financial institutions.[57] If weather change is primarily a matter of justice and equality for some, it is primarily an economic and technical problem for someone else. Even just the concept of an issue is complicated in relation to its problems, and so how we discuss and argue weather issues is a difficulty; variances in interests are equally muddled by employing differences in interpretation.[58]

III.I India's March toward Climate Change:

The first of its kind for developing nations was held in April 1990 in New Delhi at the 'Conference of Select Developing Countries on Global Environmental Issues.' India won the top award for its straightforward climate change views. This one was that the civilized world bore the primary responsibility for reducing greenhouse gas (GHG) emissions that cause climate change since they were responsible for the vast bulk of such emissions. Second, emerging nations' outputs have already been relatively low, and they've had to grow in order to meet its future growth and food insecurity goals, therefore no GHG reduction goals could be set for nations. Third, any official agreement on changing climate has to include an era shift and money for developing countries to help them address the problem (Ministry of Environment).[59]

Many legislations specifically discourse specific climate change's different facets, such as implications to give possible legal targets for climate litigation.[60] In India, however, There is presently no overarching climate change law.

Though, India's expansion apprehensions, as well as mitigation and variation issues, necessitated the formulation of a distinct national policy. The 'National Action Plan on Climate Change (NAPCC), Prime Minister's Council for Climate Change, Government of India (2008)' and its supplementary Eight Missions lay forth this framework. These missions are meant to help India progress its development and establish its climate mitigation and adaptation strategy while adhering to the National Action Plan on Climate Change's principles.

III.II Environment, Indian Constitution vis-à-vis Climate Refugee:

The Indian Constitution, one of only a handful in the world, addresses environmental concerns. The country's dedication to environmental protection and development is shown in the Directive Principles of State Policy (DPSP) and Fundamental Duties

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[57]Mike Hulme, Why We Disagree about Climate Change: Understanding Controversy, Inaction and Opportunity. Cambridge: Cambridge University Press, 2009.

[58]Navroz K. Dubash, 'An Introduction to India's Evolving Climate Change Debate: From Diplomatic Insulation to Policy Integration' India in a Warming World Integrating Climate Change and Development, 1 Oxford University Press, 2019.

[59]Ministry of Environment and Forests (MoEF) . 1990. 'Greenhouse Eff ect and Climate Change: Issues for the Developing Countries', in Proceedings of the Conference of Select Developing Countries on Global Environmental Issues . New Delhi: MoEF, GoI.

[60]Ghosh, S. (2020). Litigating Climate Claims in India. AJIL Unbound, 114, 45-50. Available at: doi:10.1017/aju.2020.5 (visited on 17 June 2021).

chapters. Climate change can not be seen as a stand-alone phenomenon. It will also influence India's economic and social growth. As a result, India had consented to partake in UNFCC-led worldwide climate change talks.

Article 47 of Indian Constitution declares that it is a state's principal responsibility to promote nutrition, living standards of its citizens, and public health. It is clear that environmental protection and improvement are involved in the improvement of public health because public health cannot be guaranteed without environmental protection. For the first time, the phrases ecology and environment were inserted to the Indian Constitution under Article 48A and Article 51A(g) following the 42nd Amendment. The government took a good start by including citizen responsibilities and environmental protection rights in the constitution. Article 49A, which refers to DPSP, inserted in Part IV of the Constitution. It gives a constitutional frame to protect and improve the environment, as well as to safeguard the country's forest and wildlife. Part III gives a Constitutional Rights, which indicates that every Indian citizen has certain rights, including the right to freedom, equality, and acceptable living situations. It provides a duty for present and future generations to defend and maintain the condition. Whereas the country's Highest Court and many High Courts have provided a wider scope of "life" within Article 21, it's doesn't immediately relate to climatic changes.

For Last few decades, India has been frontrunner in preserving its flora and fauna by various legislations and constitutional amendments, but it is silent about 'Climate Refugee' Protection. Impromptu construction projects, such as dams, bridges, and trains that were built without regard for scientific or environmental considerations has forced people to relocate in India.[61] Climate change is caused by many developmental activities, which leads to the generation of climate refugees. There really is no special domestic legislation in India that deals with refugees. Climate refugees may come under Articles 21 (Right to Life) and 14 (Right to Equality) of the Indian Constitution, which provide that non-citizens have the same right to life and equality as citizens. Part III of India's Constitution prohibits discrimination on the basis of race, religion, caste, creed, sex, or place of birth, and other fundamental liberties are equally accessible to refugees with reasonable restrictions. There are no substantial laws that protect refugees, despite the fact that the Foreigners Act of 1946 defines a person of non-Indian nationality as a "foreigner" means a person who is not a citizen of India".[62] Under the Foreigner Registration Act 1939 and the Foreigner Act 1946, which regulate the entry, stay, and departure of all aliens in India, the government establishes the status of refugees by ad hoc administrative decisions. The Passport (Entry into India) Act 1920, the Passport Act 1967, and the Extradition Act 1962 are also relevant. To handle refugees, India does not have a national agency other than the Foreigner Regional Registration Office (FRRO), which is part of the Bureau of Immigration.[63]

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[61]Sincy Wilson, "Recognition of Climate refugees: What should be India's stand?" RLI blog on Refugee Law and Forced Migration, available at: https://rli.blogs.sas.ac.uk/2021/03/18/recognition-of-climate-refugees-what-should-be-indias-stand/ (Visited on 11 June 2021).

[62]Section 2(a), The Foreigners Act, 1946.

[63]Stellina Jolly and Nafees Ahmad, Climate Refugees in South Asia Protection Under International Legal Standards and State Practices in South Asia, Springer Nature Singapore, 2019.

India is expected to have a significant surge in migration. There are no legal or regulatory structures in place to manage migration at the global, national and regional level.[64] In the majority of cases, total displacement with loss of house and livelihood has occurred, and the state has gone unreported. In India, there are a few pieces of legislation, such as the Right to Fair Compensation and Transparency in Property Acquisition, Rehabilitation, and Resettlement Act, 2013, which deals with compensation in circumstances when the government acquires land for development purposes. The Disaster Management Act of 2005, which creates catastrophe strategies, avoids or eases adversity things, and organises and manages responses, is another piece of law that deals with rehabilitation in the event of climatic events. These regulations, however, do not address the rehabilitation of climate refugees from other countries. However, these restrictions do not cover the reintegration of climate refugees from other nations.

The lack of a national legislation on refugees has left refugee rights in uncertainty, and India must take significant actions to pass a refugee law in order to safeguard territorial integrity and set high standards for international human rights respect. The idea of non-refoulement[65] is not officially recognized in Indian law. However, India's constitutional structure includes some measures that benefit all citizens, regardless of citizenship. As a result, it is stated to apply to both refugees and non-refugees. The domain of the Indian Constitution was defined in such a way as to protect the rights of persons who were not born on Indian soil.

Signatories to the International Covenant on Civil and Political Rights and the Convention Against Torture. India has also agreed to the Bangkok Principles. According to Article III of the Bangkok Principles, an individual cannot be expelled if there is a risk of harm to him as a result of his race, religion, nationality, ethnic origin, participation in a specific social group, or political beliefs. The Foreigners Act of 1946 and the Citizenship Act of 1955 are the two legislation that now deal with refugees. The Foreigners Act of 1946 is stated to apply to all non-Indians, however it does not include the non-refoulement clause.

IV. Conclusion

India, with its diverse cultures and values, is noted for its big democracy and multi-party system, and it is wary of an outside involvement in its domestic affairs, believing that it has been dealing with difficulties inside the country. Refugees have an impact on the country's political stability, and leaders are driven by worries about how their decisions on refugees will be perceived by the people. Its refusal to accept foreign meddling in its internal affairs doesn't quite appear to be improper, because every nation has the right to

[64] J. Houghton, 2005, Global Warming: The Complete Briefing, Cambridge University Press, 2005.

[65] The principle of non-refoulement forms an essential protection under international human rights, refugee, humanitarian and customary law. It prohibits States from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill treatment or other serious human rights violations. Under international human rights law the prohibition of refoulement is explicitly included in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).

protect its sovereignty. Identifying climate refugees under the Refugee Convention is a feasible alternative, but it is not without its drawbacks. India must be ready enough within its legal framework to recognise Climate Refuges as it will be a slow but steady process in coming years as different border nations are vulnerable to Climate Change which will push Refuges influx in coming days.

COURTS & SOCIETY: ACOMMENTARY ONTHE BELEAGUERED SCALES OF JUSTICE IN COVID TIMES

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Abstract

Social Justice is emblematic of constitutional justice, which aims at efficaciously addressing the observable biases and divisions in society. COVID upended the societal applecart by plunging the institutions into a never seen chaos and turbulence. The social setting met a gargantuan force of COVID, thus skewing the existing social norms. India's commitment to a welfare state was severely tested. The courts' position as the premier institutions for serving legal justice took a beating. The social exclusion earlier earmarked on various factors had the Internet as a new facet attached to it. Internet access created a new feature to entrench pervasive social divisions. Incorporating the Internet as a critical component of the governance model amplified the social divisions. Justice became a far cry as the Internet became a sine qua non for approaching the courts. Internet Rich and Internet Poor became the order of the day. The governance model in COVID times became a justice conundrum favoring a few and leaving the significant others in unsettling disquiet. The study's objective would be to assess the multitudinous challenges encountered on the justice front and how the Internet-savvy Judiciary during COVID times caused a civil rights conundrum. The findings would help evaluate the insidious practices of the justice system during testing times and how the constitutional system, unfortunately, finds itself unavailable to assuage the frayed tensions.

Key words-
Justice, Social Divisions, Social Exclusion, Internet Rich, Internet Poor, Conundrum.

1. INTRODUCTION

The measure of societal consensus is predicated upon social unity united by the contractual agreement of shared interests for the greater good of the masses. Social interests are commonly connected by mutually shared interests which constitute the coming together of groups to forma social union[1]. As per Hobbes[2] , Locke[3] , and Rousseau[4] , the conception of society in its purest standard was motivated by the conceding of interests for greater societal control and to attain social tranquility and order where the living style was nasty, poor, brutish, and short.[5]

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[1]Fukuyama, F. (2001). Social capital, civil society and development. Third world quarterly, 22(1), 7-20.
[2]Read, J. H. (1991). Thomas Hobbes: Power in the state of nature, power in civil society. Polity, 23(4), 505-525.
[3]Yolton, J. W. (1958). Locke on the Law of Nature. The Philosophical Review, 67(4), 477-498.
[4]Bellah, R. N. (2008). Rousseau on Society and the Individual. In The social contract and the first and second discourses (pp. 266-287). Yale University Press.
[5]Morris, C. W. (1999). The Social Contract Theorists: Critical Essays on Hobbes, Locke, and Rousseau. Ohio: Rowman & Littlefield.

The society stood conceptualized to achieve a state of functional, organized setup. Man has a nature to become arbitrary, so to eschew the nefarious proclivities for abuse of power, an imperative need was felt to bedeck the society with accountability-driven institutions. It forms the cornerstone of the efficacy behind institutions in a functional societal setup.

Institutions form the bedrock of any social structure[6] . The need for institutions plays a normative role. It not only helps in exceptional stability in society but also generates a set of common frameworks of rules and regulations that are to be adhered to by everyone across the board. Justice in society is a prime mover to ensure stability. Justice is an embodiment of just, fair, reasoned decision-making and, above all, rationality[7] . Justice is the fountain of truth, probity, and integrity[8] . The institutions of justice thus play an uncompromisable and inevitable role in ensuring good governance. Courts are envisaged as the pioneering institutions to help facilitate the delivery of justice to ensure that societal tensions get legally ameliorated[9] . Society and justice are two norms-creating and pattern-building indicators to suffice the narrative of the changing interests in the community. Social behavior and the penchant for rightful justice govern the underlying urge to do better and go better on social fronts. Meaning, thereby, the abiding faith to dutifully discharge one's obligations.

In its naked self, society is beset with variegated discrepancies and unrivaled differences marked by various indicators, ranging from the place of birth, caste, creed, religion, race, sex, age, and residence[10] . These factors shape the extent of role-playing of individuals in their ways. Justice-seeking is also affected by these indicators. Academic penetration is likewise affected and influenced. The cocktail of society and societal conditions in conditioning the position of people in society is unimaginably large and overwhelming. Justice posits the common thread available to everyone equally in the face of prevailing societal dichotomies. The expectation of equitable justice as a shining beacon forms the substratum of the societal state. The culmination of the study will significantly contribute to developing a sense of understanding of how access to the Internet becomes a significant determinant of access to justice. It would also help to understand how the justice system predetermines the societal template and how it failed to live up to the challenge posed by COVID-induced exigencies.

2.THE COVID ONSET-DISMANTLING OF THE SOCIETAL STATUS QUO

The equality disseminated by the structural existence of courts is unprecedented and incomparable[11]. Courts are the beacons of equality in their natural essence. Like any other public institution, the functioning of courts is also sensitive to social surroundings and relevant situations in the play.

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[6]Hodgson, G. M. (2003). Reconstitutive downward causation: social structure and the development of individual agency. In Intersubjectivity in Economics (pp. 173-194). Routledge.

[7]Spellman, B. A., &Schnall, S. (2009). Embodied rationality. Queen's LJ, 35, 117.

[8]Kaur, S. (2019). Judicial system in ancient India: A review. Asian Journal of Multidimensional Research (AJMR), 8(5), 190-200.

[9]Baxi, U. (1985). Taking suffering seriously: Social action litigation in the Supreme Court of India. Third World Legal Stud., 107.

[10]Florida, R. (2015). The creative class. In The City Reader (pp. 197-204). Routledge; Tiwari, G. S. (2002). THE EQUALITY-LIBERTY AXIS: A SOCIO-POLITICAL PARADIGM OF HUMAN DEVELOPMENT. Journal of the Indian Law Institute, 44(4), 534-554; Tiwari, G. S. (2002). THE EQUALITY-LIBERTY AXIS: A SOCIO-POLITICAL PARADIGM OF HUMAN DEVELOPMENT. Journal of the Indian Law Institute, 44(4), 534-554.

[11]Silbey, S. S. (2005). After legal consciousness. Annu. Rev. Law Soc. Sci., 1, 323-368.

The onset of COVID as a global pandemic dismantled how society was disposed to carry out its affairs[12].

It threw society into tumultuous chaos and penetrating disruption, thus effectively hampering everything alongside it. Schools were shut down[13], empty roads were the order of the day[14], institutions were brought to a standstill[15], industries went into silence[16], etc.

In brief, a hypothetical state of dysphoric governance became a state of reality. An ugly, unforgiving reality deepened the existing social divides on a new scale. COVID dismantled the thriving social structures and threw them in disarray. COVID initiated social exclusion[17], and the welfare state's imagination of the society went haywire. In essence, COVID's onset was an insignia of an overwhelming human rights crisis[18]. The worst of the worst situations that could be conceived were unfolding. With rampant hunger, education suspension, livelihoods at stake, and innumerable death numbers, institutions of governance were tested for their responsiveness during trying times[19].

The existing social divide got further amplified as the resource availability at the disposal of the public became abysmally weak, and the opportunity to earn met a dead end. Amidst the chaos, the institution of justice that forms the nerve center of peace and judicious settlement of issues hit rock bottom. Justice delivery became a scarcity. The functioning of courts got beleaguered due to the rapid onset of COVID[20]. The expectation of an afflicted litigant to be heard by the judicial institution for the dispassionate delivery of justice forms the hallmark of any sound, constitutionally governed society[21].

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[12]Hayry, M. (2022). COVID-19 and Beyond: The need for Copathy and Impartial Advisers. Cambridge Quarterly of Healthcare Ethics, 220-229.

[13]Burki, T. K. (2020). COVID-19: consequences for higher education. The Lancet Oncology, 21(6), 758.

[14]Abraham, T. (2020). COVID-19 communication in India. Journal of communication in Healthcare, 13(1), 10-12.

[15]Ellis, V., Steadman, S., & Mao, Q. (2020). 'Come to a screeching halt': Can change in teacher education during the COVID-19 pandemic be seen as innovation?. European Journal of Teacher Education, 43(4), 559-572.

[16]Mishra, A., Das, S., Singh, D., & Maurya, A. K. (2021). Effect of COVID-19 lockdown on noise pollution levels in an Indian city: a case study of Kanpur. Environmental Science and Pollution Research, 28(33), 46007-46019.

[17]Sahoo, S., Rani, S., Parveen, S., Singh, A. P., Mehra, A., Chakrabarti, S., ... &Tandup, C. (2020). Self-harm and COVID-19 Pandemic: An emerging concern-A report of 2 cases from India. Asian journal of psychiatry, 51, 102104; Bhattacharya, P., Banerjee, D., & Rao, T. S. (2020). The "untold" side of COVID-19: Social stigma and its consequences in India. Indian journal of psychological medicine, 42(4), 382-386.

[18]Elshobake, M. (2021). Human rights violations during the COVID-19 pandemic. International Journal of Human Rights in Healthcare.

[19]Choudhury, S. K. (2021). Migrant workers and human rights: A critical study on India's COVID-19 lockdown policy. Social Sciences & Humanities Open.

[20]Dehury, R. K., &Mahanandia, R. (2022). The ethical concerns of a pandemic: A critical analysis and opinions of the Indian situation in covid era. Asia Pacific Journal of Health Management, 17(2), 1-8; Rattan, J., & Rattan, V. (2021). The COVID-19 Crisis-The New Challenges before the Indian Justice and Court Administration System. In IJCA (Vol. 12, p. 1); Eichler, J., &Sonkar, S. (2021). Challenging absolute executive powers in times of corona: re-examining constitutional courts and the collective right to public contestation as instruments of institutional control. Review of Economics and Political Science; Mohanty, U. (2021). Law Enforecement and Judiciary During Covid-19 Pandemic: A Study on Smart Cities of Eastern India. Sch Int J Law Crime Justice, 4(6), 417-423; Singh, A. P. (2021). Virtual Courts during the COVID-19 Pandemic: A Critical Exposition. Supremo Amicus, 24, 452.

[21]Damaska, M. R., & Fisher, S. (1995). The faces of justice and state authority. In The Faces of Justice and State Authority. Yale University Press; King, M. S. (2010). Judging, judicial values and judicial conduct in problem-solving courts, indigenous sentencing courts and mainstream courts. Journal of Judicial Administration, 19(3), 133-159.

This enforceable expectation that creates the edifice of any justice delivery system was up against the behemoth of a challenge like COVID. The onset of COVID disrupted the thriving social expectations and became an overriding force bulldozing every other social, legal, and political commitment. The pandemic brought a new renaissance into society, i.e., COVID-induced normalcy[22].

The new normality had the Internet as a ground norm with everything shut down; humankind had nowhere to resort to but to rely heavily on the new arrangements designed, by necessity, due to the onset of the COVID-enforced paradigm. This led to the redevelopment of social equations. The functioning of the governmental systems came under a massive spell of doubt and cloud. The governmental systems' efficacy was subjected to continuous scrutiny for its glaring ineffectiveness in living up to the incalculable COVID brought challenges. The inadequacy and inefficacy became even more exacerbated when the constitutional structure's nerve center, i.e., the institution of justice, pre-supposed the Internet's presence as a mandatory rule to imagine the exercise of rights.

Another serious repercussion that can't be ignored because of the COVID-19 crisis in India is equally disturbing. During the COVID-19 crisis, the courts in India at various levels, including the Supreme Court, the High Court, and the Subordinate or District Court levels, have insisted on only holding virtual hearings[23] for several cases through guidelines that have been issued from time to time. These levels include the Supreme Court. However, because of the realities on the ground, many litigants are prevented from seeking justice through no fault of their own. More specifically, the COVID-19 crisis is to blame for the inability of lawyers to contest cases in faraway rural areas and remote towns with no internet connectivity. As a result, the litigants are suffering.

In addition, it appeared that the situation was the same for other stakeholders in the justice administration who were on the periphery but still very important during the COVID-19 crisis. Because of the stringent COVID-19 restrictions, there was a significant drop in the number of people entering the courts, which resulted in meager earnings for the Notaries, Oath Commissioners, and a subset of lawyers who practicedin the area of offenses related to petty crimes.On the other hand, with the COVID-19 pandemic dangers in mind, the government is swiftly providing video-conferencing rooms in courts across the nation to facilitate E-judiciary as a mode of justice administration during the COVID-19 crisis period[24]. This is being done to ensure that justice can be administered during the COVID-19 crisis.

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[23]Singh, M. (2022). Challenges before the indian justice and court administration system in the COVID-19 Crisis. Resilience Transform Global Restruct, 12; Bateson, D. (2020). Virtual Arbitration: The Impact of COVID-19. Indian J. Arb. L., 9, 159; Agrawal, P. (2021). Virtual Court System in India: An Experiment. Available at SSRN 4090127; Kannan, S. (2022). Covid-19: An opportunity to restructure the Indian legal system. Issue 1 Int'l JL Mgmt. & Human., 5, 1742; Jain, R., & Chaudhary, S. (2021). The Renaissance of Virtual Courts: Towards the Digital Age. Issue 3 Int'l JL Mgmt. & Human., 4, 5722; Aggarwal, A., & Mittal, K. Developing Hybrid Model of Online Courts and Mediation for India through Cross Countries Study. Dr Nand Kishore Garg, 291; Ghorpade, A. (2021). E-Courts Project and Reforms in Judiciary. Jus Corpus LJ, 2, 681.

[24]Tahura, U. S. (2021). Can Technology Be a Potential Solution for a Cost-Effective Litigation System in Bangladesh?. Justice System Journal, 42(2), 180-204; Meena, M. D., &Baplawat, A. (2022). Covid 19 And Judicial System-From A Pragmatic to Modern approach. Journal of Pharmaceutical Negative Results, 1079-1085.

3.INTERNET & COVID-DEEPENING OF SOCIAL DIVIDE

With COVID came its inalienable ally of mandatory Internet usage[25]. The already thriving societal divisions got further aggravated with the Internet becoming a common usage to experience even the most basic joys of one's life. Access to food became dependent on the Internet, not to speak about access to justice which was already a distant goal for many. The societal divides got reshaped as an Internet chasm[26]. A chasm so sinister, deep, and formidable that it bore the capacity to alter the pattern of human living[27]. The half that had access to a pool of resources became Internet Rich, and the other half that was devoid of Internet access became Internet Poor. This Internet connectivity governance model to ascertain access to rights became a familiar sight as the e-courts system emerged[28].

The government was unprepared to anticipate the civil rights positioning in the cataclysmic event of the COVID-natured pandemic. Governments worldwide, including the Indian government, made the Internet an e-governance tool, thus throwing a considerable portion of the Indian population out of the window. The process of winnowing out based on the Internet was so perverse that the Internet Poor didn't even form part of the governmental imagination in COVID governance. The modalities of the governments were so Internet rich biased that the poor who earlier had to die due to poverty took the beating for their inability to have Internet access. In the face of the onslaught of covid-induced prejudices, the expectation of justice remained a feature of dreamland. In a painting drawn of justice in covid times, the lady of justice was probably weeping till asleep witnessing the dismantling of judicial infrastructure. The judicial infrastructure, which was already a far-fetched arena, became ensconced with Internet privilege, thus negativing the pertinent concerns of the Internet Poor.

4. FALL OF THE JUSTICE DELIVERY SYSTEM

Justice is the concept of equity and forms an indivisible whole to ensure a seamless exchange of affairs in society. Courts provide the distribution of justice by belting out judgments and orders to end the contestation between the parties. COVID brought a massive challenge to the justice delivery system. As the author appreciates Indian concerns, dilating on the Indian justice delivery in that intervening period becomes apposite. The incredible pendency of cases before the Indian Higher Judiciary doesn't raise eyebrows anymore as it's a matter of common knowledge. This existing malady was aggravated when the judicial institutions closed due to compelling and unforgiving pandemic-initiated circumstances.

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[25]Secretariat, R. S. (2020). Interim Report on the Functioning of the Virtual Courts/Court proceedings through video conferencing. Parliament of India.

[26]Erer, D., Erer, E., & Korkmaz, O. (2022). Internet access and its role on educational inequality during the COVID-19 pandemic. Telecommunications Policy.

[27]Belli, L. (2016). End-to-end, net neutrality and human rights. In Net neutrality compendium (pp. 13-29). Springer, Cham; Taddeo, M. (2020). The ethical governance of the digital during and after the COVID-19 pandemic. Minds and Machines, 30(2), 171-176; Sambuli, N. (2016). Challenges and opportunities for advancing Internet access in developing countries while upholding net neutrality. Journal of Cyber Policy, 1(1), 61-74.

[28]Express Computer. Revamping India's judicial procedures with courtroom technology, 9 February 2021, <https://www.expresscomputer.in/news/revamping-indias-judicial-procedures-with-courtroom-technology/22263/>, Ujaley, Mohd, accessed 12 December 2022; Times of India, 4 March 2019. E-Courts app brings reforms in justice delivery system, Thakur, Pradeep, <eCourts app brings reforms in justice delivery system | India News - Times of India>, accessed 12 December 2022.

The unending pendency of cases offers an ominous sign for any justice system as it keeps the litigation pending for years, thus defeating speedy justice's ideals. The expectation on the part of the citizenry to approach the court for time-bound disposal of cases is a sine qua non in any constitutional system. This expectation takes a beating when the petitions linger for years without listing, let alone hearing the same. This problem got accentuated multifold with the pandemic-forced circumstances. The courts were closed, justice delivery became a rarity, litigations were not getting listed, etc. In essence, the fall of the justice delivery system was palpable as the public stood fallen out of access to courts[29].

From the Indian constitutional standpoint, speedy justice is a constitutional goal engrafted in Article 39-A of the Constitution of India, 1950[30]. It is likewise buttressed and amplified by way of several apex court judgments. Speedy Justice is necessary to enhance the constitutional promise strengthened by the relevant provision[31]. The preambular guarantees in the Indian Constitution promise justice with the end goal of assuring the individual's dignity[32]. Justice also has a remarkable interlocked relationship with the people's dignity to whom the Constitution serves day and night.

Dignity represents the sum and substance of a person's wholesomeness. The lifetime endeavors one carries about earn a reputation for oneself. This reputation is intrinsically connected with dignity, which human beings hold the propensity to preserve at all costs[33]. This penchant for self-preservation by ensuring enforceable respect for dignity is a part of Article 21 of the Indian Constitution. If justice is not meted out in a time-bound manner, the life and dignity of an individual go for a toss, thus sounding the death knell for constitutional efficacy to ensure the realization of its cherished goals. Justice in society serves a normative and functional role as it helps address the ebbs and flows of disputes between the parties. In essence, justice plays a defining role in shaping the social narrative. Justice is a social science delivered at the behest of the courts to compose a tranquil functioning of the social institutions.

All justice attributes took a major thrashing as COVID brought in a wave of insurmountable challenges that the justice infrastructure was primarily ill-equipped to handle, let alone quickly address. COVID brought a full stop to justice delivery, thus effectively imposing a COVID emergency on the justice system. The COVID emergency was compounded by Internet penetration which became a source of continuous engagement. The existing divisions in society got further exacerbated. The inadequacy and inefficacy became even more heightened when the nerve center of the constitutional structure collapsed, i.e., the fall of the justice delivery system in the aftermath of COVID.

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[29]Rattan, J., & Rattan, V. (2021). The COVID-19 Crisis-The New Challenges before the Indian Justice and Court Administration System. In IJCA (Vol. 12, p. 1).

[30]Seervai, H. (2015). Constitutional Law of India. Universal Law Publishing - An imprint of LexisNexis.

[31]Zasloff, J. (2022). On "Enforceable" Directive Principles: The Emerging Civil Right to Counsel in India. UCLA School of Law, Public Law Research Paper, (22-07); Baxi, U. (1985). Taking suffering seriously: Social action litigation in the Supreme Court of India. Third World Legal Stud., 107; Muralidhar, S. (2005). Legal aid practices: comparative perspectives. Obiter, 26(2), 261-284; Anderson, M. R. (2003). Access to justice and legal process: making legal institutions responsive to poor people in LDCs.

[32]Lahoti, J. R. (2004). Preamble: The Spirit and Backbone of the Constitution of India. Delhi: Eastern Book Company.

[33]Koops, B.-J. (2017). A Typology of Privacy. University of Pennsylvania Journal of International Law, 566.

5. JUSTICE CONUNDRUM IN INTERNET TIMES

The Indian judicial system and, more specifically, the Indian higher Judiciary, which is constitutionally duty-bound to hear cases about civil rights, found itself wanting. The avenues of access to justice were shut, and justice was handed out to people, with access to the Internet becoming a sine qua non[34]. The functioning of the courts was closed and subsequently was limited to hearing a few critical cases. The judicial processes became so perversely biased that the citizenry had no resort to the courts. Judicial exclusion due to internet isolation stereotyped the situation of justice-seeking masses.

Justice delivery became scarce as the pendency was bursting at all seams. In those misfortunate circumstances, the enforcement of fundamental rights was palpably suspended given the inefficient and inadequate judicial covid-friendly infrastructure. When the Indian constitutional book had to come to the immediate rescue of the people to it owes its origin, it left its citizenry in the lurch to face the bulldozing of COVID misery and heightened governmental apathy.

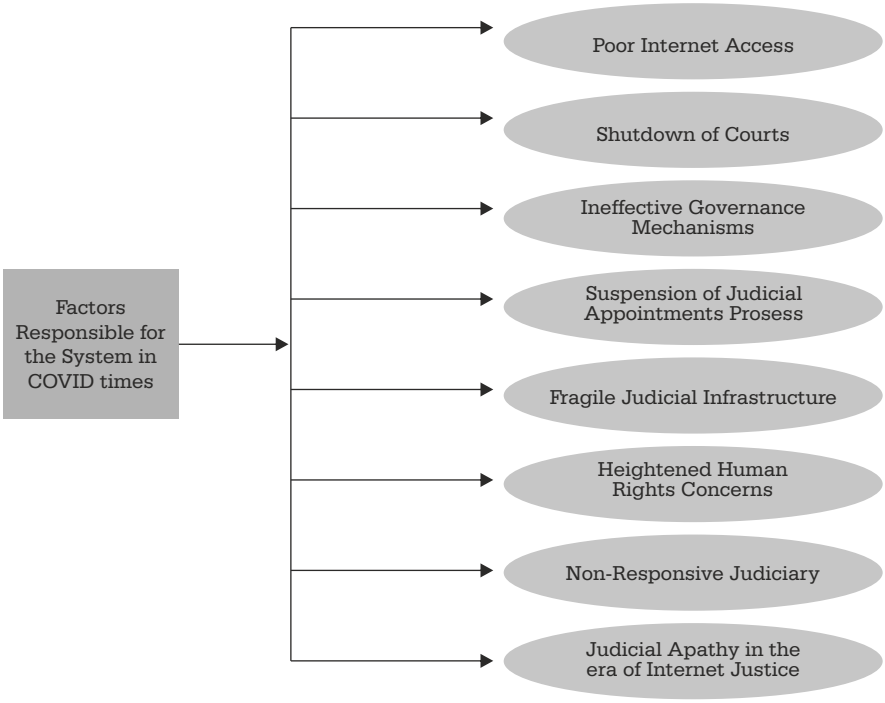

Figure 1: Factors Responsible for the Fall of the Justice System in Covid Times

[34]Rattan, J. R. (2021). The COVID-19 Crisis - the New Challenges Before the Indian Justice and Court Administration System. Indian Journal for Court Administration, 11.

Social Justice became a distant dream. The legitimate vision of the citizenry to be heard by courts in times of COVID distress met a deafening silence. This eerie silence on the part of the courts was a compromising constitutional act. The shirking of constitutional duties is unthinkable within the organized constitutional realm. In COVID times requiring urgent judicial intervention, the processes and functioning of the courts across the country were in shambles in the Indian higher Judiciary[35]. The social exclusion suffered by the poor and downtrodden got further amplified, with the Internet becoming another arm of discrimination.

Even the Supreme Court had to acknowledge the justice divide during COVID times and the failures of the judicial infrastructure to accommodate the pressing justice demands for as long as two years during the entire span of COVID. This spree of insidious practice of discrimination wasn't just limited to the financially deprived. Still, it took within its devour even those who had deep pockets but were technologically illiterate or challenged. For instance, advocates in the legal fraternity who were accustomed to practicing in the physical world found it backbreaking to transform themselves into digital space.

The herculean COVID-induced challenges battered everyone, but they actuated a wave of colossal burdens and wrongs on the ones who formed the marginalized whole. They had high hopes for the justice institution, but it failed to step onto the occasion. The justice institutions turned a blind eye to their misery. Compounding the problem during COVID times, the entire appointment process to the judicial institutions was interminably suspended[36]. The constitutional courts were functioning with judgeships vacancies skyrocketing. Although the courts were operating with reduced caseloads, the judge's requirement to dispose of the pending cases was egregiously insufficient[37]. Civil rights issues of time-essence during COVID times remained pending or were not taken up for hearing. The apparent shirking of work by the judicial institution caused an assault on the public trust and depleted the faith in judicial functioning.

6. CONCLUSION

Legal Justice and Social Justice form the cornerstone of our constitutional structure. The same can be said about every constitutional system worldwide. The normative function of the efficacious stream of justice is to ensure social stability by putting a judicial tranquilizer to agitated litigant concerns. The COVID-forced status quo brought a social pandemonium, of which judicial shutdown was a corollary. The Judiciary fell short of its duty as a responsible institution saddled with the constitutional imprimatur

[35]Singh, R., & Leo, U. (2021). COVID-19 and supreme court contractual disputes in India: a law and economics perspective. Economic and Political Weekly, 56(16), 37-43; Nomani, M. Z. M., Nusrati, N. A., &Mohataj, M. (2020). COVID-19 pandemic and challenges of public health administration & criminal justice system. International Journal of Pharmaceutical Research, 12(3), 728-735; Singh, M. (2022). Challenges before the indian justice and court administration system in the COVID-19 Crisis. Resilience Transform Global Restruct, 12; Pradhan, D., Hidayah, N. P., Anggraeny, I., & Esfandiari, F. (2021, January). Constitutional Rights of Labour During Covid 19 Pandemic: A Study of India and Indonesia. In 2nd International Conference on Law Reform (INCLAR 2021) (pp. 250-255). Atlantis Press; Ahmad, N. (2021). Protecting the rights of minorities under international law and implications of COVID-19: An overview of the indian context. Laws, 10(1), 17.

[36]Kumar, A. (2020). Appointment of judges to the higher Judiciary during the pandemic -I. Economic & Political Weekly, 12-14.

[37]Kumar, A. (2020). Appointment of judges to the higher Judiciary during the Pandemic-II. Economic & Political Weekly, 11-13.

to put a quietus to civil rights concerns. People were dying of hunger, and the Judiciary was tone-deaf to human rights concerns. The Judiciary went in for the model of Internet justice, but it had its foibles. Internet Poor fell further backward in the social stream, and their expectation of receiving unhampered justice took a massive beating. It is that constitutionally found the expectation of receiving fair justice that remained unsatisfied. Rather than achieving justice in actual terms, the modalities adopted, i.e., virtual justice delivery[38], became a few products accessible to a few. It further entrenched social and systemic prejudices. The Indian higher Judiciary invariably called the quits upon the citizenry. The Internet times, which became a source of ease and comfort for the Internet Rich, proved to be a scourge of agony and debilitation for the poor and technologically disabled.

The COVID times brought out the ugly narrative of the compelling times. Citizens who ought to be the benefactors of any development program on the development front were made to suffer beatings and thrashings given their differently situated position.

The virtual justice delivery became an aggravating evil rather than a panacea for COVID ills[39]. A development program upon which governance of the country stands predicated, if not tempered with social conditions, becomes a weapon of pain than amelioration. This disparity became a global phenomenon wherein a more significant chunk fell out of government sight for no fault.

This global catastrophe in governance compels us to be at the vanguard of decimating any such launch of social prejudice. The Internet serves as a binding tool[40] and not a weapon of discrimination. Even in the face of the behemoth of a pandemic like COVID, any sound constitutional governance cannot stare into the eye of its citizens and tell them to fend for themselves. It would do society well and encourage caution if we remain prepared for challenges unbeknownst. The goal should be to constantly improve our infrastructures and programs so that justice, an overarching feature, remains available to everyone equally without variance. Let justice remains untampered, unadulterated, and noncontaminated with the developmental renaissance of the Internet. Let there be times when legal justice is not known for its legal formalism in the textual sense and is married with social justice to bring in the ones with a tight embrace who got socially excluded in the COVID onslaught.

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[38]Bar and Bench. Virtual Courts: A sustainable option?, Dubey, Pramod Kumar, 12 April, 2020, <https://www.barandbench.com/columns/virtual-courts-a-sustainable-option>, accessed 12 December 2022.

[39]Kinhal, Deepika et al. Virtual Courts in India: A Strategy Paper, Centre for Legal Policy, 1 May 2020. <https://vidhilegalpolicy.in/research/virtual-courts-in-india-a-strategy-paper/> accessed 12 December 2022.

[40]B. N. Prakash, Setlur. E Judiciary: A Step towards Modernization in Indian Legal System, Journal of Education & Social Policy, Vol. 1 No. 1; June 2014. <http://jespnet.com/journals/Vol_1_No_1_June_2014/15.pdf>, accessed 12 December 2022.

COURTS, POLICE AND CRIMINAL JUSTICE IN CASES OF SECTION 498-A: AN ASSESSMENT

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Section 498-A of the Indian Penal Code presents a picture of acute contradictions as far as issues of justice for victims are concerned. While on the one hand there are serious concerns about protecting women from their violent spouses, on the other hand there are frequent allegations of abuse of this section against innocent men. Courts have contributed significantly to the culture of victim-blaming and perpetuated stereotypes of victims of domestic violence. Contrasting judgments have not only convoluted the understanding of matrimonial cruelty but have also curtailed police powers in such cases. In doing so, courts have frequently passed judgments emphasizing on the abuse of police process in cases of section 498 A and have also illicitly generalized all complaints under the section as frivolous. This approach has made the territory of police powers in matters of matrimonial cruelty in the Indian Penal Code extremely patchy and nebulous. This paper makes an attempt to showcase judicial trends that have led to confusion with respect to expected police response in cases of violence under section 498-A and clears the air about the existing judicial position on this issue.

Key words -
Court, Police, Justice, Women, Offence

Section 498 A of the Indian Penal Code has witnessed backlash over its alleged misuse for a significant number of years. Currently, there are two contradictory approaches to this provision. On the one hand, newspaper columns are replete with painful stories of women being attacked, abused and often killed by the husband and his relatives[1] and on the other, there is a systematic, highly targeted opposition by men's organisations against this section, demanding its repeal[2]. While the offences committed by the husband or his family members in these cases may amount to grievous hurt, unnatural offences, rape and murders, police and judicial approach to some of the most brutal cases of section 498-A is unpredictable.

Research indicates that like victims of rape, women approaching the criminal justice mechanism with complaints of matrimonial cruelty against their husbands are stereotyped and stigmatised at police stations and inside courtrooms. From Law Commission Reports[3], to judgments of the Supreme Court- victims of domestic violence

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[1]Kamakshi S, Latest NFHS-5 Data Shows 30% of Indian Women Face Domestic Violence and that's just the tip of the Iceberg, WOMEN'S WEB (Aug. 9, 2022, 8:05 a.m.) https://www.womensweb.in/2022/05/nfhs-5-domestic-violence-latest-figures-show-not-much-has-changed-may22wk4sr/.

[2]Law Commission, Report on Section 498-A IPC (Law Com No 243, 2012)

[3]Id.

have been typecast as incredulous women misusing the criminal justice mechanism for ulterior and selfish objectives. Judicial decisions in the last decade have played a significant role in shaping public opinion towards this section and arguably, have also contributed to the perpetuation, if not genesis of existing biases and prejudices. The impact of these decisions is not only confined to the manner in which victims of matrimonial cruelty are treated by the judiciary but also extends to police behaviour towards them. This is a troubling issue as the police happen to be the first point of contact for victims in such cases, when women choose to trigger the criminal justice mechanism. Reports suggest that a miniscule portion of women who are victims of matrimonial cruelty muster the courage to file FIRs and therefore, the manner in which the police respond to them would be crucial in securing their rights.

In this article, an effort has been made to clear the thicket of contradicting judicial decisions guiding police behaviour towards victims of section 498-A and chart out the obligations of the police towards them. It is argued that police and judicial behaviour towards victims of matrimonial cruelty is far removed from ground reality and that needs to be rectified urgently to prevent escalation of violence and its culmination in homicides.

Legislative Intent and Historical Purpose of Introduction of section 498-A

Despite the pervasiveness of domestic violence, India did not have laws to tackle the menace even after three decades of the enforcement of the Constitution[4]. India's lackadaisical attitude towards law-making in this area resonated with the international community's general reticence towards domestic violence. Even until the latter half of the twentieth century, International Law did not concern itself with domestic violence, discounting it as a private problem between non-state actors[5].

Ultimately, the need to criminalise matrimonial cruelty was felt in India in the context of prolonged and consistent abuse of women in their matrimonial homes. International organisations pointed out that the impact of such violence is not just on women but also on the overall health and well-being of future generations. The World Health Organisation drew global attention towards the stunted social and emotional well-being of children in societies where violence against women in families is rampant and consistent[6]. Not only that italso pointed out that the social and economic costs of such violence are too high and affect overall productivity of people[7].

As a consequence of the New Women's movement that peaked during the 1970s, violence against women was at the centre of the feminist agenda[8].

In the 1980s, the focus of Indian feminists was on legislative reform. It was around this time that issues of bride burning and other forms of matrimonial violence received

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[4]IPC S. 498- A, inserted by The Criminal Law (Second Amendment)Act, 1983.

[5]Dorothy Q Thomas and Michele E Beasley, Domestic Violence as a Human Rights Issue HUM.RTS.QTRLY. 15, 35-36 (1993)

[6]WHO, Violence against Women, UNITED NATIONS https://www.who.int/news-room/fact-sheets/detail/violence-against-women (Aug. 10, 2022, 12:30 PM)

[7]Ibid.

[8]Kaamila Patherya, Domestic Violence and the Indian Women's Movement: A Short History, INQUIRIES http://www.inquiriesjournal.com/articles/1702/domestic-violence-and-the-indian-womens-movement-a-short-history(Aug.10,2022, 12:01 PM)

serious attention from feminists, along with other forms of physical, mental and sexual violence against women[9]. As a consequence of sustained efforts of Indian feminists, new laws were inserted to tackle the problem of domestic violence. The earliest effort to penalise domestic violence was by criminalising it in 1983 under section 498 A. Under this section, matrimonial cruelty was given the status of a cognisable and non-bailable offence punishable with imprisonment for up to three years and a fine. Cruelty was defined to include both physical as well as mental cruelty and any harassment associated with a demand for dowry[10]. On the same note, section 304 B was introduced into the IPC in 1986 for dealing with dowry deaths.

Connotations of Matrimonial Cruelty under section 498-A

As a concept, 'Cruelty' within a marriage has both civil and criminal connotations. As the subject matter of Personal (civil) law, matrimonial cruelty is a ground for termination of marriage through divorce[11]. As a ground for divorce, it is available to both the spouses irrespective of gender. Matrimonial cruelty, in this form, is not necessarily dependent on the intention of the erring spouse and personal laws do not indicate an extent or degree of cruelty for the ground to apply. On the other hand, matrimonial cruelty under section 498 A of the Indian Penal Code, is punishable only when it is of such measure that it causes grave injury to the physical or mental health of a woman or drives her to commit suicide[12]. Thus, mere marital discord, verbal duels or minor scuffles, which in the language of courts, qualify as 'ordinary wear and tear of marriage' do not form the subject matter of section 498-A[13]. The sectionincludes within its ambit but is not limited to, harassment for dowry and coercive dispossession of property or valuable security by the husband or his relatives.

Unlike personal laws, the benefit of the criminal provision is available only to women. This is a special law that was inserted into the Indian Penal Code in 1983 by an amendment, as a response to wide spread instances of bride-burning that had become a matter of national concern[14]. The same amendment inserted section 304-B into the Indian Penal Code and made changes to the Indian Evidence Act to facilitate criminal proceedings in such matters, where evidence and witnesses in favour of the deceased are usually hard to find, considering that the victims are usually violated or killed in the privacy of their matrimonial homes. Section 498 A of the Indian Penal Code, therefore, is a legal provision that came into existence to address a pressing social need, which was to punish violence against women inside their matrimonial homes. For the majority of Indian women, traditionally, matrimonial homes are those of their husbands and the families of such husbands and therefore, section 498-A had to be designed in a manner that women could have a cause of action against their married partners and their families, when they faced violence.

Judicial opinion on the question of what constitutes matrimonial cruelty has not crystallised over time and as a consequence, the difference between a discord or dispute

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[9]Id.

[10]Id.

[11]Hindu Marriage Act, 1955, S. 13(1) (ia), No. 25, Acts of Parliament, 1955 (India).

[12] Indian Penal Code, 1860, S. 498-A, No. 45, Acts of Parliament, 1860 (India).

[13]Samar Ghosh v Jaya Ghosh (2007) 4 SCC 511

[14]Indira Jaising, Concern for the Dead, Condemnation for the Living, EPW. 34, 34-35 (2014)

and a criminal offence remains unappreciated by courts. For instance, sometimes courts have relied on frequency of domestic abuse and cruelty against the woman to determine the applicability of section 498-A, although the law does not spell out any such requirement. At the same time, judicial pronouncements point out that irrespective of the frequency of such abuse, derogatory conduct of the husband or his relatives such as kicking the married woman, taunting her for her looks or humiliating her for her inability to bear a child amount to matrimonial cruelty within the meaning of section 498-A. Thus, what amounts to cruelty in one case, is not necessarily ruled as cruelty in another and these decisions set confusing precedents.

Chequered judicial decisions, apart from obfuscating the meaning of cruelty, also lead to large scale acquittals. While the reasons for these acquittals may be many and do not in any way point towards the complainant being frivolous, the fact of such acquittals is used to count against victims- by courts, the police and the public, painting portraits of victims as incredulous, selfish women with ulterior motives[15]. A plethora of judgments of the Supreme Court in the last decade stand testimony to this trend.

Constitutional Challenges to section 498-A

Section 498-A of the Indian Penal Code has faced challenges to its constitutionality on several occasions. Although the constitutionality of the section has been upheld in these cases, courts have made unsympathetic observations impeaching the credibility of victims. These observations, combined with the fact of a large number of acquittals in these cases, paved the path of towards restricted powers to the police in cases of section 498-A.

In 2005, the constitutional validity of section 498 A was challenged in the case of Sushil Kumar Sharma[16]. Although the Supreme Court upheld the constitutionality of section 498 A, it noted that the section is abused on numerous occasions by "unscrupulous persons" to unleash "legal terrorism" on innocent husbands[17]. The Court stated as follows;

"Merely because the provision is constitutional and intra vires, does not give a licence to unscrupulous persons to wreck personal vendetta or unleash harassment. It may, therefore, become necessary for the legislature to find out ways how the makers of frivolous complaints or allegations can be appropriately dealt with. Till then the Courts have to take care of the situation within the existing frame work. As noted the object is to strike at the roots of dowry menace. But by misuse of the provision a new legal terrorism can be unleashed. The provision is intended to be used a shield and not assassins' weapon. If cry of "wolf" is made too often as a prank assistance and protection may not be available when the actual "wolf" appears. There is no question of investigating agency and Courts casually dealing with the allegations."[18]

However, on the question of constitutionality of the section, the Supreme Court decided rightfully by referring to decisions in India and elsewhere that if a provision of law is otherwise constitutionally valid, it cannot be said to be unconstitutional merely because there is a potential to abuse it.[19]

While pronouncing the constitutional validity of the section on the aforementioned

[15]Law Commission Report, supra note 2.
[16]Sushil Kumar Sharma v Union of India (2005) 6 SCC 281.
[17]Id.
[18]Id.
[19]Id

ground, the Supreme Court relied on its earlier precedents and stated as follows:[20]
"From the decided cases in India as well as in United States of America, the principle appears to be well settled that if a statutory provision is otherwise intra-vires, constitutional and valid, mere possibility of abuse of power in a given case would not make it objectionable, ultra-vires or unconstitutional. In such cases, "action" and not the "section" may be vulnerable. If it is so, the court by upholding the provision of law, may still set aside the action; order or decision and grant appropriate relief of the person aggrieved. In Mafatlal Industries Ltd. and Ors. v. Union of India and Ors., [1997] 5 SCC 536, a Bench of 9 Judges observed that mere possibility of abuse of a provision by those in charge of administering it cannot be a ground for holding a provision procedurally or substantively unreasonable."[21]
Right after Sushil Kumar Sharma's case, in 2010, the case of Preeti Gupta[22] raised similar issues in the Supreme Court. The Supreme Court observed that the Legislature needs to seriously revisit the section[23]. The Court noted that it is a matter of common knowledge that exaggerated versions of complaints are reflected in numerous complaints and there is a common tendency to implicate the husband and all the in-laws in such cases. It is significant to note that the Court did not rely upon any research or data to place on record such observations. Other than that, the exact implication of the terms "common knowledge" and "common tendency" is nebulous and as such, should not have formed the major premise of the Court's conclusions with respect to section 498 A. The Supreme Court asked for a copy of the judgment to be sent to the Law Commission and Union Law Secretary to ensure that appropriate steps may be taken to protect the greater interests of the society[24].

Judicial Guidelines for Police Conduct in Cases of section 498-A

A life-altering event for all Indian women traumatised by matrimonial violence was the judgment passed by the court in Arnesh Kumar's case in 2011[25]. In this case, the Supreme Court came down heavily on the alleged abuse of section 498-A. Labelling women victimised by matrimonial cruelty as 'disgruntled wives', the Supreme Court stated that the fact that section 498-A is a non-bailable and cognizable offence is abused by such women, who weaponize it for harassing their husbands[26]. Without any reference to data, the Court also pointed out that in several cases, the husband's bed-ridden grandfathers, grand-mothers and even sisters residing abroad are arrested by the police[27]. Pointing towards numbers, the Apex Court also stated that while the rate of charge-sheeting in cases of section 498-A is as high as 93.6%, the rate of conviction is only 15%- in doing so, the Court indicated that most of the cases filed by women are false[28]. The Bench found the practice of mandatory arrests in these cases to be highly arbitrary and indicated that the police are responsible for gross abuse of section 498 A[29].

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[20]ibid.; Mafalal Industries Ltd. V. Union of India (1997) 5 SCC 376; State of Rajasthan v Union of India (1977) 3 SCC 592; Budhan Choudhry v State of Bihar AIR 1955 SC 191.
[21]Sushil Kumar Sharma, supra note 16.
[22]Preeti Gupta v State of Jharkhand AIR 2010 SC 3363.
[23]Id.
[24]Id.
[25]Arnesh Kumar v State of Bihar (2014) 8 SCC 273
[26]Id.
[27]Id.
[28]Id.
[29]Id.

With the objective of curtailing police powers in arresting husbands and families of such husbands in complaints of matrimonial cruelty, the Supreme Court laid down that all State Governments must pass instructions to the effect that police officers must not make arrests automatically in cases of section 498A. A list of other guidelines was laid down, some of which are as follows:

I. That all police officers must be provided with a checklist containing specified sub-clauses under section 41 (1) (b) (ii)
ii. That such checklist has to be filled up duly along with a complete record of reasons that necessitated the arrest. Such filled up record has to be submitted by the concerned police officer to the Magistrate while producing the accused before him/her
iii. That the record must be perused by the Magistrate and only upon complete satisfaction based on facts, must he permit detention of the accused
iv. In case the accused is not arrested, a record of reasons for not making the arrest must be forwarded to the Magistrate within two weeks of the institution of the case
v. Notice of appearance has to be served on the accused within two weeks of the institution of the case and the period may be extended by the Superintendent of Police and reasons for such extension must be recorded

In this case, the Court further laid down that if police-officers do not comply with the directions mentioned above, they will be liable for departmental action and may also be tried for contempt of court[30]. Likewise, if judicial magistrates authorise detention in contravention of the aforementioned guidelines, they would be made liable for departmental action by the appropriate High Court[31].

In 2017, in the case of Rajesh Kumar Sharma v State of Uttar Pradesh[32], the Supreme Court was confronted with the question of whether or not there is a need for framing certain guidelines to curtail the abuse of section 498 A of the Indian Penal Code. In the trial court, the issue of dowry harassment and torture of the wife by the husband was confirmed and he was convicted under section 498 A of the IPC. It was the complainant's case that she was tortured and harassed for the inability of her parents to meet the demands for dowry and as a consequence of it, eventually, even her pregnancy was terminated. The facts were found to be true, however, the court found only Rajesh Sharma guilty. The complainant asked for a revision and claimed that appellants 2 to 5, i.e. her in-laws should have been summoned to court. Although the ASJ ordered in favour of the victim, appellants 2 to 5 went to the High Court under section 482 of Cr PC against the order of summons. Eventually, the High Court found no ground to interfere with the summons order and on this basis, an appeal was made to the Supreme Court on the issue of misuse of section 498 A and the need to curtail its ambit of involving all family members in cases of 498 A was emphasised by the Court. In this case, the Supreme Court issued certain guidelines for dealing with victims approaching various authorities under section 498 A. Some of the guidelines are listed below:

[30] Arnesh Kumar supra note 25
[31] ibid.
[32] 2017 SCC OnLine SC 821.

I. Firstly, the Division Bench recommended that in every district, at least one Family Welfare Committee may be constituted by the District Legal Services Authority. Such committee should consist of a minimum of three members. The constitution and working of this Committee has to be reviewed by the District and Sessions Judge of the district at least once a year.
ii. Secondly, such Committees may consist of paralegal volunteers, social workers, retired persons, wives of working officers and other citizens who may be found "suitable and willing"
iii. The members of Family Welfare Committees shall not be called as witnesses in courts
iv. According to the Supreme Court, every complaint of section 498 A must be forwarded to the Family Welfare Committee, the members of which, may interact with the parties either personally or over phone
v. The Family Welfare Committee will then be required to submit a report to the authority from which it received the complaint, within one month from the date of receipt of such complaint
vi. The police shall not be authorised to make any arrests "normally" until the report of the Committee is received
vii. On the issue of training of members of the Committee, the Apex Court recommended that they will receive basic and minimum training from time to time as may be considered necessary by the District Legal Services Authority. The members are entitled to receive honorarium as may be considered viable.
viii. Complaints under section 498 A may be investigated only by a designated Investigating Officer
ix. In cases where a settlement is reached, the District and Sessions Judge may dispose of the matter if he/she is of the opinion that it is "primarily matrimonial" in nature
x. In case of bail applications, the Supreme Court opined that if they have been filed with at least one clear day's notice to the Public Prosecutor, such bail applications must be disposed of as far as possible, on the same day.
xi. Further, impounding of passports or issuance of Red Corner notice should not be done routinely in cases registered under section 498 A
xii. Finally, the Supreme Court also noted that these guidelines shall not apply in cases where the victim suffered "tangible physical injury or death".

This judgment of the Supreme Court is part of a series of judgments aimed at curtailing the ambit of section 498 A. However, these guidelines are questionable on many fronts. The primary purpose of section 498 A is to deter individuals from inflicting matrimonial cruelty on victims. Like other cognisable offences, the nature of this offence is non-compoundable. As reflected in the guidelines above, the Court's order of setting up Family Welfare Committees which have the authority of "settling" disputes under section 498 A may amount to judicial overreach and by doing so, the judiciary may have well transgressed into the domain of law-making and not just judicial interpretation. Further, the composition of Family Welfare Committees is also questionable. Matters of matrimonial cruelty deal with vulnerable victims and therefore, persons entrusted with resolution of such disputes must be adequately trained in these matters. However, there is a strong sense of non-seriousness which is reflected in the composition of these committees. For instance, the reason for involving 'wives of working officers' to deal with as sensitive an offence as section 498 A needs some serious reflection. The composition

of the Family Welfare Committees seems to suggest that no special qualifications or experience needs to be taken into consideration for intervention in cases related to 498 A.

While the Apex Court provides a rider to the applicability of these guidelines by stating that they may not be applicable in cases in which victims are tangibly injured physically or are dead, the circumstances under which these guidelines may still be applied are worthy of deliberation. Under the existing laws, Section 498 A may be invoked by a victim if grave mental cruelty has been inflicted on her or where the infliction of such cruelty may drive her to commit suicide. The purpose of enacting this provision was to make sure that matters of matrimonial cruelty did not escalate to the extent of causing irreparable injuries to the victim. Further, matrimonial cruelty often results in the homicide of victims. Therefore, arresting the perpetrators, aiders and abettors ensures the safety of the victim.

By labelling grave mental cruelty as something non-serious and visualising that it can be remedied like ordinary civil matters by Family Welfare Committees, most members of which are likely to have no expertise in handling such sensitive issues, problems of victims will be multiplied manifold.

At this juncture, it is pertinent to note the observations of the Law Commission of India in its 243rd Report. In Para 7.1, the Law Commission observes that the object and purpose of section 498 A cannot be undermined by exaggerating the potential of its abuse and that its re-evaluation simply on the basis of allegations of abuse is unwarranted[33].

There were widespread protests by women's organisations following the verdict of the Supreme Court in Rajesh Sharma's case[34]. Noted Indian feminists such as Flavia Agnes openly criticised the judgment, stating that it ignored and even falsified lived experiences of women traumatised by domestic violence[35].

In 2018, a three-judge bench of the Supreme Court struck down the part of the verdict that said that a District or Sessions Judge could pass an order to quash an FIR or complaint against the accused if a settlement is reached[36]. The Court pointed out that only the High Court had powers to do so[37]. Relying on section 482 of the Code of Criminal Procedure, the Supreme Court also reiterated that section 498-A is not a compoundable offence and so, the question of "settling" the case after a criminal proceeding has been initiated or a case registered, does not arise, without the parties filing a petition under section 482 of Cr.P.C. Only after such petition is filed, the High Court and not subordinate courts, may quash the FIR/complaint[38]. Further, the Supreme Court also pointed out that Family Welfare Committees were extra-judicial bodies that could not be allowed to perform the functions of the court or the police and therefore, the creation of those committees was stayed by this judgment[39].

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[33]Law Commission Report, supra note 2.

[34]The Invisible Lawyers Team, Women to the Supreme Court: "We are not liars", protest against dilution of section 498 A, THE LEAFLET (Sep. 9, 2022, 9:00 AM) https://theleaflet.in/women-to-the-supreme-court-we-are-not-liars-protest-against-dilution-of-section-498a/.

[35]Flavia Agnes, Are Women liars? Supreme Court's Judgment Ignores Lived Reality of Married Women, EPW52, 53 (2017).

[36]Social Action Forum Manav Adhikar and anr. V Union of India (2018) 10 SCC 433

[37]Code of Criminal Procedure, 1973, S. 482, No. 2, Acts of Parliament, 1973(India).

[38]Social Action Forum, supra note 36.

[39] Id.

In the same judgment, the Supreme Court once again reiterated that the police must have respect for individual dignity and work within the confines of constitutionalism and refrain from making arbitrary arrests, while dealing with men accused of violence under section 498-A[40].

In order to do so, the Court said, the police must apply the guidelines laid down in the cases of Arnesh Kumar[41], DK Basu[42], Joginder Kumar[43] and Lalita Kumari[44]. While in DK Basu's case, procedural guidelines were laid down to restrain the police from abusing their powers, in the case of Joginder Kumar, the Supreme Court had clearly stated that arrests cannot be made in a routine manner based on mere allegations of the complainant. Before making arrests, the police must ascertain that the complaint is not frivolous and there is justification or necessity to make an arrest[45].

In Lalita Kumari's case, the Supreme Court had emphasised on the requirement of a preliminary inquiry before the filing of an FIR in certain categories of cases[46]. The text of the judgment made a mention of matrimonial disputes' as one category of such cases[47]. However, it is to be noted that the purpose of making preliminary investigation is only to ascertain truthfulness of the complainant's allegations. In cases where injury is apparent, such as those where the woman is visibly assaulted, the requirement of preliminary investigation may be done away with. Further, a line of demarcation needs to be drawn to distinguish cases of physical/mental abuse from cases of matrimonial dispute as the former are not cases of civil disputes but those of violent criminal conduct.

Concluding Remarks

As the first point of contact for victims in the criminal justice system, the police have a significant role to play and judicial decisions in this area play a significant role in shaping their response to victims. Keeping all verdicts in mind, it will be apt to say that the current stance of the judiciary on police conduct in cases of 498-A is one of abundant caution but not impunity. In cases where serious injury to the life or limb or mental health of the woman aggrieved by matrimonial cruelty is evident, the requirement of preliminary investigation may be done away with. The police are bound to file FIRs in such cases and cannot turn women away, as is evident in many qualitative studies in this area. "Settling" of cases in 498-A, which is a cognizable and non-compoundable offence is not an option for the police as per the latest verdict of the Supreme Court.

It is pertinent to note that despite decades of anti-domestic violence legislations being in existence, even today, several studies rank India very high in the list of countries where women frequently report incidents of family-based violence by their partners[48]. While many studies reveal that domestic violence in Indian homes is not just frequent but also intense, they also simultaneously point out that only a small percentage of such

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[40]Social Action Forum, supra note 39.
[41]Arnesh Kumar, supra note 25.
[42]DK Basu v State of W.B. (1997) 1 SCC 416
[43]Joginder Kumar v State (1994) 4 SCC 260
[44]Lalita Kumari v. Government of Uttar Pradesh and ors. (2014) 2 SCC 1
[45]Id.
[46]Id.
[47]Id.
[48]Editorial Team, Poll Ranks India the World's Most Dangerous Country for Women, THE GUARDIAN https://www.theguardian.com/global-development/2018/jun/28/poll-ranks-india-most-dangerous-country-for-women-.(Sep. 8, 2022, 10:01 PM)

incidents are actually reported to the police[49]. A comparison of data of the National Family Health Survey and the National Crime Records Bureau specifically points towards the problem of under-reporting of cases of domestic violence, revealing thereby that existing records show only a tip of the iceberg.[50]

The problem of violence against women behind closed doors is said to have risen sharply in course of the Covid 19 pandemic, during which many victims were trapped with their abusive partners at home, due to lockdown measures imposed by the government to contain the spread of the novel corona virus[51]. In March, 2021, the National Commission for Women reported an unprecedented spike in cases of domestic violence, with the numbers jumping from 2960 in 2019 to 5297 in 2020[52]. Complaints of domestic violence , the NCW reported, now account for about one-fourth of all complaints of crimes against women and the problem that was once just chronic , has now become potentially infectious due to causes that are an inevitable consequence of the pandemic. However, an absolute lack of understanding of what section 498-A connotes, along with a plethora of confusing judicial decisions in this area has led Indian women to the nadir of exploitation in marriages- with very little scope to activate the criminal justice system in their favour. In this context, the beginning of any change in the direction of women's welfare in cases of 498-A can be made only by sensible police response, that is not guided by misconceptions generated by conflicting judicial decisions.

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[49] Id.

[50] Payal Seth,Decoding extent to which DV in under reported in India, THE WIRE https://thewire.in/women/domestic-violence-india-underreported(Sep. 10, 2022, 11:21 AM)

[51] Id.

[52] PTI, Complaints of domestic violence against women spiked in year of lockdown: NCW Data ,TOI https://timesofindia.indiatimes.com/india/complaints-of-domestic-violence-against-women-spiked-in-year-of-lockdown-ncw-data/articleshow/81687915.cms(Sep. 11, 2022, 11:29 AM)

AN ANALYTICAL APPROACH WITH SPECIAL REFERENCE TO THE RECENT GUIDELINES OF CENTRAL CONSUMER PROTECTION AUTHORITY (CCPA) 2022

Dr. Sangeeta Taak*

Abstract

The Consumer Protection Act 2019 has repealed the Consumer Protection Act of 1986. "The 2019 Act has also established a Central Consumer Protection Authority ("CCPA"). The CCPA is a regulatory authority under the Act with powers of investigation, inquiry and injunctive actions. The primary objective of the CCPA is to regulate matters pertaining to violation of rights of consumers, unfair trade practices and false or misleading advertisements that are prejudicial to the interests of public and consumers".

'Product Liability' has been defined for the first time under the Consumer Protection Act, 2019 (CPA 2019 Act). "As per the Consumer Protection Act 2019, the product liability means the responsibility of a product manufacturer or product seller, or product service provider, to compensate for any harm caused to a consumer by a defective product manufactured or sold or by deficiency in services in relation to the product".

In my paper I have made an attempt to discuss the liability of the Product Manufacturer, Product Seller and foreign Manufacturer. The paper has three parts, the first one defines the Product Liability and its various forms and the second Part deals with the Product Liability and its different aspects under which the liability can be fixed and the third one is the defenses and exceptions available to the Service Providers, manufacturers etc. Moreover, the paper includes the analyses of the recent guidelines which has been issued by the CCPA on July 20, 2022. They have also mentioned the liability in case the guidelines are not followed appropriately by the Manufacturers and Sellers.

1. Introduction

The Consumer Protection Act 2019 has repealed the Consumer Protection Act of 1986. "The Consumer Protection Act 2019 Act has also established a Central Consumer Protection Authority (CCPA)"."The CCPA is a regulatory authority under the Act with powers of investigation, inquiry and injunctive actions. The primary objective of the CCPA is to regulate matters pertaining to violation of rights of consumers, unfair trade practices and false or misleading advertisements that are prejudicial to the interests of public and consumers".

The 2019 Act has intentionally, included the concept of product liability with an object to replace the concept of 'caveat emptor' i.e, let the buyer beware doctrine with the concept of 'caveat venditor' i.e., let the seller beware, in practice. However, most of its provisions, that includes the chapter on product liability came into effect in July 20, 2020[1].

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[1]Bishwajit Dubey, Surabhi Khattar & Ashutosh Singh, Cyril Amarchand and Mangaldas, Product Liability under the Consumer Protection Act, 2019: An Overview, January 20, 2020 available at Product Liability under the Consumer Protection Act, 2019: An Overview | India Corporate Law (cyrilamarchandblogs.com)

'Product Liability' has been defined for the first time under the Consumer Protection Act, 2019 (CPA 2019 Act). "As per the Consumer Protection Act 2019, the product liability means the responsibility of a product manufacturer or product seller, or product service provider, to compensate for any harm caused to a consumer by a defective product manufactured or sold or by deficiency in services in relation to the product"[2] . As per the section 2(34) of the Act, "product liability" means the "responsibility of a product manufacturer or product seller, of any product or service, to compensate for any harm caused to a consumer by such defective product manufactured or sold or by deficiency in services relating thereto".

It means that under the Product liability, in case any harm is caused to the consumer due to the defective product manufactured, or it is sold, or if there is any deficiency of services is found then the manufacturer, seller and service provider shall be held responsible respectively.

However, there are various other aspects that need to be discussed while discussing the Product Liability under the Consumer Protection Act, 2019.

In my paper I have made an attempt to discuss the liability of the Product Manufacturer, Product Seller and foreign Manufacturer. I have discussed the Product liability in the cases of Market Place, where the goods are just displayed for sale. In this paper the emphasis is explain the liability of the several manufacturers as well as the defenses which can be taken by the Product Manufacturers, Sellers and Service Providers etc. I have discussed the Liability, issues, causes and the defenses and exception in detail under the Product Liability.

The paper has three parts, the first one defines the Product Liability and its various forms and the second Part deals with the Product Liability and its different aspects under which the liability can be fixed and the third one is the defenses and exceptions available to the Service Providers, manufacturers etc. Moreover, the paper includes the analyses of the recent guidelines which has been issued by the CCPA on July 20, 2022. They have also mentioned the liability in case the guidelines are not followed appropriately by the Manufacturers and Sellers.

2. Product Liability Under the Consumer Protection Act, 2019

It is important to discuss what is a product under the Consumer Protection Act, 2019 (hereinafter referred as CPA, 2019). Section 2(33) of the CPA, 2019 defines that product "means any article or goods or substance or raw material or any extended cycle of such product, which may be in gaseous, liquid, or solid state possessing intrinsic value which is capable of delivery either as wholly assembled or as a component part and is produced for introduction to trade or commerce, but does not include human tissues, blood, blood products and organs"[3] ;

It means that any article, substance or raw material however, it does not include the human tissues, blood or organs as a product under the CPA, 2019.

Moreover, under chapter VI of the Consumer Protection Act, 2019 Section 82 to 87 of the Consumer Protection Act, 2019 explains the Product Liability in detail. The CPA, 2019 has added the product liability and it has explained the situations where a claim for compensation under a product liability action would be available for 'harm'[4] caused by a 'defective' product manufactured by a product manufacturer or serviced by a product service provider or sold by a product seller.

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[2]Section 2(34) of the CPA Act, 2019.

[3]Section 2(33) of the Consumer Protection Act, 2019

[4]"product" means “any article or goods or substance or raw material or any extended cycle of such product,

As per the CPA, 2019, section 2(22) of the Act defines Harm[5]. Harm', in relation to a product liability has been described in three ways firstly, any damage to any property other than the product itself, secondly, in case of any personal injury, illness and thirdly, death and mental agony or emotional distress, etc.

It means that any harm to the product is not considered as harm or it shall not include any damage to the property on account of breach of warranty conditions or any commercial or economic loss including any direct, incidental or consequential loss relating thereto.

Further, the Section 2(10) of the CPA, 2019 defines 'defect'[6]. "Defect means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard, which is required to be maintained by or under any law or contract, express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods or product. So, it means, in order to claim product liability, consumer needs to prove that the harm had caused due to a 'defective' product".

The CPA, 2019 also distinguishes between the roles of a product manufacturer, product seller and service provider, and each one has a separate criterion to attract the product liability.

2.1. Product Liability under the Goods sold for free of Cost

In another situation of 'harm' caused from a product. It means if the good is not purchased after paying consideration, however, it is free of cost provided to the consumer with some other product.

However, the goods purchased with consideration has no defect and the complementary gift which was provided has a defect. Then under the CPA, 2019, the situation needs much attention whether the definition of 'harm' may cover the defect available under free of cost goods or not? Under the section 2(22) may be considered, if the free of good was provided with some article or product which was charged by the seller then any harm, even, if it is caused by the purchaser from the free of cost good, still it may fall under the purview of section 2(22) of CPA, 2019.

2.3. Product Liability and 'Market Place'

A Market Place is a place that provides a platform to buyers and sellers. Can Market place be held liable under the CPA, 2019 or not? It depends upon the services provided by the market place. Let us discuss the definition of Market place, as per the definition "marketplace e-commerce entity""means an 'e-commerce entity which provides an information technology platform on a digital or electronic network to facilitate transactions between buyers and sellers"[7].

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which may be in gaseous, liquid, or solid state possessing intrinsic value which is capable of delivery either as wholly assembled or as a component part and is produced for introduction to trade or commerce, but does not include human tissues, blood, blood products and organs;"

[5]"harm", in relation to a product liability, includes, " (i) damage to any property, other than the product itself; (ii) personal injury, illness or death; (iii) mental agony or emotional distress attendant to personal injury or illness or damage to property; or (iv) any loss of consortium or services or other loss resulting from a harm referred to in sub-clause (i) or sub-clause (ii) or sub-clause (iii), but shall not include any harm caused to a product itself or any damage to the property on account of breach of warranty conditions or any commercial or economic loss, including any direct, incidental or consequential loss relating thereto".

[6]"defect" means "any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods or product and the expression "defective" shall be construed accordingly".

[7]Under Section 3 (g) of Consumer Protection (E-Commerce) Rules, 2020

It means, in those cases, "if the additional services are provided by the marketplace only then the market place can be held liable". It means that if "market place acts as a product manufacturer or service provider as defined under the CPA, 2019 only then the 'marketplace' may be liable if in case,the product liability claim arises. It may arise in two situations, i.e., express warranty given by the manufacturer or the services provided by the market place, independent from the manufacturer's liability."
For example, the market place may be held liable in case of express warranty provided by the market place which is independent from the manufacturer's warranty. Or in case the services are provided for example, installation etc. in relation to the product.

2.4. Liability in case of Several Manufacturers are involved

The liability may arise when more than one manufacturer' is involved. In the case of Bhopal Steels v Govind Lal Sahu & Others[8], it was held that the "apportionment of liability in case of multiple manufacturers would be determined on a case-to-case basis, where the commission would examine which component caused the defect, and whether adequate instructions/warnings were provided for proper use". Moreover, this arrangement shall be beneficial for those cases where goods are manufactures by different-different manufacturers compulsorily, for example, in the cases of automobiles etc. In many cases, the courts have tried to fix the liability of the manufacturers however, the need of the hour is to find that where the lapse had been made and to whom to make responsible in multiple manufacturers case. No doubt, these cases shall be challenging for the forum in future.

2.5. Product Liability in case of the 'Defective Product'

The product manufacturer or service provider' as the case may be, 'recall the goods voluntarily or they may withdraw the product or services from the market as the case may be'. However, the CPA, 2019 does not contain any provision, for voluntary recall. However, the recall process depends upon the 'specific industry/ product guidelines applicable to the recall process'. However, the recall of products or services "would not prevent the product manufacturer/ service provider from product liability actions initiated due to harm caused by the products/services already in the market."[9] "The product manufacturer or 'service provider' may "also consider notifying the Central Consumer Protection Authority ("CCPA") the regulator responsible for administering and enforcing the CPA 2019 regarding the defect identified and the recall process"[10]. As the CCPA is actively working for the protection and promotion of the consumer Protection Act and also issues guidelines from time to time ".[11]
CCPA can better protect the interest of the consumer through implementing the recent guidelines on Product liability. Under the new rules, the CCPA may "pass orders directing recall of products post investigation, if there is sufficient evidence to establish violation of consumer rights or unfair trade practice by a person. However, no specific rules have been prescribed so far on recall procedures".

2.6. Mediation and the Product Liability

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[8]2008, CPJ, 89, NC
[9]Nishith Desai, Frequently Asked Questions on Product Liability under the Consumer Protection Act, 2019, 2020, available at FAQ-Consumer-Protection-Act-A5.pdf (nishithdesai.com)
[10]YashikaSarvaria, India Consumer Protection Act: Take Away, VGC Law firm, available at Consumer Protection Act, 2019: Key Takeaways - Dodd-Frank, Consumer Protection Act - India (mondaq.com)
[11]Nishith Dessai, id.

As mediation has also been added under the CPA, 2019 as a unique and new feature. Mediation.[12] Mediation can be used as a mean and method of dispute resolving process under the product liability claim. However, there is a possibility that mediation may be able to solve many disputes of product liability, if both the parties agree to refer their case for mediation and they are willing to solve the dispute amicably.

"The relevant consumer forum may refer a dispute to mediation in the event""both parties are amenable to the same". In case, the dispute is not resolved by 'way of mediation', the relevant consumer forum will continue to hear the dispute.

It shall be the duty of the mediator to submit the report of every mediation case to the appropriate consumer forum.

3. 'Liability' under the Product Liability

There are various Liabilities explained in the case of the Product Manufacturers, Service Providers and the sellers.

3.1 Liability of a Product Manufacturer

Section 2(36) of the CPA, 2019, explains the definition of 'product manufacturer'[13] and section 84 of the Act explains the liability of the Product Manufacturer.[14] As per the Act, "Product Manufacturer" means a person who

(i) "Makes any product or parts thereof; or
(ii) assembles parts thereof made by others; or
(iii) puts or causes to be put his own mark on any products made by any other person; or
(iv) makes a product and sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains such product or is otherwise involved in placing such product for commercial purpose; or
(v) designs, produces, fabricates, constructs or re-manufactures any product before its sale; or
(vi) being a product seller of a product, is also a manufacturer of such product"

The simple analyses of the definition explains that 'product manufacturer' assembles any part which is prepared by others, or it may make any product or parts, he may also put his mark on the product which is made by others, Product manufacturer may make product or sell, labels etc. Product manufacturer may design, produce or remanufactures any product prior to its sale. If he is a product seller, even then the term of manufacturer shall be used for him/her under the section 2(36) of the CPA, 2019.

Section 84 of the CPA, 2019[15] explains the "product liability of the product manufacturer[16] in case the product contains a manufacturing defect or if the product is defective in design or if there is a deviation from manufacturing specifications or in case the product

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[12]Under section 37 the reference to mediation is mentioned as "At the first hearing of the complaint after its admission, or at any later stage, if it appears to the District Commission that there exists elements of a settlement which may be acceptable to the parties, except in such cases as may be prescribed, it may direct the parties to give in writing, within five days, consent to have their dispute settled by mediation in accordance with the provisions of Chapter V".

[13]Section 2(36) of the CPA, 2019

[14]Section 84 of the CPA, 2019

[15]Section 84. (1) "A product manufacturer shall be liable in a product liability action, if— (a) the product contains a manufacturing defect; or (b) the product is defective in design; or (c) there is a deviation from manufacturing specifications; or (d) the product does not conform to the express warranty; or (e) the product fails to contain adequate instructions of correct usage to prevent any harm or any warning regarding improper or incorrect usage (2) A product manufacturer shall be liable in a product liability action even if he proves that he was not negligent or fraudulent in making the express warranty of a product."

[16]Ibid.

does not conform to the express warranty or the product fails to contain adequate instructions of correct usage to prevent any harm or any warning regarding improper or incorrect usage".

The most important thing to note here is that a "product manufacturer shall be liable in a product liability action even if he proves that he was not negligent or fraudulent in making the express warranty of a product and if the manufacturer does not mention an adequate instruction on correct usage to prevent any harm or any warning regarding improper or incorrect usage".

However, the product manufacturer shall not be liable, if it is proved that the employer had purchased the product for the use at his/her workplace and the product manufacturer had categorically provided warnings or instructions to such employer.

In case the "warning is issued related to the product and it was legally meant to be used or dispensed only by or under the supervision of an expert or a class of experts and the product manufacturer had employed reasonable means to give the 'warnings or instructions' for usage of such product to such expert or class of experts or in case the complainant, while using such product, was under the influence of alcohol or any prescription drug which had not been prescribed by a medical practitioner".

Moreover, a Product manufacturer shall not be liable "for failure to instruct or warn about a danger which is obvious or commonly known to the user or consumer of such product or which, such user or consumer, ought to have known, taking into account the characteristics of such product."

3.2 Liability of a Product Service Provider

A 'product service provider' under the CPA, 2019 is defined. Product Service Provider means a person who provides "a service in respect of any product. A product service provider shall be liable in a product liability action, if the service provided by him was faulty or imperfect or deficient or inadequate in quality, nature or manner of performance which is required to be provided by or under any law for the time being in force, or pursuant to any contract or otherwise; or if there was an act of omission or commission or negligence or conscious withholding any information which caused harm; or if the service provider did not issue adequate instructions or warnings to prevent any harm; and in case, the service did not conform to express warranty or the terms and conditions of the contract".

It is proposed that the Right to Repair may be included in under section 85 of the CPA, 2019. As the definition of a product service provider is wider enough to cover services such as maintenance or repair where the service and the product are inherently related.

3.3 Liability of a Product Seller

"A product seller who is not a product manufacturer shall be liable in a product liability action, if he has exercised substantial control over the designing, testing, manufacturing, packaging or labelling of a product that caused harm". He shall also be liable; in case he has 'altered or modified the product and such alteration or modification was the substantial factor in causing the harm'. Further, the product seller shall also be held liable in case, the 'product has been sold by him' and the identity of product manufacturer of such product is not known. After discussing liability, it is necessary to discuss how these manufacturers and sellers can avoid the liability through the defences under the CPA, 2019.

3.4 Liability of a Foreign Manufacturers under the Consumer

Protection Act, 2019

There are products which are offered by the foreign manufacturers. However, there is no specific clause in the CPA, 2019 to make the Foreign Manufacturers liable. However, if we make analyses of the CPA, it can be said that there is no distinction provided under the definition of 'Product Liability' for the domestic or foreign manufacturer. It means, the consumers may file a complaint before the consumer forum, for redressal against the domestic as well as the foreign manufacturers. As per the Act, the Consumer may approach the consumer forum for the redressal if the cause if action arises and the place of jurisdiction may be considered a place where either party resides or where the usual course of business is carried on by the opposite party. The place of jurisdiction may include the place of residence of consumer or the work place of the consumer. Although, the distinction has not been made between the foreign as well as the domestic manufacturers, the main concern here is how the enforcement shall be initiated incase the forum decides a matter against the foreign manufacturers.

Indian courts can not compel the foreign party to attend the proceedings and in their absence the decision of the court shall not be considered as impartial. Moreover, the execution of the decree shall be again an issue.

Under such circumstances, the CPA, 2019 mentions a provision as under "the product seller would be liable in a product liability claim in the event it is not possible to effect a service of notice or process or warrant against the product manufacturer or the product manufacturer is not subject to the law in force in India or an order cannot be enforced against the product manufacturer". So, it means that the indemnity from the product manufacturer, who are exporters of the product, may be asked by the product sellers who shall be the importers, in case the product liability arose and paid by the product sellers in case of foreign goods. However, in case the liability arises in the cases of the fault at the part product seller, then the liability of foreign product manufacturer shall not arise and they shall not be obligated to indemnify the product seller.

4. Defenses under the CPA

Although there are various defenses available under the Product Liability. These are available to the Product Sellers, Manufacturers etc. Let us discuss in detail as under:

4.1 Defenses Available to the Product Seller:

There are some defenses available to the Product Seller under section 87(2).[17] The provision says that the

(I) "Product seller cannot be held liable if the product was misused, altered, or modified at the time of the harm."

(ii) "If the Product seller has given the instructions to the employer who had purchased the product for his/her workplace then the Product seller shall not be liable".

(iii) "The Product Seller shall not be liable in case the product which has been sold was a component that was supposed to be used with another supplementary product and proper warning or instructions were provided by the product manufacturer. If the person, has suffered the harm due to the end product in which, the Product seller's one component was used, then the Liability of Product seller shall not be considered because he had sold just one part, or component or just some portion of material of it was used in making the finished product. Moreover, the finished product has caused the harm".

(iv) "The Product seller shall not be liable in case; the proper warning has been issued

[17]Consumer Protection Act, 2019.

regarding the use of product under the supervision of an expert. Proper and reasonable means should have been used by the product seller to bring this clause into the notice of the purchaser only then the Product seller may avoid a liability under this situation".

(v) "The product seller may not be held liable in case the product has been used by the complaint in the situation of intoxication like alcohol or drug, which is not authorized by the medical practitioner".

In the above-mentioned situations, the liability may be avoided by the product seller under section 87(2). However, under the recent guidelines issued by the CCPA the provision of penalties had been included if the product has been found defective.

4.2 Defense for Company in case of Product Liability

In case the product is safe and company has to produce evidence for that then the manufacturer can provide:

I. "Documents demonstrating that the product is as per standards prescribed by law e.g. standards prescribed under the Medical Device Rules, 2017 in the case of medical devices;
ii. Documents demonstrating the product is in compliance with the standards prescribed under law or by organisations such as the Bureau of Indian Standards, International Standards Organisation or the International Electro-technical Commission;
iii. Independent test reports demonstrating the quality of the product;
iv. Expert evidence on the cause and effect of the defect in the product or cause of the harm caused (e.g., consumer negligence);
v. A copy of the agreement between the manufacturer and complainant capturing the terms of sale and any warranties made in respect of the product;
vi. A copy of the manufacturing specifications to demonstrate there is no deviation between the product sold to the complainant and the manufacturing specifications;
vii. A copy of the warranty to demonstrate the product conforms to the express warranty provided in respect of the product; and
viii. User manuals/instructions/label design to demonstrate adequate warnings and usage instructions were provided in respect of the product."

5. Waiver Clause and Product Liability

If a consumer waives off his claim under the contract, it shall be termed as an unfair contract. '"The definition of unfair contract[18] under the CPA 2019 is broad and covers the imposition of unreasonable conditions that puts a consumer at a disadvantage. Given this, a waiver of claims under the CPA 2019 may be construed as an unfair contract". Moreover, "agreements in restraint of legal proceedings i.e. an agreement in which any party "is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his right" is void under the Indian Contract Act, 1872[19] and therefore unenforceable".

"The question of waiver of claims is yet to be tested before a court of law. Therefore, any contractual language regarding waiver of product liability claims should be examined

[18]"Section 2(46) "unfair contract" means a "contract between a manufacturer or trader or service provider on one hand, and a consumer on the other, having such terms which cause significant change in the rights of such consumer"

[19]Section 28, Indian Contract Act, 1872

closely to prevent unenforceability either from a CPA 2019 or an Indian contract law perspective."

6. Remedies available under the Product Liability

In case the Product liability arises under the CPA, 2019, and the 'harm' caused is proved then the consumer commission is empowered to grant compensation as well as to issue directions to the 'product manufacturer', 'product service provider' and 'product sellers' under the CPA, 2019.[20] Further the direction for the removal of defect in goods and services may be ordered or the remedy to replace the defective goods with brand new goods, free from defect may be ordered. The price of the goods may also be refunded for goods and the order of interest may also be decided. As per the new guidelines, the hazardous goods should never be offered for sale. "The CCPA may also direct the manufacturers and sellers not to offer the hazardous goods for sale and to cease the hazardous goods if it is being offered in the market. In some cases, where the harm has happened to the large group of people due to the hazardous goods or defective goods, then the compensation must be determined by the consumer forum very carefully as it is basically a concern and question of the protection and redressal of the consumer forum."[21]

7. Penalties

There are penalties mentioned under the Act as well. It states that the consumer may get the remedy if the product is found defective as per the provisions of the CPA, 2019. Moreover, the right to replace the goods and the defect removal are other options available to the consumer under the CPA, 2019 . In some cases, the seller may be asked to return the price with interest as well. However, as per the discretion of the commission, the damages for the negligence may also be awarded in exceptional cases.

8. Conclusion

After discussing these different issues and aspects under the Product liability, one thing is sure that it is definitely going to help and consumers. As the liability of the service provider, manufacturer and the sellers has been fixed. Although certain issues are yet to be seen how the consumer commission are going to handle the foreign retailers or exporters liability in case of harm cause to the consumers. However, it is positive step taken by the CCPA to issue the guidelines to clear the rules and regulations related to the product liability.

However, many rules related to the filing of the complaint with two years from the date of the case of action shall remain the same. That is the law of limitation, summoning, and execution etc.

It is important to see how the Service providers make use of the provisions of the CPA, 2019 and follow the guidelines issued by the CCPA, however, the commission also have a duty to decide and also ensure the execution of the decisions so that the letter and spirit of the Act may be maintained. No doubts, the provisions available under Product liability and the Mediation process is definitely going to support the consumer to solve their disputes amicably and outside the court settlement shall ensure the time saving and unnecessary delay.

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[20]Nishith Desai Associates,Frequently Asked Questions on Product Liability under the Consumer Protection Act, 2019, 2020, available at FAQ-Consumer-Protection-Act-A5.pdf (nishithdesai.com) (Last visited on 10-10-2022).

[21]R.K Gupta, Medico Legal Issues, June, 2020 available at Medicolegal issues | DR P K GUPTA MD NEUROPSYCHIATRIST AND EPILEPTOLOGIST (wordpress.com)

The burden is on the Manufacturers, Sellers and service providers to understand the provisions of the CPA, 2019 and to provide the best services to the consumers. The cases, where consumers choose the waver of their right to approach the court shall not be considered in case the consumer suffers harm as the contract to waive the legal right is against the provisions of constitution, Moreover, any contract to avoid legal right is void and is not enforceable under the court of law.

However, it is hoped that the penalties under the Product liability shall also play a relevant part as it shall make a deterrence effect for those who deliberately exploit the consumers.

DOMESTIC VIOLENCE IN LIVE-IN RELATIONSHIP : A JUDICIAL DISCOURSE

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Abstract
Live-in relationship is relatively a new phenomenon for the Indian society. There has been an on-going debate on live-in relationship as the concept strikes the very spirit so called societal morality in India. The Indian judiciary has always interpreted the law in the favor of Live-in relationship therefore it becomes vital to protect the partners in case of any kind of violence witnessed in such relationships. Although Domestic violence is very widespread, buthas mostly gone unnoticed by the general population. The Act seeks to reduce domestic abuse offences involving women who are legally married or who are in relationships that resemble marriage, such as live-in relationships. The work aims to mainly focus on the various aspects of live-in relationship with a special reference to Domestic violence in live-in relationship in India.

Keywords: *Live-in relationship,Domestic violence, Cohabitation, Marriage.*

1. Introduction

Cohabitation or Live-in relationship is a setup in which two consenting individuals comprising of male and female decides to live together without tying the knot of marriage. Such kind of relationship are getting more and more prevalent in the society as the young generations finds such relationship to be much suitable to their living conditions. The fact that such relationship are increasing in number but still such relationship is not governed by any specific law in India.

The concept of live-in relationship does not have a specific law in Indiaand there is no specific statute related to it. The rights and responsibilities of parties in a live-in relationship as well as the legal liability of any children they may have are not defined by any laws. The legality of these kinds of relationships is also unknown because there is no statutory definition of a live-in relationship. Under Indian law, no rights or obligations are conferred upon the participants to a live-in relationship. However, the court has thrown some light on the idea of a live-in relationship in a number of rulings. Despite the fact that the law is still unclear on the legal standing of these relationships, some rights have been established by interpreting and amending the current legislation to forbid the improper use of these ties.

2. Live-in Relationship and Law in India

Live-in relationship has occupied a legal position in many Indian laws by judicial interpretation granting legal status to live-in relationship. As in *Khushboo v.*

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Kanniammal,[1] it was stated in this case that live-in relationships come under the purview of the Right to lifeguaranteed under Article 21[2] of the Indian Constitution, making it legally valid. The Hon'ble Supreme Court in numerous cases has given decisions in the favour of Live-in relationship. The judiciary neither supports nor denies live-in relationship it just wants to create balance and justice in the society. The Indian court has largely focused on legitimizing live-in relationship. The government in the year 2008 in Maharashtra made an attempt to rearrange Section 125 of the Criminal Procedure Code to widen the scope of definition of the term "wife" in order to include a female who has been living with a male "like his wife" for a term for reasonably long period as defined in the section. This attempt was followed by the recommendations of the Malimath Committee in 2003 to widen up the scope of the word "wife" There have been instances in which the court have tried to interpret the definition of wife in view of the recommendations given by Malimath committee.[3]

The legislation like Protection of Women from Domestic Violence Act, 2005 (hereinafter referred as PWDV Act, 2005), which is considered to be the first piece of legislation that, in having covered relations "in the nature of marriage", has provided a legal recognition to relations outside marriage.

A woman who experiences cruelty or harassment from her husband or his relatives can only file a complaint under section 498A of the Indian Penal Code, which clearly does not cover all forms of violence against women that take place inside the four walls of the home. Before the PWDV ACT of 2005, there was no law that could address all forms of violence against women.The other key phrase that has been recognised in this Act is a live-in relationship, which was previously not recognised by Indian law. Since the PWDV ACT 2005 was put into effect in India, there is little doubt that living together has gained legal protection. Relationships that have the same legal status as marriage, such as live-in relationships, have also been legalised under various personal laws like the Hindu Marriage Act. Referring to the pertinent definitions of the PWDV ACT 2005, where the term "live-in relationship" received legal sanction, is crucial for a clearer understanding of the term and its legitimacy in India.

3. Live-in relationship and Domestic Violence in India

In the PWDV Act of 2005, the legislature acknowledged live-in relationships for the first time by granting rights and protection to females who are not legally married but are instead residing with a male person in a relationship that is in line with marriage, also similar to being a wife but not the same as being a wife.

The PWDV Act, 2005 defines "Domestic relationship".[4] The Act does not clearly define a live-in relationship; the courts are free to interpret it. In light of the aforementioned clause, the court gave the word "relationship in the kind of marriage" an interpretation. The Domestic Violence Act of 2005's restrictions currently applies to those who are in

[1] AIR 2010 SC 3196

[2] Constitution of India, 1950; Article 21:"Protection of Life and Personal Liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law."

[3] www.lawyersclubindia.com/articles/live-in-relationship-and-protection-of-women-from-domestic-violence-act-2005-7565. (Last visited on 5-01-2021).

[4] Section 2(f) "Domestic relationship means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family."

live-in relationships. Since "nature of marriage" and "live-in relationship" have a history and definition, courts presume that live-in relationships are encompassed by the term. This gives women some important safeguards against illegitimate marriage, bigamy, and similar live-in relationships.

Women who are in "relationships in the nature of marriage" are given protection under Section 2(f)[5] of the PWDV Act, 2005, but all live-in relationships do not fall under this definition. A live-in partner could be bigamous, adulterous, or involved with a minor. These relationships are unlawful, and the persons engaged will face consequences in court. The law is also silent about same-sex relationships. Although they are not exhaustive, the Supreme Court has established certain parameters for determining whether a live-in relationship may be considered to be "a partnership in the nature of marriage" for heterosexual adults.

The key determining factors are: a substantial length of time of relationship, to be determined subjectively; partners should have lived together as a shared household, as defined in Section 2(s)[6] of the PWDV Act, 2005 (simply dating for one night or spending weekends together is not sufficient); there must be some kind of financial pooling and domestic arrangements; and having a reasonable length of relationship. The nature of the relationship is primarily determined by the parties' shared intentions regarding what their relationship is to be and involve, as well as their respective roles and responsibilities. Common intentions include having children and sharing the responsibility for raising and supporting them, portraying themselves publicly as husband and wife, and socialising with friends, relatives, and others as though they are husband and wife.

According to the PWDV Act of 2005, women in relationships that have the characteristics of marriage are entitled to protection and maintenance. However, couples that do not pass the aforementioned standard are not eligible to apply for protection under the PWDV Act. Pre-nuptial agreements, cohabitation agreements, or any other legal instrument describing the roles and obligations of each partner before moving in together would be a smart choice in these situations to protect the parties' interests in the event of a relationship collapse. Pre-nuptial agreements are not common in India due to the lack of societal acceptability of them. People believe it to be a factor that encourages breakups or marriage dissolution.

Pre-nuptial agreements are not recognised by Indian law because it views marriage as a sacrament rather than a contract. Additionally, the legal status of pre-nuptial agreements is unclear, making it a murky area of the law. The term "Palimony" refers to a financial settlement that a court orders for partners in live-in relationships in the US. The phrases "pal" and "alimony" were combined by the California Supreme Court in Marvin v.

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[5] *Ibid*

[6] *"shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household.*

Marvin in 1977[7] to create the term "palimony,"[8] which is a colloquial term rather than a formal legal term. In 2011, the Supreme Court of India also said that India should develop the idea of palimony in light of shifting social mores (*D. Veluswamy v. D Patchaiammal*).[9]

Another issue that requires clarification is rape in live-in relationships. The Supreme Court stated in *Shivashanka Shiva v. State of Karnataka & Another*[10] that long-term sexual activity in a relationship cannot be characterised as rape, particularly in light of the complainant's own claim that they cohabited as husband and wife. This does not, however, imply that men who live with their female partner have unrestricted access to her because the defence of presumed matrimonial consent to cohabit is only available to legally married husbands and not to live-in partners who would have to ask permission each time they wanted to have a sexual relationship. As a result, if a woman has a sexual relationship with a man without her consent, she may accuse him of rape.

The word 'violence' refers to act which causes harm to another, which can be either physical or mental. The women are considered to be a subject of violence whether being in a husband wife relationship or even in live-in relationship. The courts have also included live-in partners under the purview of PWDV Act, 2005. Now the fact that such relationships are morally correct or not does not matter as judiciary in its various decisions have accepted and given relief to the aggrieved party in case of any dispute arising due to violence in such relationship.

Immorality and illegality are distinct. People may believe that live-in relationships are immoral, but that is their opinion, and it cannot be permitted to sway another person's choice. Moral policing is not acceptable, especially when the arrangement has the support of the fundamental rights touchstone. Although millennials prefer to enjoy relationships while they last rather than clutch to their relationship's relics, it's crucial to realise that healthy relationships take work. They require two people who genuinely want to be together as well as patience and time. Love, trust, and respect for one another are the three most crucial components of any relationship. Regardless of the social acceptance of marriage, the presence of these makes any partnership happy.

4. Judicial Response

"With changing social norms of legitimacy in every society, including ours, what was illegitimate in the past may be legitimate today."

- Honourable Justice A.K. Ganguly in *Revanasiddappa v. Mallikarjun*[11]

The Indian judiciary has taken the initiative to close the gap left by the lack of a live-in relationship-specific statute. Although it might be viewed as immoral by society, it is not at all "criminal" in the eyes of the law. The Indian judicial system seeks to provide justice to those involved in live-in relationships who, up until this point, had no legal protection against abuse resulting from such relationships. The judiciary neither explicitly

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[7] *http://online.ceb.com/calcases/C3/18C3d660.htm (Last visited on 16-11-2022)*
https://www.lawyersclubindia.com/articles/live-in-relationship-and-protection-of-women-from-domestic-violence-act-2005-7565. (Last visited on 16-11-2022)

[8] *https://dictionary.cambridge.org/dictionary/english/palimony*

[9] *AIR2011SC479*

[10] *[Criminal Appeal Number 504 of 2018, disposed of on 6th April, 2018]*

[11] (2011) 11 SCC 1

supports nor forbids these kinds of relationships. However, it only cares that there won't be any injustices committed. Consequently, the judiciary has considered several issues while making decisions in various situations, including both societal norms and constitutional.

Under the PWDV Act, 2005, a relationship like marriage must agree to a few fundamental requirements. It stipulates that the pair must be of legal age to get hitched or must meet the requirements for a valid marriage. The couple had to have lived together voluntarily and pretended to be wives for a sizable amount of time, it was further revealed. There shouldn't be any exceptions to the PWDV Act of 2005 for all types of live-in relationships.A one-night stand or a weeklong connection cannot be considered to be a household partnership. It further stated that a connection in the form of marriage would not be accepted if a man has a "keep" that he financially supports and uses primarily for sexual purposes or possibly as a slave.[12]

The Supreme Court emphasised the importance of expanding Section 2(f) of PWDV Act, 2005's definition of "domestic relationships," to cover impoverished, illiterate people who are in illegal relationships as well as their offspring who are born into such relationships and have no other means of support. In addition, the Supreme Court asked Parliament to pass new legislation in accordance with certain directives it provided in order to safeguard the victims from any societal harm brought on by such interactions. The Supreme Court[13] has also laid down the conditions for live-in relationships to be considered as relationships in the "nature of marriage" to be given benefits under the legal provisions.

5. Conclusion

A person is said to be in a live-in-relationship if they cohabit, i.e. share a house with their partner without married to him or her. It is considered a domestic relationship between an unmarried adult woman and an unmarried adult male who live or, at any point of time lived together in a shared household.[14] Live-in partnerships are only legally accepted as lawful if they have the "nature of marriage," or at least some of the key elements of a marriage, even though they are not legally recognised as such. When making decisions about live-in partnerships, the courts consider marriages to see if the relationship meets the criteria for a typical marriage.

Indian women must be shielded from domestic violence. Despite the fact that women are treated equally with men in India and despite the country's advancements, violence against women and girls remains one of the factors holding it back. It has a harmful effect on kids, and sometimes domestic abuse spreads beyond husband and wife relationships, involving kids as well. They are typically severely beaten by the father. Men think they have sole authority over women, and they believe they can act however they like even if it means endangering the lives of women. Burns from cigarettes can be observed on the body, as well as red swelling around the face and occasionally head trauma. Violence continues because proper regulations and legislation have not yet been established. Women never want to oppose their husbands or partners, so they are unable to even stand up to these individuals. In case of live-in relationship especially the women due to the fear of society would not complain of violence as she is already in the

[12]D. Velusamy v. D. Patchaiammal, (2010) 10 SCC 469 : AIR 2011 SC 479.
[13]Revanasiddappa v. Mallikarjun (2011) 11 SCC 1.
[14]Indra Sarma v. V.K.V. Sarma (2013) 15 SCC 755.

guilt of living in such relationship. Therefore it is futile to discuss about Right to life and personal liberty where a woman living with her own choice cannot even freely talk about the violence committed on her. So what is needed is to bring awareness among the people to accept such relationship. Instead of attempting to include live-ins within the purview of the current laws, the Parliament should attempt to pass a distinct branch because such a fruitless approach would further severely confuse the legal system.This would be a righteous way to bring about justice and equality in the society.

REVISITING THE JUDICIAL CONUNDRUMS OF DISCHARGE IN CRIMINAL PROCEEDINGS: TRACING THE ALTERNATIVES FOR TRADITIONAL APPROACHES

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Abstract

The pendency of cases in Indian Judiciary has been a recurring concern. According to the government sources, there are 4.9 crore pending cases in subordinate courts while 58,000 in High Courts. The clearance rate was at its lowest at 0.79% by the end of 2021. Backlog and high pendency has wide-scale ramifications, the most fundamental of which is denial of the basic right to justice to undertrial prisoners who keep languishing in jail for long periods. Structural barriers denying fundamental safeguards to the accused for his need of speedy justice negates the cardinal principles of Indian criminal justice system which is primarily based on the due process model. Interestingly, in a system where the presumption of innocence holds paramount importance and apart from many other provisions which is even reflected in the scheme of trial procedure, the attitude of courts towards the procedure of discharge poses varied anomalies.

The present research paper in the backdrop of the aforesaid facts attempts to-firstly, as certain the extent to which judicial mind is permissibly applied at the stage of discharge. Secondly, this study in the backdrop of NCRB data and select elopement cases of adolescent girls and subsequent criminalization, aim stobringout the elements of one of the most important yet occasionally used provision of discharge as one of the measures to combat pendency. It explores the possibility of altered approach towards discharge asamed ium to reduce the length of a criminal case and the pendency of criminal cases.

Key Words: *Discharge, Due Process, Pendency, Speedy Justice & Presumption of Innocence.*

1.Introduction: Understanding presumption of innocence in due process model

The Indian criminal justice system has a colonial legacy and is largely adversarial in nature.[1] It finds its roots in the "Due Process Model", consequentially "presumption of innocence" plays a very prominent role in criminal trials whereby the judiciary decides on the guilt of the accused by applying the ancillary principles namely, "proving beyond reasonable doubt" and giving the benefit of doubt to the accusedif the guilt is not proved[2]

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[1]The Code of Criminal Procedure 1973,Section 313, No. 2, Acts of Parliament, 1973 (India).
[2]1 MINISTRYOF HOME AFFAIRS, COMMITTEEON REFORMSOF CRIMINAL JUSTICE SYSTEM(Government of India 2003).

The over-crowded prisons, incidence of recidivism and high acquittal rates points towards something amiss about the system. Cases are dragged into a quagmire of technical details for years and even decades, while the victims of injustice continue to suffer. Their suffering is aggravated by the severe rigours of pursuing complicated and expensive legal procedures. There is very little attempt to arrive at an amicable settlement.

The criminal justice machinery in India is driven by due process that is shouldered by the adversarial adjudicatory process. The system is applauded not just for the protections it gives to the accused but also the extensive presentation of evidence and arguments to arrive at an accurate outcome. The judiciary discourages the role of thejudge as a mere spectator and advocates for a participative role.[3] Due process model acknowledges the state inflicted drastic deprivation of dignity and liberty upon initiation of criminal process against an offender.[4] In contrast to the crime control model, there is a presumption of innocence and full opportunity is given to an accused to discredit the case of investigative and prosecutorial agencies before an impartial authority. The Code embodies the principles underlying Articles 14, 19 and 21.[5] The constitutional spirit of justice, reasonableness, fairness and equality not only give access to justice to the victims of crime but also give body to the rights of an accused who is in fact the person on trial.

The Presumption of innocence follows the accused throughout the trial[6] until his guilt is proved beyond reasonable doubt.[7] This principle is embedded at every pre-trial as well as trial stage, including the under-utilised provision of discharge in the Code of Criminal Procedure.[8]

A preliminary hearing called 'hearing on discharge' assists the Court in identification of the specific issues and the number and need of witnesses. It also helps determine the prospective length of the trial, if the hearing points to the fact that the accused committed the offence. This stage is crucial for the most significant reason, that is, to explore alternatives of reducing the length of trial and adopting means that would serve the ends of justice without a protracted trial. When it is abundantly clear by way of lack of evidence, weak allegations and no material on record to explain the accusations against the accused, the Court has power to cut short the criminal process and let the accused be discharged. This stage, if approached with caution, curiosity and conviction, can help reduce the number of under-trials locked up in the prisons.

The under-trial population in prisons have prompted the Supreme Court to issue several directions[9] for release/discharge of accused in case of minor offences and offences punishable up to seven years except the economic offences. Burgeoning pendency of cases is also symptomatic of a diseased criminal justice system- the very system operating as an engine of oppression.[10]

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[3]Ram Chander v. State of Haryana, (1981) 3 SCC 191.

[4]HerbertL.Packer,Two Models of the Criminal Process, 113UNIVERSITYofPENNSYLVANIAL.REVIEW1–68 (1964).

[5]INDIA CONST, art. 14, 19 & 21.

[6]Leonard Munker, Preserving the Presumption of Innocence 49(1) J. KANSAS BAR ASSOCIATION49-54 (1980).

[7]Joseph Sorrentino, Demystifying the Presumption of Innocence 15 GLENDALE L. REVIEW16-26 (1996).

[8]The Code of Criminal Procedure 1973,Section 227, 239, 245, No. 2, Acts of Parliament, 1973 (India).

[9]Common Cause v. Union of India AIR 1996 SC 1619.

[10]177 LAW COMMISSION OF INDIA, REPORT ON LAW RELATING TO ARREST 65 (Ministry of Home Affairs 2001).

This grave situation can be remedied by identifying the specific causes of pendency at each stage and targeting them. The high acquittals signify that in most of the cases trial wasn't necessary if there had been application of mind at the pre-trial stage of discharge/framing of charges in order to weed-out cases which were groundless or malicious, with no chances of securing conviction.[11]

Figure 1: Nature Wise disposal of Criminal Cases 2022 (Source: National Judicial Datagrid, available at: https://njdg.ecourts.gov.in/njdgnew/?p=alert_dashboard/index)

2. Pre-Trial Discharge in Due process model: A Safety valve

The Due process model of Herbert Packer which aims at providing due process or fundamental fairness by way of procedural safeguards focuses more on accused's rights. The prime focus on protecting the rights of accused stems from the fact that firstly, the accused is presumed to be innocent until proven guilty and secondly, he is pitted against the mighty state. The criminal process in a due process model sets legitimate obstacles to the State which must be negotiated to secure a conviction. Apart from various such obstacles posed in the course of arrest, detention, there are many such safeguards in the pre-trial as well as during the trial stage. One such safeguard is the provision of discharge of the accused. Pre-trial discharge is a filter which is used to weed out cases instituted on no firm ground, with or without malicious intent. This stage acts as a safety valve and is used to protect the accused from wrongful prosecution and the ensuing harassment.

2.1 Discharge in Warrant and Sessions Case

The discharge under the Code of Criminal Procedure has multi-faceted reasons. Courts discharge an accused when there is no sufficient ground for proceeding[12] (Figure 1) or when on the day fixed for the hearing, the complainant is absent and the offence is such which can be lawfully compounded or is non-cognizable. The discharge in both the above stated case happens prior to framing of charges. The Code of Criminal Procedure provides for pre-trial discharge in cases of Trial of warrants case by Magistrate (case instituted on Police report/Otherwise than on police report) and Trial before a Court of Session (figure 1). It doesn't make such provision in Summons cases tried by Magistrate or the Summary trials.

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[11]245 LAW COMMISSION OF INDIA, REPORT ON ARREARS AND BACKLOG: CREATING ADDITIONAL JUDICIAL (WO)MAN POWER 6(Ministry of Home Affairs 2014).

[12]The Code of Criminal Procedure 1973,Section 227, 239, 245, No. 2, Acts of Parliament, 1973 (India).

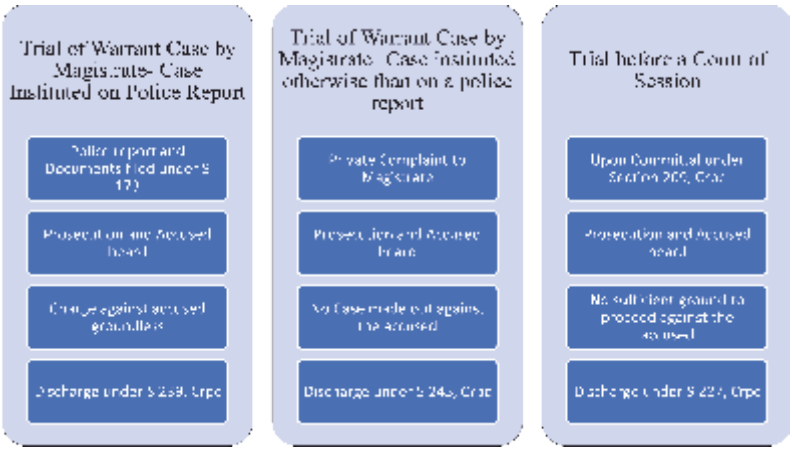

Figure 2:Discharge in different kind of cases at Pre-trial Stage

This is the stage where the court has an opportunity to weed out merit less cases at the very inception. Lack of establishment of prima facie case against the accused is likely to result in the discharge of the accused. This stage is also an opportune time to nip the issue of pendency of cases in the bud, by removing frivolous or un-merited cases which end up taking the crucial and precious time of the court. However, courts in India are apprehensive of discharging the accused because they are required to give a reasoned order for the same, in contrast to the other alternative i.e. framing of charges[13] which doesn't require any reasoning whatsoever. The precautionary approach of the court in matters of discharge is also mirrored in the National crime Records Bureau Data which shows a mere 7% of accused persons being discharged, while 51% of being convicted and 42% acquitted for the offences under Indian Penal Code (Figure 3).

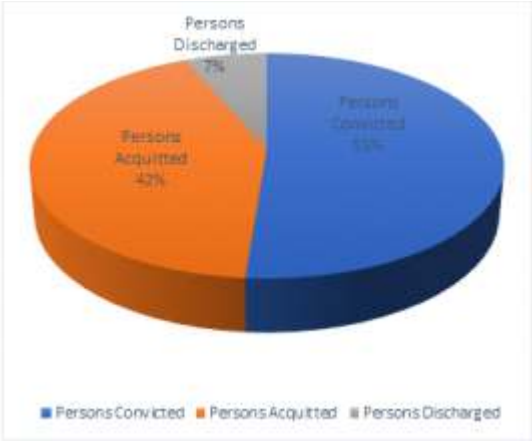

Figure 3: Disposal of Persons accused of crime under IPC (Source: 'Crime in India 2021', National Crime Record Bureau)

[13] Id., Sections 228, 240, 246.

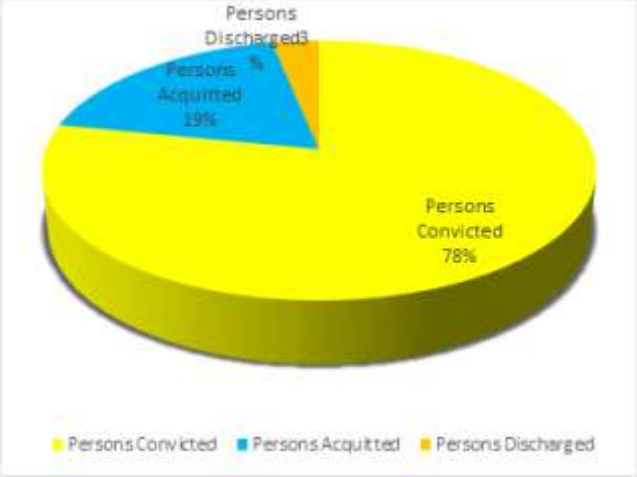

Figure 4: Disposal of Persons accused of crime under Special and Local Laws (Source: 'Crime in India 2021', National Crime Record Bureau).

The long periods of pre-trial detentions not just hits the presumption of innocence of the accused but also denies their fundamental right to speedy justice and their right to life and liberty guaranteed by Article 21.[14] As per Prison Statistics of India, there were 3,71, 848 undertrial prisoners and 1,12,589 convicts out of the total 4,88,511 prisoners in the year 2020. The number of undertrials in Indian prisons has seen an increase from the previous two years (2018, 2019). The languishing undertrials which has always been a matter of concern in terms of burgeoning prison population also has an economic downside. Long trials has always been an expensive affair, for instance the trial of Nitish Katara case went for 12 years and cost 5.8 crores to the exchequer.[15] It is also evidenced by the prison expenditure of 5814 crore (86.3%) out of the total sanctioned budget for the financial year 2020-21 Rs. 6740 Crore.[16] The brunt of the procedural lapses and the misplaced systemic practices is borne by the State exchequer which has to spend humongous money in maintaining undertrial prisoners.

Pre-trial diversions such as compounding,[17] plea-bargaining[18] and quashing[19] are another good alternative to cut short the period of trial and expeditiously dispose off the matter. While the order of compounding and plea-bargaining are of acquittal and conviction, respectively, the order of quashing results in discharge of the accused.

2.2 Discharge in Summons Case

[14] Hussainara Khatoon v. Home Secretary, State of Bihar, AIR 1979 SC 1369.
[15] THE ECONOMIC TIMES, https://economictimes.indiatimes.com/news/politics-and-nation/nitish-katara-murder-case-cost-rs-5-8-crore-to-exchequer/articleshow/46148033.cms?from=mdr (last visited Sept. 8, 2022)
[16] NATIONAL CRIME RECORDS BUREAU, PRISON STATISTICS OF INDIA, 263 (Ministry of Home Affairs, 2020).
[17] The Code of Criminal Procedure 1973,Section 320, No. 2, Acts of Parliament, 1973 (India).
[18] Id., Section 265A-L.
[19] Id., Section 482.

The Code of Criminal Procedure doesn't make a provision of discharge in summons cases like those in warrant and session cases. However, the judicial pronouncements over the period had unsettled the law by allowing discharge in summons case.[20] There are counter decisions in congruence with the legislative scheme as well.[21] The course set by these catena of decisions reading the provision of discharge in summons case has been corrected in the case of *Amit Sibal v. Arvind Kejriwal*[22] which is in harmony with the legislative scheme. This sentiment has also echoed by the Delhi High Court in a recent decision.[23]

The rationale for not having discharge provision in summons case is reflected in the legislative intent[24] which did not envisage summons case to be as protracted as a warrants case, thus elaborate hearing at the time of framing of charges was deliberately avoided. However it is pertinent to note that trial of summons cases these days are as long drawn as a warrants case, thus there is no plausible reason to make the accused face a protracted trial and deny the right to argue for discharge.

2.3 Revision by Sessions Court and the High Court

The discharge provisions require the Judge to "record his reasons" for discharging the accused. Moreover, Magistrate cannot pass an order of discharge until he examines all prosecution witnesses.52 It will be illegal to pass an order only upon examination of complainant.[25] A reasoned order is needed because the same is subject to revision by a higher court i.e. the Sessions Court or the High Court as the case maybe.[26]

If the discharge application of the accused is rejected then he may approach the High Courts challenging the same or even pray the quashing of proceedings against him. This order is, thus, not an interlocutory one and revision is maintainable under S. 397 of the Code[27]

The Law Commission of India suggested conferring the Magistrate with the power to restore the case on good and sufficient cause and re-summon the accused to face the trial on merits in cases where the accused had been discharged previously. This will not only ease the inconvenience caused to the aggrieved party who is asked to knock the doors of High Court in such event but also ease the burden of the High Court, which will have to rehear the entire matter by virtue of its inherent power under s 482.

2.4 Discharge in Foreign Jurisdiction

2.4.1. The United States of America

In the United States, the Federal Rules[28] comprise of the procedure for a preliminary hearing.[29] It is mandatory for the Magistrate to hold such hearing in 14 days of his initial

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[20]Arvind Kejriwal &Anr. v. Amit Sibal & Anr., (2014) HCC (Del) 719; Bhushan Kumar v. State (NCT of Delhi) (2012) 5 SCC 424.

[21] Subramanium Sethuraman v. State of Maharashtra &Anr., (2004) 13 SCC 324.

[22]2016 SCC OnLine SC 1516.

[23]R.K Aggarwal v. Brig. Madan Lal Nassa & Anr., 2016 SCCOnline Del 3720.

[24]41 LAW COMMISSION OF INDIA, REPORT ON THE CODE OF CRIMINAL PROCEDURE 1898, 178(Ministry of Home Affairs 2001).

[25]Yashodabai Keshav Thakur Desai v. Bhaskar Moreshwar kamat, 1972 SCC OnLine Bom 52.

[26]R.S Nayak v. A.R Antulay, (1984) 2 SCC 500.

[27]MCD v. Girdharilal Sapuru & Ors., 1981 (2) SCC 758.

[28]US Federal Rules of Criminal Procedure, 2020.

[29]Id., Rule 5.1.

appearance and if he is not in custody, then within 21 days or any other time upon satisfaction of extraordinary circumstances.[30]

Unlike Indian process, at the hearing, the US rules allow the accused to produce evidences and even cross-examine witnesses but cannot challenge the legality of process adopted by the Prosecution in obtaining the evidence.

The hearing helps the Court ascertain the commission of impugned offences by the accused before it. And if the outcome is affirmative, accused is promptly required to appear for trial.67 If the Magistrate is convinced that the accused did not commit the offence, he must dismiss the complaint and discharge the accused.68 The discharge does not preclude prosecution for the same offence.

There is also a stark contrast in procedure adopted in the U.S. and in India. While the rules in U.S. allow the accused to present evidence, the Code in India restricts the involvement of accused to raising objections orally in a hearing. Merely permitting oral submissions without the provision to produce evidences to substantiate the arguments would be a futile exercise. Only with an open-mind and a rights-based approach can the Court really assess the strength of the case made out against the accused at the preliminary stage itself.

2.4.2 Singapore

The concept of a pre-trial hearing is prevalent in another common law country that is Singapore. A pre-trial conference like this happens after the stage of plea of guilt however the objective behind it is to disclose the case to the Court as well as the accused. For this reason the provision for the same is called 'criminal case disclosure conference' and is laid down in S. 160 of the Criminal Procedure Code, 2010. It is a formal process that facilitates the trial by help of parties who outline their cases and evidences for the Court to determine if a case is made out against the accused person or not.

2.4.3 New Zealand

To assess the pre-trial delay and ensure there is sufficient support to take the matter to trial, the Court requires the prosecuting agencies to establish a preliminary case before it. The Criminal Procedure Act, 2011 of New Zealand provides for a 'pre-trial admissibility hearing' under Section 78. This hearing plays a significant role where the Court is convinced to deal with issues, the adjudication of which does not require the commencement of trial as a pre-condition. Moreover, if the Court believes the evidence is such that if the admissibility is not decided at a pre-trial stage, it may affect the overall proceedings. And finally, this hearing helps clearly ascertain whether the need for a trial is precluded.

2.4.4 Realm of International Law

Discharge finds its relevance in principles of international law where pre-trial release is encouraged in matters where charge is unfounded upon an impartial investigation[31] According to it, the prosecutors are under the duty not to continue prosecution or make effort to have the proceedings stayed. Other agencies like investigators and the police

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[30]Ibid..

[31]Tokyo Rules, Rule 5.1; UN Guidelines in the role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27th August to 7th September 1990, at paras 14 and 18.

should be permitted to discharge the accused if it is found that proceeding with the course of law is unnecessary for a particular matter.[32]

The International Criminal Court (hereinafter 'ICC') follows a hybrid of adversarial and inquisitorial system.[33] Its procedure is governed by the Rome Statute[34] and comprises of a stage of confirmation of charge before the trial actually begins. As per A. 61 the Court is required to hold a pre-trial hearing to approve the charges proposed by the Prosecution in presence of both parties and their counsels. The charges are substantiated by the Prosecution with documentary or summary evidence and the accused may object to charges, challenge the evidence and even present evidence.[35] Upon such hearing, the charges may be confirmed by the Pre-Trial Chamber or declined in light of insufficient evidence or an adjournment may be granted.[36]

When a charge has not been confirmed by the Pre-Trial Chamber of the ICC, the same acts as a blockade for unscrupulous and unnecessary proceedings against the accused. As a consequence all the restrictions upon the accused are also lifted and have the effect of discharge.

India has neither ratified nor signed the Rome Statute. But international practices and trends have often shaped the legislations especially in light of human rights jurisprudence. The opportunity to contradict the Prosecution evidence and to present own material can make the charge hearing a fruitful process rather than a mere formality before commencing a full-blown trial. Similarly, with respect to the procedure of a pre-trial hearing adopted in other jurisdictions does not absolutely match the Indian process for a hearing on discharge but the objective behind them is the same. For this reason, when this hearing is to be conducted is not the prime question. The importance of this hearing lies in the provisions for active involvement of the accused while weighing prosecution material to find out whether the Court requires an elaborate trial to convince itself of the accused's role in the crime.

3. Judicial approach towards "Discharge": Analysis of Role of Accused

The determination of the issue whether the trial court at the stage of discharge has the power to receive the material filed by the accused has recently drawn the attention and attempt has been made to evaluate the effect of providing the opportunity to the accused to adduce material at this pre-trial stage.

The Supreme Court in *Minakshi Bala v. Sudhir Kumar*[37] explained the scope and ambit of Section 239 and 240 of the Criminal Procedure Code, 1973- that the Magistrate after considering the police report[38] and the documents sent with it, can examine the accused, if required, and provide an opportunity of being heard to the prosecution as well as the accused. If upon such exercise, charge is found to be groundless then the Magistrate can discharge the accused in accordance with Section 239 CrPC; alternatively, if there is a ground for presuming the guilt of the accused, then the Magistrate has to frame the charge under Section 240 CrPC.

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[32]UN Guidelines on the Role of Prosecutors, Id. at para 18.

[33]Kress. Claus, The Procedural law of the International Criminal Court in outline: Anatomy of a unique compromise:, 1 J.INAT'LCRI. JUSTICE 603-17(2003).

[34]Rome Statute of the International Criminal Court, OHCHR 1998

[35]Id, Art. 16.

[36]Id, Art. 61.

[37](1994) 4 SCC 142.

[38]The Code of Criminal Procedure 1973,Section 173, No. 2, Acts of Parliament, 1973 (India).

Whether or not the accused can adduce material at the time of discharge was decided by the Supreme Court in *Satish Mehra case*[39]- If the accused succeeds in producing any reliable material of sterling and unassailable quality at that stage which might fundamentally affect the sustainability of the case, it would be unjust to discard such material by the court at that stage.

Thus, if the case ends there it saves a lot of time of the Court, efforts and cost. When the judge is reasonably certain that are less chances of conviction, the precious time of the Court should not be spent on holding a trial only for the purpose of completing the formality ergo it is advisable to snip the proceedings at the stage of Section 227 of the code itself.

The Supreme Court in State Anti-Corruption Bureau v. P. Suryaprakasan[40] went against its stand in Satish Mehra case that the court should not have rejected the application of discharge without applying its mind and considering the entire materials and explanation produced by the accused and held that the accused has at this stage has only the right of being heard and nothing beyond that.

The matter has been settled by the Supreme Court in *State of Orissa v. Debendra Nath Padhi*[41] where it was held that the accused has no right to produce any material/evidenceat the time of framing of charge and that the precedent set by Satish Mehrais per incurriam and against the mandate of the statutory scheme.

The Supreme Court has recently in *Nitya Dharmanand*[42] departed from the previous *Debendra Nath Padhi*[43] position by holding that the accused can present fresh material of "sterling quality" at the stage of framing of charges itself, if the material had been withheld by the prosecution. This reinforces the objective of framing of charges of filtering out wrongful prosecutions saving the accused to go through the ordeal of a full-

	Nature of Offence	Pending for	Reason
1.		More than 2 years	Noservice of summons to the accused or any other reason
2.	Traffic Offences Offence under IPC or any other law which iscompoundable with the permission of the court	More than 2 years	trial not commenced
3.	Offence under IPC or any other law- Non-cognizable & Bailable offence	More than 2 years	trial not commenced
4.	Offences under IPC or any other law which are punishable with fine only and are not of recurring nature	More than 1 years	trial not commenced
5.	Offences under IPC or any other law punishable upto	More than 1 years	trial not commenced
6.	Offences under IPC or any other law punishable upto	More than 2 years	trial not commenced

[39]Satish Mehra v. Delhi Administration, (1996) 9 SCC 766.
[40](1999) SCC (Cri) 373.
[41]AIR 2005 SC 359.
[42]Nitya Dharmananda v. Sri Gopal Sheelum Reddy Criminal Appeal No. 2114 of 2017.
[43]State of Orissa v. Debendra Nath Padhi, Appeal (crl.) 497 of 2001.

fledged trial.

Regarding the issue of pendency in courts, the Supreme Court in *Common Cause v. Union of India*[44] issued directions encouraging courts to use the tool of discharge or acquittal and close the case in following enumerated matters:

Table 1: Cases fit for Acquittal/discharge and closure (Source: Common Cause, 1996)[45]

4. Evaluating the collaterals of mechanical framing of charges: A case study of elopement in romantic relationships

The primary objective of conducting a criminal trial is to ascertain the guilt of the accused by following a fair procedure and giving equal opportunity to both - the prosecutor and the accused. Trial generally commences after the conclusion of investigation (except in cases instituted otherwise than on police report) with the prosecution opening the case, which is followed by submissions of the defendant. The court at this stage has to sift through the material on record and ascertain if there is sufficient ground for proceeding against the accused (Figure 5) ergo either discharging the accused or proceeding with the framing of charges.

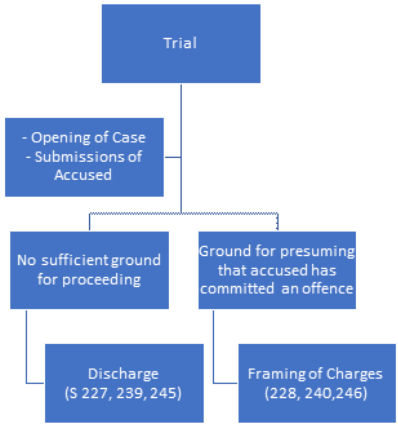

Figure 5: Process of Trial (Warrants and Sessions Case)

4.1 Framing of Charges

The court by applying its judicial mind[46] frames the charges only if there is a prima facie case and sufficient ground for proceeding against the accused. This judicial exercise of evaluation of the materials on record for framing of charges must be a reasoned order, to maintain sanctity of the accused's rights to know the grounds.

However, the Apex Court in *Bhawna Bai*[47] doing away the need for citing reasons in an order framing charges undermines the importance of this stage- reducing it to a mere formality- and thereby violating the crucial statutory right of an accused.

This decision is in complete disregard of the earlier decision *R.S Mishra v. Union of India*[48] where the Supreme Court held that the order framing charges should be clear and self-

[44]Satish Mehra v. Delhi Administration, (1996) 9 SCC 766.
[45]Common Cause v. Union of India, AIR 1996 SC 1619.
[46]Union of India v. Prafulla Kumar Samal, AIR 1979 SC 366.
[47]Bhawna Bai v. Ghanshyam, (2020) 2 SCC 217.
[48]R.S Mishra v. Union of India, Criminal Appeal No. 232 of 2005.

explanatory.This is in consonance with the legal right of revision available to an accused under Section 397 of the CrPC against an order framing charges. A revision can be preferred against an illegal or perverse order of framing charges, which post *Bhawna Bai* would be difficult to establish for it will be a non-reasoned order.

Bhawna Bai relying on *Kanti Bhadra Shah*[49] justified the need of giving reasons while framing of charges on the grounds of 'overburdening the already burdened trial courts with extra work'. This decision is in complete disregard of the constitutional and statutory rights of the accused, the principles of natural justice and the precedent set by *R.S Mishra* and *Prafulla Kumar Samal*.

Bhawna Bai, by endorsing *Kanti Bhadra Shah*, has opened the avenue for a perilous practice of trial courts to stop giving reasons in orders framing charges. This will supposedly pose serious repercussions to the accused, who will now have to withstand a possibly wrong, illegitimate and malafide prosecution till the end of trial. In fact, this will further increase the burden of the trial as well as High courts. It also runs against the cardinal principle of 'presumption of innocence'- where on one hand the discharge of the accused which upholds innocence of the accused requires reasons to be given, whereas the framing of charges pointing towards the guilt requires no reasons to be given.

4.2 A Case Study of Adolescent Sexuality

The law on age of consent[50] qualifies the consensual sexual relationship by an under 18 year-old as rape. This female under 18 years is assumed to have no sexual agency or sexual autonomy in the eyes of the law. This law on statutory rape, also called as the Romeo Juliet law in other jurisdiction has far reaching consequences. It is being excessively abused by the parents of the girl child to implicate her paramour for the offence of rape/penetrative sexual assault. Similarly, the instances of elopement of a girl child are labelled as kidnapping from lawful guardianship. This is so, because the offence of kidnapping from lawful guardianship doesn't consider the agency of the minor male or minor female, but gives credence only to the consent of the guardian.[51]

The legal framework on consensual adolescent sexuality is dragging minors into the criminal justice system. This over-criminalisation is leading to traumatic experience for minor and also over-burdening the State machinery. This is further complicated by the conflicting judicial discourse on interpretation and enforcement of the legal framework on sexuality. The age profile of the kidnapped/abducted female child victim and the purpose of kidnapping as given in NCRB Data corroborates the criminalization of underage sexuality. The share of female child victims in the age bracket 16-18 years kidnapped/abducted is 58% of the total child victims, while those in 12-16 years constitute 37% (Figure 6).

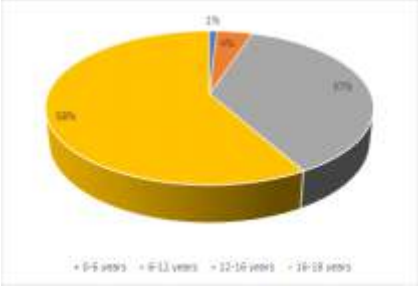

Figure6: Age-profile of Kidnapped/Abducted Female Child Victim (Source: Crime in India 2021, National Crime Record Bureau)

[49]Kanti Bhadra Shah &Anr. v. State of West Bengal, Appeal (Crl.) 5 of 2000.
[50]The Indian Penal Code 1860,Section 375, No. 45, Acts of Parliament, 1860 (India).
[51]Id, Section 361.

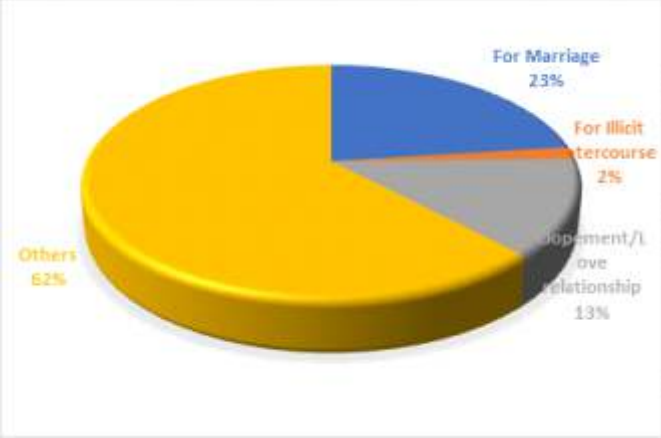

Figure7: Purpose of Kidnapping (Source: Crime in India 2021, National Crime Record Bureau)

Marriage (23%), elopement/love relationship (13%) and illicit intercourse (2%) account for 38% cases of kidnapping (figure 7). The consensual act criminalized by the law burdens the criminal justice system as a whole as evidenced by high acquittals, low convictions and recorded instances of compounding and quashing. This legal complexity can be ironed out by using the stage of discharge to weed out cases of marriage of underage girl, elopement out of romantic relationship and consensual intimacy.

Table 2: Court Disposal of Cases (Source: Crime in India 2021, National Crime Record Bureau)

Offence	Cases Convicted	Cases Discharged	Cases Acquitted	Cases Compounded	Cases Quashed
Kidnapping and Abduction of Women to compel her for Marriage (S 366, IPC)	259	46	982	70	6
Rape of Girls	694	160	1451	9	8
POCSO S 4 & 6 r/w 376	3270	297	6660	25	

Table 3: Disposal of persons arrested (Source: Crime in India 2021, National Crime Record Bureau)

Offence	Persons Convicted	Persons Discharged	Persons Acquitted
Kidnapping and Abduction of Women	685	246	1696
Kidnapping and Abduction of Women to compel her for Marriage	1248	133	3150
Kidnapping and Abduction of Women to compel her for Marriage	375	64	1256
Rape of Girls	869	211	1837
POCSO	3849	329	8183

4.2.1 Quashing

The courts in India have been allowing quashing of FIR in POCSO and aforesaid select provisions of IPC on the grounds that the that the parties had consented to the sexual relation and they were to be married[52], prosecutrix had forgiven the petitioner and both of them have consequentially married[53] and amicable settlement of dispute between the parties.

Court has also quashed the proceedings where the continuance of the same would jeopardize the welfare of the child born[54] out of the relation and the future of the prosecutrix (marital life[55]).[56] However, the Court has warned that this should not be taken as a precedent and quashing in rape cases on the grounds of parties entering into a compromise should be avoided at all cost, as it would go against the intention of the legislature[57]. Similar reasoning has echoed in another case, where the Court refused to quash the proceedings where a 17-year-old girl had entered into a marriage with the accused but drifted apart. The Karnataka High Court on the similar lines that the offence of rape is a grave crime against the society and thus no settlement between the parties either in the form of marriage or otherwise, can be a ground of quashing the proceedings.[58]

[52]Harish Kumar v. State (NCT) of Delhi, Crl. M.C 2377/2020.
[53]Ashish Gupta v. State (NCT) of Delhi, Crl. M.C 1003/2022.
[54]Mallesha @ Malla v. State of Karnataka, Criminal Petition No. 3481/2020/
[55]Mizanpur Rahman v. State of Assam & Anr, Crl. Pet. 159/2020.
[56]Vikash Kumar v. State (NCT) of Delhi & Anr, Crl. M.C 1015/2021.
[57]Dinesh Sharma & Ors. v. State (NCT) of Delhi, Crl. M.C 1002/2021.
[58]Soni Nihal Dinesh Bhai & Anr. V. Sri Sandeep Patel & Anr, Criminal Petition No. 9463 of 2016.

The court tends to quash the proceedings involving minor girl in order to protect the institution of marriage,[59] where the parties have entered into a compromise and have readily married[60] and a child begotten[61].In such cases, bleak chances of conviction and continuation of proceedings amounting to abuse of process of law was cited as a ground of quashing.[62]

Therefore, going by the legal framework criminalizing underage sexuality, the figures of NCRB and the decided case laws, it is evident that the situation can be salvaged if there is better application of judicial mind at the pre-trial stage (figure 8).

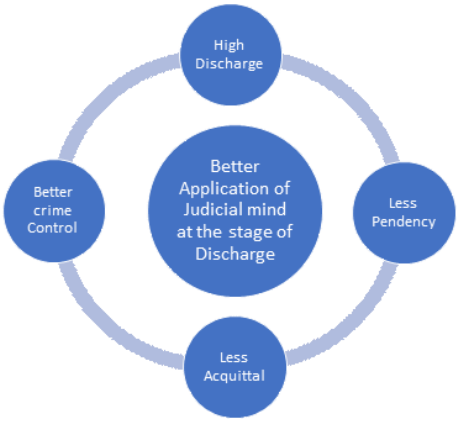

Figure 8: Schematic representation of Impact of better application of judicial mind at the stage of discharge

5. Conclusion: The Suggested approach

The Due Process model focuses on giving an equal space to the accused and enforcing his rights. However, as soon as the state machinery intervenes, the accused gets labelled and the evil gets dramatized[63]. Despite multiples safeguards, a criminal trial in itself is a status degradation process[64]. The role played by different stakeholders can turn out to be discriminatory when safeguards are ignored, process is abused and trial is approached mechanically. Overlooking the importance of the stage of discharge is one such crucial void that needs mending by a pragmatic attitude and a more detailed threshold hearing to weed out unscrupulous litigation and frivolous cases.

As regards the lack of statutory provision for active participation by accused at the stage of discharge, a judicial decision will be able to clear the air on the same. An amendment may be an appropriate way to bring a change where the desired result can be easily

[59]Jasmeer K P. v. State of Karnataka, Criminal Appeal No.336 OF 2021.

[60]Sivagnanapandian v. State of Tamil Nadu 2016 SCC OnLine Mad 18120; Thiyagarajan v. Union Territory of Puducherry & Anr, 2016 SCC OnLine Mad 17436.

[61]Ashok Kumar Singh v. State of M.P; A. Pannerselvam v. State & Anr, 2015 SCC OnLine Mad 4028; Prasanth v. State of Tamil Nadu, Crl. O.P. (MD). No. 3463 of 2020.

[62]Tejbhan Singh @ Jitu v. State of M.P., MCRC-10857-2015.

[63]FRANK TANNENBAUM, CRIME AND THE COMMUNITY (Columbia University Press,1938).

[64]Harold Garfinkel, Conditions of Successful Degradation Ceremonies 61AMERICAN J. SOCIOLOGY420–4(1956).

achieved without stretching the language of the section by way of interpretation.

While the intervention by the Apex Court or the legislature is awaited, the Courts have to be more circumspect and judicious in exercising discretion in the ongoing matters. It must take into consideration the facts and circumstances before rejecting the discharge application mechanically lest it would be a loophole that will unleash vendetta for harassment of others.

A pre-trial hearing is done at the stage of discharge but it can be a more collaborative and participative process on part of accused. His involvement, as a stakeholder, mustnot be limited to recipient of information and respondent to the prosecution material and allegations. In light of natural justice, an accused must also be equally contributing to the hearing that might ultimately be decided in his favour and a discharge be granted. Through purposive interpretation, this stage needs rethinking and redesigning. At the same time there has to be caution to not let the accused use discharge as a tool to desist prosecution and bring about abrupt end of a trial.

When the facts are inadequate and unintelligible, more so in absence of any evidencebefore Court which is faced with issues, legal or factual, of magnitude that cannot be known without sufficient material, prima facie decision should be avoided. Simultaneously, before the trial has commenced, the Court is not required to carry out meticulous analysis of whether a conviction or acquittal would result. However, the proceedings must be halted then and there if it appears that in the lieu of material presented in form of witnesses, statements, etc. the allegations are false, frivolous orvexatious and save the time of state machinery in arriving at the same conclusion at a later stage when resources have been invested in the process.

Though the discharge is not a highly used tool for the accused in the hands of defenceor the Court, if used vigilantly it will reduce the unnecessary filing of petitions and a consequent delay in proceedings. However, discharge order does not tantamount to acquittal. The outcome of a pre-trial hearing in regulating the possibility of cases tried is hard to be determined statistically. However, the impact is substantial if adopted more meticulously and can eliminate fictitious and unsubstantial claims.83 Not only does this permit a preliminary disposal of the matter, it advances the objective of the constitutional goal of speedy and effective justice.

COURT OF JUDICIAL MAGISTRATE- THE FIRST LINE OF DEFENCE AGAINST VEXATIOUS CRIMINAL LITIGATION

Saurabh Rana*
Nitesh Saraswat#

Abstract

The course of a criminal case is almost entirely dependent on the manner it is handled by the courts of judicial magistrates in their pre trial phase; and when it is so, the judicial Magistrates have a duty not only to identify a series of multiple frivolous criminal proceedings originating from the same transaction but also to nip it in the bud by utilising his powers in appropriate cases. An over jealous litigant has a tendency to exploit the loop-holes of criminal justice administration system but these courts have to ensure that the fundamental rights of the party at the receiving end are not trampled in this vicious repetitive process. The Supreme Court of India (see AIR 2021 SC 1381)felt compelled to note in this context that these courts have as much responsibility in protecting the fundamental rights of the citizenry of India as the Apex Court of this land.

Keywords- *cognizable, investigation, inquiry, Judicial Magistrate, procedure*

Some cases should never reach at the doorsill of Apex Court simply because they do not deserve to be there - being repetitive off shoots emanating from the same transaction with the sole purpose of perpetually harassing the opponent in a series of criminal litigation. But then recently it (again) happened and the issue of frivolous vexatious criminal litigation (again) came under the scanner of Supreme Court and grabbed the attention of academia also. To understand the whole issue, let us start from the basic law in this respect- for deciding the procedure to be adopted, crime is divided in two categories- one, is for cognizable cases and the other for non cognizable ones.[1] The selection of process out of the available alternates in the criminal justice administration system depends upon this classification to a large extent viz.if it is a non cognizable case, section 155 CrPC(Criminal Procedure Code, 1973- hereinafter CrPC) is resorted to; and if it is a cognizable case, section 154 CrPC is to be resorted to and the police is supposed to register an FIR and then investigate the matter; although in India criminal justice system getting an FIR registered by police is an uphill task; even the Supreme Court has divided people in 'ordinary' people and 'resourceful/practical' people and observed that if unfortunately one is from the former category, then even after registering of FIR there are less chances that the offence be investigated by the police, on the other hand, if one is from the later privileged category, FIRs are registered in a matter of minutes and investigation proceeds with 'supersonic speed'.[2] Anyway, apart from

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[1] See section 2 (c) and 2 (l) CrPC; also refer to Schedule First of CrPC, 1973
[2] See Lalita Kumari v. Govt. of Uttar Pradesh 2008 (11) SCALE 154

these two available modes, there is yet another way of initiating criminal justice administration system in the context of commission of crime, and that is by way of filing complaint under section 200 CrPC-this complaint procedure (section 200 to section 203 CrPC) does not differentiate on the basis of the offence being cognizable or non cognizable one.

This writing examines the way criminal litigation process is abused by those who keep on harassing their opponents at their whims and fancies by throwing the state instrumentalities- read police and courts- into action time and again by filing abovementioned proceedings successively one after the other. Such people take the system for a ride and do everything possible under the sun to keep the sword hanging on the heads of their opponents. They would get the FIR registered and after sometime to keep the opponent on their toes they would get another FIR registered after some time on the same incident; and mind you here we are not referring to cross FIRs rather we are looking at the instances where another FIR is registered by the same party for the same incident against the same opponent- yes, that also happens. We also find cases of NCR after NCR pertaining to the same incident by the same party against the same 'other' party. We find instances of repetitive complaints under section 200 CrPC upon the same incident by the same party against the same 'other' party. As if that is not enough, we also find instances of first filing of FIR/NCR under section 154/155 CrPC as the case may be, and thereafter a complaint filed under section 200 CrPC upon the same incident by the same party against the same opponent. These seem to be the cases of excess- of personal vendetta on the part of litigant/s; and of state corruption / carelessness as you want to portray it on the part of state officials including presiding officers of judicial courts. But one thing is sure that for the 'other' party/opponent, there is no end of this dark tunnel and it is he who endlessly suffers without any fault of his- paying to lawyers for the litigation, sometimes from his savings and sometimes after borrowing, spending his valuable time, which he would have spent in earning something for his family, briefing counsel and loitering in the court premises just waiting for his case to be announced in the court of law. Let us briefly survey the existing observations by the Supreme Court in this respect.

Successive FIRs/NCRsu/s 154/155CrPC

In cognizable cases, Cross-FIRs from the two sides is a usual phenomena where the two parties allege commission of cognizable offences by each other within the same transaction. But there are instances where on the same transaction, the same party files second/successive FIR/s against the same 'other' party or say adding one or two more persons as accused and adding one or two more penal provision/shere and there. It goes without saying that such embellishments would not only be planned and strategic 'improvements' upon the original version of facts but could have been well taken care of by the investigating agency while investigating the matter upon the earlier FIR itself. The apparent motive of restarting the whole thing again is to get the opponent arrested one more time, making him to suffer humiliation at the hands of police and probably again going to jail if his bail application is rejected. The Supreme Court commenting upon it has observed[3] that filing of second FIR in this manner is totally impermissible as it violates Article 21 of the Constitution of India.

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[3] See Amitbhai Anilchandran Shah v. CBI (2013) 6 SCC 348

Article 21 guarantees that personal liberty cannot be taken without due process of law and allowing such successive FIRs from same side for the same transaction will make the accused therein to forego and surrender his personal liberty time and again before the criminal justice administration machinery without following due process. Here note that on happening of an event which changes the contours of the criminal case- say e.g. death of the injured victim in hospital changing the case from section 326 to section 302- the possibility of re-arrest in the same FIR is not ruled out.

In another case,[4] the Apex Court observed that undoubtedly the police has power for investigation including conducting further investigation under section 173(8) CrPC even after filing charge sheet in the case; however such sweeping and expansive powers of police has to be balanced with Articles 19 and 21 of the Constitution of India. These investigating powers of policecannot subject a citizen to successive investigation upon the same incident especially upon successive FIRs and it cannot happen whether the police has already filed the charge sheet in the case or not. In both the eventualities, the course open for the police is to investigate upon the same earlier FIR; of course, addition/deletion of sections and accused may be done in the ongoing investigation or in further investigation as the case may be.

This discussion with all suitable modification/s as required applies to the cases of successive NCRs under section 155 CrPC on the same incident by the same party against the same opponents.

Successive Complaints u/s 200 CrPC

Complaint under section 200 CrPC is filed before the Magistrate and it may pertain to any case- cognizable or non cognizable. As we have the instances of Cross-FIRs and Cross-NCRs, so also we come across the cases where Cross/Counter-Complaints under section 200 CrPC are filed before the Magistrate by opposite parties in the same case/transaction. Holding them as a valid course of action, the Supreme Court observed[5] that if we prohibit such Counter-Complaints, it would be of serious impediment to the cause of justice for it may happen that the real guilty party in an event manages to file the first complaint under section 200 CrPC or for that matter an FIR/NCR, in such case if the law precludes any further complaint or FIR/NCR as the case may be by the real victim giving his side of the story, his legitimate rights would be in peril and it would be a great injustice to him.

Hence, as Cross-FIRs/NCRs, Cross/Counter-Complaints under section 200 CrPC are permissible and perfectly valid. But at the same time, second/successive complaint/s under section 200 CrPC by the same complainant against the same 'other' party pertaining to the same incident with some artificial embellishments here and there mustnotbe allowed. If there is any such attempt by a party, naturally the other party when comes before the court in pursuance of the summons issued under section 204 CrPC would tell that court about the fact of earlier proceeding pending in respect to the same incident; but before that occasion arises, such party bears the harassment of again responding to repetitive summons and surrender in gagain before the court in the same case which tantamount to unduly curtailing his personal liberty. In this context, as observed by the Supreme Court,[6] it is the bounden duty of the complainant to make a full and true disclosure of the facts of the case in the subsequent complaint including that of

[4]T. T. Anthony v. State of Kerala (2001) 6 SCC 181
[5]Upkar Singh v. VedPrakash (2004) 13 SCC 292
[6]Ram Dhan v. State of Uttar Pradesh (2012) 5 SCC 536

the pendency of any previous complaint on the same incident, and thereupon it is the duty of Magistrate to deal with him with a heavy hand and nip such vexatious second/successivecomplaint/sin the bud which was fuelled only by personal vendetta. Such second/successive complaint/shave no necessity in the eyes of law to be filed in such manner and serve no purpose in the course of justice except to harass the 'other'/opponent party.

Complaint u/s 200 CrPC after FIR/NCR u/s 154/155

(Even) in a trivial case, 'practical people'[7] manage to get FIR registered of course by manipulating legal provisions and factual circumstances with active association of some state officials who evince extra interest[8] in the matter for some ulterior motives. On the other hand, for not so influential people, getting even an NCR registered is a herculean task. As if that is not sufficient, practical people then focus on the maximum possible exploitation of the system and to keep their opponent constantly harassed through the state instrumentality they file criminal complaint under section 200 CrPC before the concerned magistrate. Here let us keep in view the observation of Apex Court in T. T. Anthony's case supra that every time a person's personal liberty is taken away without due course of law and he is forced to attend/surrender at a particular place, his rights under Article 21 of the Constitution of India is violated. It is no place and occasion to dilate upon the fact that the Supreme Court in a galaxy of cases observed Article 21 to contain the most basic right available to people under the Constitution of India.

Let us take onereal example of this sort of occurrence. In a recent case,[9] one party got an NCR registered under section 323, 504 and 506 IPC against his neighbour in the year 2012 in respect of an incident occurring the same year. Criminal force was used from both sides so the neighbour also got an NCR registered against him under same sections. As if that did not satisfy his ego, the first party in 2018, after a gap of 6 years, filed a complaint under section 200 CrPC upon the same incident before the concerned judicial magistrate.The magistrate issued summons on the complaint under section 204 CrPC. This summoning was challenged but curiously it was upheld first by the sessions court and then by the High Court. The matter was then taken to the Supreme Court. Commenting upon the conduct of the party filing complaint under section 200 CrPCbefore the judicial magistrate, the Supreme Court observed that that was a concerted efforton his part to mislead the magistrate with a clear motive of harassing his opponent with a frivolous and vexatious process. Reflecting upon the conduct of judicial magistrate in issuing the summons, the Supreme Court observed that it was a case where the magistrate surprisingly, while being aware that there was a significant delay in filing that complaint (6 years after the incident) and that there was another legal proceeding in the form of NCRsgoing on in respect of the same incident, issued summons under section 204 CrPC on that complaint against the other party. Looking at the circumstances of the case, the Apex Court felt compelled to observe that it seems that the sessions court took 'extra interest' in the matter in not only upholding this summoning by judicial magistrate, as if that was not enough, it 'improved' the case of complainant by adding section 506 part II IPC to it which was punishable with upto 7 years of imprisonment, that was done 'probably only to bring that complaint within

[7] See supra at 2

[8] We shall see in our discussion infra that the Supreme Court has recently used this phrase even in the context ofjudicial courts.

[9] Krishan Lal Chawla v. State of Uttar PradeshAIR 2021 SC 1381 (2021 SCC OnLine SC 191)

limitation period under section 468 CrPC'.
Ultimately the Supreme Court quashed that summoning but the damage had already been done as the other party had to fight the case for almost 3 years for getting the order of summoning quashed right from sessions court to the High Court and then to the Supreme Court. Mental disturbance, wastage of money and time were the inevitable by-products of this process.
In Upkar Singh's case supra, the Supreme Court clearly observed that any complaint filed before a magistrate under section 200 CrPC by the same party against its opponent subsequent to the registration of an FIR/NCR as the case may be by the police upon the same incident, is prohibited under the code simply because the matter has already come under the scanner of criminal justice administration system; the process has started, one may take his grievances in respect of that process to the concerned court or for that matter to the higher officials of police but filing another complaint under section 200 CrPC in the same matter is simply not permissible. Such complainant cannot subject the other party to a double whammy of two parallel processes simultaneously.
In any such case, as observed by the Supreme Court,[10] it lies upon the litigant to come clean on facts, he is supposed to make a full and fair disclosure of all the relevant facts in his knowledge and any suppression thereof must be taken seriously by the court. In such settled legal position, it is the duty of the complainant to disclose any previous proceeding if going on upon the same incident. Upon such disclosure, when the magistrate gets to know about the existence of previous proceeding, he must consolidate the two under section 210 CrPC if the previous such proceeding was an investigation going on pursuant to an FIR if the case was cognizable or pursuant to an order under section 155 (2) CrPC if the case was non cognizable; as for the remaining possibility i.e. if it was a non cognizable case but there was no section 155 (2) CrPC order, the magistrate must not issue summons upon the subsequent criminal complaint as more efficacious recourse in this situation would be to consider what could be done on the earlier original NCR filed with the police in the case. In any case, as observed by the Supreme Court,[11] if there is a significant delay between the occurrence of incident and the filing of criminal complaint thereupon, it is incumbent upon the magistrate that he examines any possibility of exploitation and abuse of the process of court by making further enquiries. The magistrate in such casesmust find out the real truth in the matter and dismiss frivolous complaints at the outset itself after applying his judicial mind.

Key Position of the Judicial Magistrate

If we look at the positioning of judicial magistrate in the criminal justice system administration system, we find that in all cases across the board- whether they are triable by magistrate's court or triable by session courts[12] or whether they are cognizable/non cognizable- his role is crucial in more than one ways in the life span of a criminal case.
If we look at the pre trial[13] stage in all criminal cases- magistrate triable or session triable- the judicial magistrate performs some key functions which may seal the fate of the case in one way or the other. Let us delineate some stages where the judicial

[10]See K. D. Sharma v. SAIL (2008) 12 SCC 481
[11]See Supra KrishanLalChawla case
[12]This is the main division of triability of criminal cases as per their nature / heinousness- refer to First Schedule to CrPC.
[13]Trial starts with the framing of charges- which in magistrate triable cases is done by the magistate whereas in session triable cases it is done by the session court.

magistrate functioning is crucial to the foundation of a criminal case.

1. At the stage of registration of FIR

Section 154 CrPC provides for the registration of FIR by police in case of a cognizable offence but it is no secret that getting the FIR registered by police is not an 'ordinary' task- refer to the discussion above centered around Lalita Kumari's case-in this state of affairs, the courts of judicial magistrate upholds the rule of law and provides access to justice to the 'ordinary' people of this country by ordering police to register FIR under section 156(3) CrPC. And this discussion holds both for magistrate triable cases and session triable cases.

2. After the registration of FIR

In all cases, once FIR is registered, section 157 CrPC saysan 'occurrence report' has to be sent to the illaqa magistrate (judicial magistrate of that police station) as soon as possible. This provision is designed to check diversions, and embellishments and non-investigation on the part of police. In case of non investigation by police, the judicial magistrate may direct an inquiry or if he deems fit he is empowered to look in the matter himself.

3. Arrest in the stage of Investigation

Then it is the court of judicial magistrate which in all criminal cases is the first court of approach- section 57 CrPC says that the person arrested must be produced before the magistrate within 24 hours of his arrest; this is also mandated by Article 22(2) of the Constitution of India. As per *Arnesh Kumar's case*,[14] heavy duty is casted on the court of judicial magistrate to ensure that the police has not over-stepped its powers and unnecessarily harassed the accused in the case as far as the matter of arrest is concerned. Thereafter under section 167 CrPC the judicial magistrate has a key role to perform in the context of continuance of arrestee's detention in police custody or judicial custody, as the case may be, and then in the matter of statutory bail in case of non filing of challan by police within the stipulated time frame in section 167 CrPC..

4. Statements and Confessions under section 164 CrPC during the stage of investigation

It is yet another important function of a judicial magistrate that he records the statement/s of witnesses and confession of accused persons during the stage of investigation in a criminal case. Such statements are to be given under oath though in case of confession the oath is not to be administered to the accused. It is the paramount duty of the judicial magistrate that he ensures that the accused while getting his confession recorded under here section 164 CrPC is free of any fear, force or compulsion of police.

Also in this respect it is notable that as far as the investigation is concerned in all criminal cases, the judicial magistrate performs crucial functions in the form of Test Identification Parade, scientific tests e.g. DNA etc.

5. Monitoring of investigation

Investigation is generally understood to be the prerogative of police- the way it is to be conducted is to be decided by the police and judiciary is expected not to interfere in that matter as per the theory of separation of powers. But in *Sakiri Vasu's case*[15] the Supreme Court applied the theory of 'implied powers' and observed that when the judicial magistrate has power to order registration of FIR it has also the power to monitor the

[15]SakiriVasu v. State of U.P. (2008) 2 SCC 409

investigation in a criminal case- this is analogous to- when one has power to direct something to be done it has implied powers to see that it is properly done.

6. Further Investigation

Police files the challan under section 173 CrPC in the court of judicial magistrate- after a series of judicial pronouncements by the Apex court[16] it is now settled law that the court is not bound by the conclusion of police. Judicial courts may act de hors the police report; also it may order the police to 'further investigate' in the matter under section 173(8) CrPC. Earlier a restrictive view was taken in this respect that further investigation could be ordered by the judicial magistrate only before the accused appears before him in pursuance of the process issued- but now in *Vinubhai Haribhai's case*[17], the Supreme Court observed that there seems to be no plausible reason/s given by the earlier courts as to why a Magistrate ceases to have power to order further investigation once he issues process and the accused appears before him in pursuance of that; while concomitantly, the power of police to investigate further into the offence remains intact till the stage the trial commences. The court further observed that to hold that the police retains the power to further investigate till charges are framed, subject of course, to the Magistrate's nod under section 173(8) CrPC; but Magistrate's supervisory jurisdiction suddenly ceases much before that, would be a travesty of justice.

As seen above, it is clear that the court of judicial magistrate has to perform crucial functions in the pre-trial phase of all criminal cases. In the same manner, it is to be appreciated that the court of judicial magistrate has a special role in curbing the abuse of process in the form of vexatious multiple criminal proceedings emanating from a single transaction- it is in the court of judicial magistrate that every criminal complaint under section 200 CrPC is to be filed- irrespective of the fact whether the case is magistrate triable or session triable. In all complaint cases, the process originates from the magistrate's level. They are the sentinels of the entire criminal justice administration system in this domain. It is their bounden duty to not only decide the cases running through the trial but also they have a duty to nip in bud the vexatious litigation if possible even before it reaches the stage of trial- whether in their own court or in the court of session. Magistrate's vigil is the first line of defence and an integrated automatic mechanism saving people from the abuse of unwarranted repetitive processes of courts. The Supreme Court observed[18] to the effect that the Magistrates have as much, if not more, responsibility in protecting the most sacrosanct rights of the citizenry of India as the Apex court itself; that in this context, the Magistrates have important role in setting the record straight and curbing injustice. They must act as the first line of defence mechanism for the harassed litigant. In that manner, the Magistrates are under legal obligation to nip frivolous litigation in the bud and to make sure that such cases do not enter the stage of trial; that they can do so by using their power of discharging the accused in deserving cases. While doing so, the Magistrates ensure that the personal liberty of the citizenry of this country is not taken away without due process as guaranteed by Article 21 of the Constitution.

Curtailing frivolous criminal litigation is a crucial step towards achieving rule of law in a real sense. This however cannot be done without the vigil and active association of lower judiciary i.e. magistrate's courts because that is where the seeds are sown. In this

[16] See e.g. State of Bihar v. J. A. C Saldanha AIR 1980 SC 326
[17] Vinubhai Haribhai Malviya v. State of Gujarat 2019 (17) SCC 1
[18] See Krishan Lal Chawla's case supra at 9

context, magistrate's key position in the criminal justice administration system may be understood as follows-

At the time when criminal justice administration system is set in motion, its primary course almost entirely depends upon the application of judicial mind by the magistrate. Be it section 156 (3) CrPC or section 155 (2) CrPC or for that matter section 200 CrPC, it is abundantly clear that irrespective of the kind of case involved, much depends upon the application of mind by magistrate especially during the starting phase of legal proceedings pertaining to a crime. In such circumstances, it goes without saying that the magistrate also carries the responsibility to make sure that such legal proceedings must not start where it should not.

If we talk especially about complaint procedure in CrPC from section 200 to section 203 following which the magistrate under section 204 issues process against the accused, we see that the power under section 202 CrPC is a very crucial power bestowed upon him. Under section 202 CrPC, after the complaint is filed before him, the magistrate may postpone the issuance of process against the accused and may make an inquiry or order an investigation by the police. This power is patently for the purpose of filtering out the vexatious complaint at this initial stage itself, and the magistrates must make full use of this power to know about the circumstances in which the complaint was filed, particularly the reason for delay in filing the complaint if any.

The next important power in the hands of magistrate in this context is contained in section 203 CrPC which says that if after the examination of the complainant and the result of inquiry or investigation under section 202CrPC as the case may be, the magistrate is satisfied that there is no ground for proceeding further in the case then he must dismiss the case after recording his reasons. If such scrutiny of the complaint shows that the allegations as contained in the complaint create suspicion of vexatious litigation, the magistrate must nip it in the bud itself. In a case,[19] the Supreme Court observed that the Magistrate must peruse the complaint with a view to ascertain whether there is substance in it and if he finds otherwise, he must not issue process against the accused in a casual manner so as to make him to face the criminal proceedings. However, at the same time, the Magistrate must make sure that no accused against whom there are substantial allegations in the complaint, go scot free.

These powers which have been given to the magistrate have great significance for the right of life and personal liberty of people which has been guaranteed to them by Article 21 of the Constitution of India. With great powers come great responsibilities also. Magistrates carry humongous responsibility upon their shoulders for exercising such powers with great vigil and after due application of their judicial acumen. In another case,[20] the Supreme Court observed that summoning a person as an accused in a criminal complaint case cannot be done as a matter of routine. Magistrate must not sit as a silent spectator during the stage of recording of preliminary evidence; he must exhibit active interest by asking questions from the complainant's witnesses. The order of Magistrate must reflect that he has applied his mind to the facts and circumstances of the case; that he has appreciated the evidence, both oral and documentary, and has satisfied himself that it would be sufficient to bring charge home to the accused.

[19] See Chandra Deo Singh v. Prakash Chandra Bose AIR 1963 SC 1430

[20] Pepsi Foods Ltd. v. Special Judicial Magistrate (1998) 5 SCC 749

As far as the above observation of the Supreme Court is concerned and so far as it relates to the magistrate's role in asking questions from the complainant and his witnesses, it is to be kept in mind that every trial is a sort of voyage wherein discovery of truth remains the main quest. In India, keeping in view the adversarial system we follow, the judiciary is not generally supposed to be actively involved in 'fact finding' on its own but we have no dearth of provisions for such role to be played by the judges. In this context, section 165 Evidence Act deserves special mention which confers on the court power to ask questions from any party before him in a legal proceeding and to order production of material 'in order to discover or to obtain proper proof of relevant facts' in the case. No doubt it is a trace of inquisitorial system in our legal system but then such approach on the part of judicial magistrate has been held[21] to be justified in appropriate cases where dispensation of justice so requires.

All this amply shows that the magistrate must ensure that the criminal proceeding takes its course only after he is satisfied that it is a real deserving case where the wheel of criminal justice administration system should be set rolling. These powers conferred upon the judicial magistrate demonstrate that he has a duty under CrPC as well as under the Constitution of India to exert this powers judiciously and dismiss vexatious litigation in its initial phase itself. In an important observation about the trial courts' placement and responsibility in the criminal justice administration system, the Supreme Court observed[22] that the trial judge is the 'kingpin' of our hierarchical criminal justice administration system; it is based upon his understanding of the case that the cause of justice is first responded in a formal institutional way; it is he who comes in direct contact with the common man who may not have the resources to proceed further to higher/appellate court/s; as for him, the trial court itself may be the first and last court of resort. The trial judge's knowledge and personality go into making the court's overall functioning successful.

Concluding Observations

In India, we are burdened by huge backlog of cases. According to an estimate, almost 70% of the total pendency in trial courts is that of criminal cases.[23] Out of this backlog of criminal cases pending at different levels of courts, a huge fraction is definitely that of such vexatious litigation which is filed only with the motive of harassing opponents by abusing the criminal justice delivery system. Legal machinery is used for achieving nefarious aims and objectives. In these circumstances, it is the responsibility of the courts manned by judicial magistrates that they apply their mind to stem out the flow of vexatious litigation as soon as they find one. Curbing frivolous litigation is apparently a vital step for making the judicial system more efficient and less time consuming. A falsely accused person not only suffers financial loss but also suffers at the social front. Starting from finding a lawyer, briefing him about the case, arranging money, diverting his time and thereby inevitably cutting upon his earnings- and it goes on- he loses a part of his life and his existence in the process. Criminal justice administration system must not be used as a tool to settle personal vendetta. The plight of a person caught in the cobweb of vexatious litigation has been clearly reflected by the Supreme Court when it

[21] See e.g. ZahiraHabibullaH.Sheikhv.StateofGujarat (2004) 4 SCC 158
[22] See All India Judges' Association v. Union of India (1992) 1 SCC 119
[23] See Krishan Lal Chawla's case supra

observed[24] to the effect that Indian judicial system is plagued by vexatious litigation. We must devise ways and means to deter obsessive litigants from filing their ill-considered claims. In every such litigation, if allowed to take place in a court of law, an innocent citizen is going to suffer long drawn periods of anxiety and uncertainty. It will be draining upon him not only psychologically but also financially. Curtailing such frivolous litigation is not possible without the active involvement of lower judiciary- the courts of judicial magistrates. This if done in real sense would not only save the public resources but would also subserve the rights and interests of our citizenry as provided in CrPC and our Constitution. The sword of Damocles cannot be allowed to hang forever on the heads of people falling unpredictably at the whims and fancies of the chronic over jealous litigants seeking to harass and persecute at will. We gain strength in our conclusion from Article 21 of the Constitution of India which duly encapsulates the right to speedy trial. Trial in this context would mean not only the actual trial before the court- which, as i mentioned above, starts with the framing of charges by the concerned court- but also it would cover its preceding phases such as inquiry and investigation, as the case may be.

[24]See Subrato Roy Sahara v. Union of India (2014) 8 SCC 470

TRANSFORMATIONAL GOVERNMENT: APPLICATIONS AND CHALLENGES IN IMPLEMENTING THE CITIZEN-CENTRIC SERVICES IN SIKKIM

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Abstract

The role of government in any democracy is to address the requirements of its citizens. This role of government in Indian federal democracy is provided in the various provisions of the 'Constitution of India'. These provisions elaborate the distribution of powers, authority and responsibility of governance between the central and state governments and make both the central and the provincial governments liable for designing and delivering services keeping in mind the interest and welfare of the public. The framing and designing of policy with citizen centric approach motivates people to participate in the system of governance. Thus, if services are launched with a necessary emphasis on the quality of services, the public undertakes participation in the system of governance. Participatory democracy is the best form of democracy which travels best on the wheels of information and communication technology. The use of information and communication technology in governance equips the government with more possibilities to reach the people. The system of electronic governance is a metamorphosis of changes in attitudes towards the governance of its services and ultimately the fundamental relationship of government with its citizens. Under the mandates of chapter III of the Information Technology Act, 2000, the government initiated the system of electronic governance and launched the Digital India program at National level. Several schemes that had a purely provincial character were launched at state level. Government of Sikkim too has launched many schemes and put efforts to bring a system of electronic government. Despite launching these efforts, Sikkim is facing challenges in implementing them. This research paper is designed keeping in mind the role of citizens in a democracy and the advantage of citizen-centric schemes. The research paper will examine various initiatives of the government of India and Sikkim government to gauge the challenges in implementing these various schemes in Sikkim. The paper argues that the designing of the policy should be based on a citizen-centric approach with the key agenda of public welfare which would reduce the impediments of implementation.

Introduction

India is a democratic republic based on the inherent and intrinsic principles of justice, equality, liberty and fraternity enshrined in the Constitution of India.[1] These democratic

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[1]INDIA CONST. Preamble

principles of the country flow from the Preamble of the Constitution itself. In a democratic setup everything revolves around the citizens or the nationals including the creation and continuance of the government itself.[2] This makes the role of government very important and since the government is elected by the people and is responsible and accountable to the people for all its action, it embraces a prime responsibility to satisfy the needs of society[3] for which the government was chosen by the people. The agenda of a popular government should always be public welfare and the schemes the government introduces must always be with the citizen centric perspective. The responsibility and agenda of the government should be public welfare and the ways of ensuring responsibility and accountability include actively engaging the public through policies. Initially, the system of governance was process and procedure centric with a top-down approach in policy making. The changes in the system of governance have transformed public participation which is gradually increasing over a period of time.[4] The role that the public plays when participating in governance determines the effectiveness of policies.[5] Democracy is evaluated on the basis of participation of people in democracy and the increased participation makes a polity more democratic.[6] Nonetheless, people may play a very significant role in the system of governance depending upon the strategies used to deliver various services to them by the government to make them participate.[7] The strategies to deliver services include the designing of policy as well which is inclusive of the policies to implement the schemes and programs launched by the government.

Technological revolution has revolutionised the approach of government and people and this decade has seen copious adoption of technological means and devices in various sectors. Various governments across the globe also incorporated the use of technology in the delivery of services and adopted the e-Governance model[8] including India.[9] Adoption of the e-governance model of governance has also produced an impact on spread of globalization and provided a fillip to globalization. The E-governance model is gradually replacing the prior procedure and the process centric model that has been in vogue in the governance of the country and is gradually becoming a part of the sustainable development model of governance.[10] The component of good governance in

[2]Nidhi Saxena & Veer Mayank, From State to Smart State - Bridging the Digital Divide in Sikkim, VI INTERNATIONAL JOURNAL OF TRANSPARENCY AND ACCOUNTABILITY IN GOVERNANCE,41, 41 (2020).

[3]Id. at. 3

[4]NIDHI SAXENA ET. AL., E-GOVERNMENT AND E-DEMOCRACY: THE ROLE OF TECHNOLOGY VIS-A VIS INDIAN SOCIO-LEGAL FRAMEWORK,361 (Cyber Crimes in 21st Century ed., Manakin Press Pvt.. Ltd. 2017).

[5]Nidhi Saxena, E-Governance - An Evaluation of Citizen Centric Services in the State of Sikkim, 12 SHRIJI SOCIO LEGAL JOURNAL. 67, 77 (2017).

[6]Russell J Dalton, Is Citizen Participation Actually Good for Democracy? BRITISH POLITICS AND POLICY BLOG Mar. 26, 2022, 8:33 PM),https://blogs.lse.ac.uk/politicsandpolicy/is-citizen-participation-actually-good-for-democracy/.

[7]Nidhi Saxena & Veer Mayank, supra note 3, at 63

[8]Richard Heeks, Understanding e-Governance for Development, 11 MANCHESTER: INSTITUTE FOR DEVELOPMENT POLICY AND MANAGEMENT. (2001).

[9]Mithun Barua, E-Governance Adoption in Government Organization of India, 3 INTERNATIONAL JOURNAL OF MANAGING PUBLIC SECTOR INFORMATION AND COMMUNICATION TECHNOLOGIES 1, 1-20 (2012).

[10]Meenakshi Madaan, Implementation of Governance Reforms in Punjab: Delivering Services with Citizen Centric Approach, CONTEMPORARY SOCIAL SCIENCES,111, 114 (ND).

public administration has become an integral part of governance in states.[11] The government is required to be connected with the people for a better system of governance. When the government is connected with people it understands their requirements.[12] The advancement of technology has made it easy to encourage people and ensure with security their involvement in policy making. Nonetheless, the participation of people in policy making with the horizontal flow of communication[13] not only establishes communication between people and government but also builds their confidence in government and system. E-governance is not merely a technological interface or an interaction of people with the government, it is a friendly, convenient, transparent and inexpensive mode of governance.[14] Thus, designing schemes should embrace the requirements of the public, must address their needs and provide solutions to their day-to-day problem, which emphasises citizen centricity in policy making.

Research Methodology

The state of Sikkim hasn't been able to achieve a complete implementation of the e-governance services that were launched and several challenges are there in the execution of many e-Governance projects in Sikkim. The impediments are gauged with the help of research conducted in the project. The research is conducted using both the doctrinal and non-doctrinal method. After analysing various primary and secondary sources including laws, digital directives, research reports, policy papers, government websites applications, e-applications, their working, merits and demerits the report has been generated. The report also includes input from field surveys and interviews conducted with various department heads such as the 'Information Technology Department' of Sikkim etc. The surveys were conducted on people of different age groups which includes 'college-going students' of different age groups and senior people of age group between 30-40. The methodology utilised was the snowball sampling methodology. The interviews were to examine the problems in bringing new projects and issues of implementation which helped us to conclude this paper.

Citizen - centricity and Governance

To involve citizens in the process of governance, the services must be developed with a focus on citizen- centricity. To provide citizen's centric services, the services should be designed with the objective of protecting the interest of citizens and this requires proper planning & scheming of services in accordance with the aspirations and needs of people. The rate of success of these services depends upon the successful implementation of services that needs efficacious identification of the necessities and requirements which at times varies from person to person, group to group, community to community and even place to place. It is thus important to learn the different needs of people and thereafter provide the most appropriate services to address them. A service

[11]Shreyasi Ghosh, The Essence of E-Governance in the Modern Era of Indian Public Administration Today, 4 SOCRATES: AN INTERNATIONAL, 110, 117 (2016).
[12]Nidhi Saxena & Veer Mayank, supra note 3, at 53
[13]Ryan Peterson, Crafting Information Technology Governance, 21 INFORMATION SYSTEMS MANAGEMENT, 7, 21. (2004).
[14]REHEMA BAGUMA, AFFORDABLE E-GOVERNANCE USING FREE AND OPEN SOURCE SOFTWARE, in MEASURING COMPUTING RESEARCH EXCELLENCE AND VITALITY, 201 (Ddembe Williams & Venansius Baryamureeba eds.,2006).

when launched without taking into consideration the needs may have a strong possibility of failure. Citizen-centricity lies in identifying and measuring the requirements of the citizens and to providing services accordingly with consistency which means providing the quality services and taking measures to improve the quality of such services according to these changing requirements. E-Governance with key feature of responsibility, transparency, and accountability etc. have potential to improve the quality of human life and thereby the level of their satisfaction[15] with the services so designed with the citizen's perspective as a focus on operation and other similar imperative. An absence of citizen-centricity may not result in desired implementation of e-Governance projects.

The government dreamt of "deliberative democracy"[16] and then designed services for its citizens to make them participate in the process of policy making[17] which affects the people at large spearheading the launch of the Digital India Plan.[18] Many online schemes were launched by the government at the central level under plan.

The information revolution has impacted the system of governance at global level. The unseen and unrealised potential was felt at global level wherefore to legalise electronic communication in all the spheres of life in particular in global business, the UNCITRAL Model Law on Electronic Commerce was adopted by the United Nations Commission in 1996[19]. Many countries adopted the provisions or they enacted their laws with slight modifications to legalise electronic communications. India too introduced its first law to govern electronic technology accordingly Information technology Act came into existence followed by many legislative and administrative steps to make India electronically empowered. The next section will discuss these legislative initiatives in India.

Indian Legal Storyline

Based on the model law on electronic commerce of 1996,[20] India enacted the Information Technology Act 2000. The Act came into existence with an objective of establishing a paperless system of e-Commerce as well as to legalise electronic communication systems in India.[21] Participatory democracy requires accountancy and transparency. For the purpose of being more transparent and accountable, it required allowing citizens to ask the authorities any information relating to governance, the parliament enacted the Right to Information Act, 2005[22] and thereby encouraged the

[15]Vinay Singh & Garima Singh, Citizen centric assessment framework for e-governance services quality,27 INTERNATIONAL JOURNAL OF BUSINESS INFORMATION SYSTEMS, 1 (2018).
[16]NANCY CHARLOTTE ROBERTS, THE AGE OF DIRECT CITIZEN PARTICIPATION, vi (M.E. Sharpe. 2008).
[17]Dhanraj A Patil, Democracy in the age of Robocracy: Exploring scenarios for future democratic participation in the era of Digital India. 4 RESEARCH REVIEW INTERNATIONAL JOURNAL 231, 232 (2019).
[18]Ministry of Electronics & Information Technology, Digital India, Ministry of Electronics & Information Technology(2020),https://csc.gov.in/digitalIndia.
[19]United Nations Commission on International Trade Law, UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5 bis as adopted in 1998 (Vienna: United Nations, 1999).
[20]Id.
[21]Information Technology Act. Preamble
[22]Right to Information Act. Preamble

citizen's participation in democracy. The Act secured a statutory right to all citizens to ask information from a public authority on the matter of governance.[23] This right can be exercised in online mode too since an online channel to speed up collection of information on the system of governance has been created by the government of India. The government has also placed various policies to use and utilise the benefits associated with cyberspace, internet, and social media platforms. Amongst others there is a policy framework that emphasises upon the use of social media platforms by the government organisations to provide information about all the schemes and initiatives of the government.[24] The framework guides on how to utilise the social media platform with optimisation and to be in touch directly with the citizens. The launching of this framework was influenced and guided by the increasing presence of common man on social media platforms such as Facebook etc. Another framework is designed with a focus on citizen engagement in various e-Governance initiatives.[25]

The government also introduced 'Saaransh - A compendium of Mission Mode Projects under NeGP' [26] to make various electronic services available to citizens of India. Since the date of Saaransh many 'Mission Mode' projects have been launched by the government. 'The National Information Technology Policy 2012'[27] was created for bridging the technological gaps and coordinated measures between the governments. The policy aimed to fully utilise the potential of technology in government schemes. The Policy Guidelines for Empanelment/Engagement of Social Media Platforms with Bureau of Outreach and Communication[28] focuses to spread information about various schemes of government within a short span of time. All these policy directives aimed at making India an economy that has adapted itself to the digital highway and is attempting to bring digital governance to the doorsteps of all. These policy directives guided the launch of many e-Governance initiatives at national and state levels. Some of these initiatives couldn't last for long, some worked initially but later shut down by the

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[23]Id. at. Sec. 3

[24]Department of Electronics and Information Technology, Framework & Guidelines for Use of Social Media for Government Organisations, Department of Electronics and Information Technology Ministry of Communications & Information Technology Government of India(2012),https://www.meity.gov.in/writereaddata/files/Social%20Media%20Framework%20and%20Guidelines.pdf. (Last visited on 20-01-2022)

[25]Department of Electronics and Information Technology, Framework for Citizen Engagement in e-Governance, Department of Electronics & Information Technology Ministry of Communications & Information Technology Government. (Last visited on 20-01-2022)
of India(2012),
https://www.meity.gov.in/writereaddata/files/Framework%20for%20Citizen%20Engagement%20in%20NeGP.pdf.

[26]Department of Electronics and Information Technology, Saaransh - A compendium of Mission Mode Projects under NeGP, Department of Electronics and Information Technology(2011),
https://www.meity.gov.in/writereaddata/files/Compendium_FINAL_Version_220211(1).pdf. . (Last visited on 20-01-2022)

[27]Department of Electronics and Information Technology, National Policy on Information Technology, 2012, Department of Electronics and Information Technology(2012),
https://www.meity.gov.in/writereaddata/files/National_20IT_20Policyt%20_20.pdf. . (Last visited on 20-01-2022)

[28]Government of India Ministry of Information and Broadcasting Bureau of Outreach and Communication, Policy Guidelines for Empanelment/Engagement of Social Media Platforms with Bureau of Outreach and Communication., Government of India, Ministry of Information and Broadcasting, Bureau of Outreach and Communication(2020), http://www.davp.nic.in/writereaddata/announce/Adv12171352020.pdf.

government whereas, some are successfully operating. This whole legislative and policy efforts coupled with the launch of electronic governance initiatives opened the door for evaluation of their success and failures. The next section analyzes these very initiatives first at central level then at state level. Since the paper focuses on the success of these initiatives in Sikkim, the paper will analyse the e-Governance policies promoted in Sikkim by the Union and/or the State and will suggest the appropriate recommendations.

Electronic Initiatives at Centre Level

The government at central level launched the 'Digital India Plan'[29] with an aim to revolutionise the system of public services by making them available in electronic form or through electronic means and mode.[30] For making India a digitally equipped and empowered country, under the 'Digital India Plan',[31] The central government introduced the National e-Governance Plan (NeGP) with 31 Mission Mode projects (MMP) in the year 2006 with a multi-pronged strategy.[32] The project aims to reach rural India with the help of the internet. Various schemes like BharatNet,[33] Make in India,[34] Start up India,[35] Industrial Corridors,[36] Bharatmala,[37] Sagarmala,[38] dedicated freight corridors[39] and UDAN-RCS[40] etc. have been brought into existence. Digital India envisioned the digitally empowered India.[41] Several 'National e-Governance Plan (NeGP)' plans too were

[29]Ministry of Electronics & Information Technology, About Digital India, Ministry of Electronics & Information Technology, Government Of India (2020), https://www.digitalindia.gov.in/ (Last visited on 20-01-2022)
[30]Id.
[31]Ministry of Electronics & Information Technology, supra note 30
[32]Vikaspedia, National e-Governance Plan, Ministry of Electronics and Information Technology (MeitY)(2021), https://vikaspedia.in/e-governance/national-e-governance-plan/national-e-governance-plan-negp. (Last visited on 20-01-2022)
[33]Ministry of Electronics and Information Technology (MeitY) & Government of India, Bharat Net, Ministry of Electronics and Information Technology (MeitY) Government of India(2021), https://vikaspedia.in/e-governance/digital-india/national-optical-fibre-network-nofn. (Last visited on 20-01-2022)
[34]The Department for Promotion of Industry and Internal Trade (DPIIT), About Us, The Department for Promotion of Industry and Internal Trade (DPIIT)(ND), https://www.makeinindia.com/about.
[35]The Department for Promotion of Industry and Internal Trade, About Startup Portal, The Department for Promotion of Industry and Internal Trade(ND), https://www.startupindia.gov.in/content/sih/en/about_startup_portal.html. . (Last visited on 20-01-2022)
[36]The Department for Promotion of Industry and Internal Trade, Industrial Corridors, The Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry(2021), https://www.indiafilings.com/learn/industrial-corridor-projects-of-india/.. (Last visited on 20-01-2022)
[37]National Informatics Centre (NIC), et al., Bharatmala Pariyojana - A Stepping Stone towards New India, National Informatics Centre (NIC), Ministry of Electronics & Information Technology, Government of India.(2018), https://www.india.gov.in/spotlight/bharatmala-pariyojana-stepping-stone-towards-new-india. . (Last visited on 20-03-2022)
[38]Ministry of Ports, et al., Concept & Objectives, National Informatics Centre(NIC)(2019), http://sagarmala.gov.in/.
[39]The Ministry of Railways, Dedicated Freight Corridor Project, The Ministry of Railways(2021),https://www.railway-technology.com/projects/dedicatedrailfreight/.. (Last visited on 22-01-2022)
[40]Airports Authority of India,Regional Connectivity Scheme - UDAN, Airports Authority of India (2021), https://www.aai.aero/en/rcsudan. . (Last visited on 20-01-2022)
[41]National Informatics Centre (NIC), Digital India – A Programme to Transform India into Digital Empowered Society and Knowledge Economy, PRESS INFORMATION BUREAU. GOVERNMENT OF INDIA.

launched by the Government of India such as e-Kranti.[42] Launched in 2006 e-Kranti[43] aims to reach electronically to the citizen by the unification of many online provisions of services and by harmonising other mission mode projects. Another application the 'Open Application Program Interface (API)'[44] was launched with an objective to open multiple digitised channels of delivery of services for the public. API made services available on mobile phones, websites etc. without much effort.

Targeting the needs of old aged pensioners of central and state government employees, the government launched a biometric based initiative Jeevan Pramaan.[45] This digital scheme was aimed to make 'acquisition and submission' of Digital Life Certificates (DLC)[46] easy and convenient. Thus, extra running, helter-skelter or painful long queuing at old age was handled electronically through this initiative. A scheme was also launched by the government to realise the dream of paperless governance, the DigiLocker.[47] DigiLocker[48] provides digital storage for the electronic storage of documents in a national database that can be accessed from anywhere and at any time on an internet connection. The DigiLocker in collaboration with many institution are making documents available directly from the issuing authority and mitigating the possibilities of fabrication of documents, forgery and nonetheless corruption. Thus, with good storage capacity, the DigiLocker promotes the usage of providing digital documents.

To strengthen the district administration with simplified, transparent and convenient services at district & sub-district level the e-District[49] Mission Mode Projects (MMP) were launched. These services were launched to leverage the electronic infrastructure that was developed for the projects namely the 'State Wide Area Network (SWAN),[50] State

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(Aug. 14, 2014, 20:57 IST),
https://pib.gov.in/newsite/printrelease.aspx?relid=108926#:~:text=This%20programme%20has%20been%20envisaged,the%20current%20year%20till%202018.

[42]Ministry of Electronics & Information Technology & Government of India, eKranti, Ministry of Electronics & Information Technology, Government of India(ND), https://www.digitalindia.gov.in/content/ekranti. (Last visited on 20-01-2022).

[43]Id.

[44]Ministry of Communications & Information Technology & Department of Electronics and Information Technology, Policy on Open Application Programming Interfaces (APIs) for Government of India, DEPARTMENT OF ELECTRONICS AND INFORMATION TECHNOLOGY, Ministry of Communications & Information Technology,
Department of Electronics and Information Technology, (2015).
https://www.meity.gov.in/writereaddata/files/Policy%20for%20API%20for%20GoI.pdf

[45]The National Portal of India, Jeevan Pramaan, The National Portal of India(2020),
https://jeevanpramaan.gov.in/.. (Last visited on 20-01-2022)

[46]Jeevan Pramaan, Digital Life Certificate for Pensioners, Jeevan Pramaan.(2021),
https://jeevanpramaan.gov.in/#about. . (Last visited on 20-01-2022)

[47]Digital India Corporation(DIC), et al., How It Works?, Digital India Corporation(DIC)National eGovernance Division (NeGD)Ministry of Electronics & IT (MeitY) Government of India (ND), https://digilocker.gov.in. . (Last visited on 20-01-2022)

[48]Id.

[49]Ministry of Electronics and Information Technology (MeitY), E-Districts, Ministry of Electronics and Information Technology (2020), https://vikaspedia.in/e-governance/national-e-governance-plan/mission-mode-projects/e-district-mission-mode-project. . (Last visited on 20-01-2022)

[50]Ministry of Electronics & Information Technology & Government of India, State Wide Area Network (SWAN), Ministry of Electronics & Information Technology, Government of India(2016),

Data Centre (SDC),[51] State Service Delivery Gateway (SSDG)[52] & Common Services Centres (CSCs).

The financial irregularities have also been addressed at centre level through the electronic and digital medium and as a single dashboard to provide information about electronic transaction thus e-Taal - Electronic Transaction Aggregation and Analysis Layer[53] was launched. Further to make payments and collections of money easy, Bharat Interface for Money (BHIM)[54] service was set in motion. Application 'BHIM' is based on the Unified Payments Interface (UPI).[55] Public Finance Management Scheme (PFMS)[56] which is mandated for all 'central sector schemes'[57] provides monitoring of the capital flow to beneficiaries wherein the beneficiary of different government welfare schemes can check all the details by accessing the website.

The centre also introduced many schemes keeping in mind the need of increasing communications with its people. The app/site MyGov[58] provides a platform for interacting with the government. The application gives an opportunity to people to participate in the policy making process. Another initiative was also taken by the government to launch an umbrella application to provide a single platform to access electronic services that are offered by various governmental, private and semi-private entities that have been boarded on the platform. This is known as Unified Mobile Application for New- Age Governance (UMANG).[59]

National Scholarships Portal,[60] as the Mission Mode Project under NeGP is launched to offer various student related services electronically at one platform which includes online students' applications and allied services, sanction and disbursal of various scholarships etc. The government launched many initiatives at centre level to implement a system of electronic governance such as national identity document

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https://www.meity.gov.in/content/state-wide-area-network-swan. . (Last visited on 20-01-2022)

[51]Ministry of Electronics & Information Technology & Government of India, State Data Centre, Ministry of Electronics & Information Technology, Government of India(2017), https://www.meity.gov.in/content/state-data-centre. . (Last visited on 20-01-2022)

[52]Ministry of Electronics & Information Technology & Government of India, SSDG, Ministry of Electronics & Information Technology, Government of India (2016), https://www.meity.gov.in/content/ssdg. . (Last visited on 20-01-2022)

[53]Ministry of Electronics & Information Technology & Government of India, eTaal, Ministry of Electronics & Information Technology, Government of India(2017), https://www.meity.gov.in/etaal.

[54]National Payments Corporation of India (NPCI), Home / Who We Are, NATIONAL PAYMENTS CORPORATION OF INDIA (NPCI) (2022), https://www.npci.org.in/who-we-are/about-us

[55]National Payments Corporation of India, Unified Payments Interface (UPI), NATIONAL PAYMENTS CORPORATION OF INDIA (NPCI) (2022). https://www.npci.org.in/what-we-do/upi/product-overview

[56]Id.

[57]Public Finance Management Scheme (PFMS), et al., About PFMS, Public Finance Management Scheme(PFMS) Office of Controller General of Accounts, Ministry of Finance(2017),https://pfms.nic.in/static/NewLayoutCommonContent.aspx?RequestPagename=Static/Implementation.aspx. . (Last visited on 20-01-2020)

[58]MyGov National Informatics Centre, Ministry of Electronics & Information Technology, Government of India, Government of India, Ministry of Electronics & Information Technology, Government of India, (2014), https://www.mygov.in/. (Last visited on 10-05-2020)

[59]Government of India MeitY, About UMANG, Ministry of Electronics & Information Technology, Government of India (ND), https://web.umang.gov.in/landing(Last visited on 10-05-2020)

[60]National Scholarship Portal, About Us, Ministry of Electronics & Information Technology, Government of India (2018), https://scholarships.gov.in/(Last visited on 10-05-2020)

Aadhaar.[61] A long list of digital India initiatives is available on the government website. The state was also asked to implement certain e-Governance initiatives separately. Likewise, Sikkim introduced and implemented various Digital India initiatives as well as many initiatives at state level.

The e-Governance Model of the State of Sikkim

The e-Governance Model of the State of Sikkim places responsibility on the shoulders of the Department of Information Technology.[62] The department was established to bring digitization in the system of governance by computerising the departments which not only generate the job opportunities but enhance the performances of various departments. The 'Sikkim State Portal' and 'State Service Delivery Gateway Portal' are the online sources of information for the various services offered by the department. The state provides various electronic services such as e-District with a single window setup. This project was conceptualised on 9th July 2016 in the east district of Sikkim for strengthening the district administration to deliver government services. The services offered under the project include application for getting various certificates such as 'certificate of senior citizen'; 'property possession/ownership certificate'; 'income certificate'; schedule tribe, schedule caste and OBC certificates, etc. In the e-District project, an applicant can apply online and once the physical verification of the document is over, the applicant will get the certificate. However, since the services offered are not completely online or in digital mode, it discourages public participation.

Another initiative is the commencement of Community Information Centres (CIC)/ Common Service Centres (CSC). As a part of infrastructure building, to tackle the problem of communication, 'Community Information Centers' was launched by the Government of India in September 2001 with the forty CICs, established within Sikkim initially. An additional five more such centres were added a little late which made it forty-five. The working of Community Information Centres (CIC) are monitored by the Department of Information Technology in Sikkim with the assistance of National Information Centre (NIC). In 2006, the CICs became Common Service Centres (CSC) when the Government of India stopped the funding of CIC, which are now supervised by the 'Department of Information Technology in Sikkim'. These Common Service Centres assist all state departments by channelizing the services to them.

The 'State Portal', 'State Service Delivery Gateway' & 'State Service Portal' projects started in 2013 under the National e-Governance Plan (NeGP) as a result of computerization of the departments. The online state portal contains information about the services offered by the government of Sikkim under its various departments. The State Portal and State Service Delivery Gateway offers 41 services offered by 9 State departments such as animal husbandry, labour department, rural management, agriculture, Urban Dev and Housing Dept etc.

As another valued initiative the "Department of Energy and Power" digitalized the system of electricity bill payment. The scholarship schemes were also digitised by the

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[61] Id.

[62] Department of Information Technology, & Government of Sikkim, Information Technology Department, Department of Information Technology, & Government of Sikkim (ND), https://sikkim.gov.in/departments/information-technology-department(Last visited on 10-05-2020)

Sikkim government; to enable the students to apply online for various scholarships. The students of ST, SC, OBC (of Central & State List) and minority can avail these scholarships. The scholarship schemes work through two steps and each step is regulated differently. The two governments- the central government regulates at the registration level while physical verification is done by the state government under the authority of the department of social justice empowerment and welfare. The government is continuously putting efforts to implement the existing scheme launched by the centre and the state but is facing hardship. The next section of this research paper throws some light on various implementation challenges of e-Governance in the state of Sikkim.

Implementation Challenges in Sikkim and Probable Solutions

The research found the following challenges in implementation of e-Governance projects and initiation and development of new projects and schemes.

The hilly terrain of Sikkim is prone to landslides. The weather conditions, which includes heavy rainfall during the monsoon season, disturbs the roadways of Sikkim and makes the state 'cut off' from mainland India. The landslides and heavy rainfall sometimes disturb the connectivity ultimately resulting in failure to implement citizen-centric services in the locale/ region. Further, the telecommunication services in Sikkim used by everyone including various Departments of Sikkim governments for connectivity (internet also) is of the 'Bharat Sanchar Nigam Limited' of West Bengal circle. Absence of any telecommunication circle of its own renders the connectivity poor and implementation of various initiatives very challenging. Further the telecommunication services to the State of Sikkim are provided through the 'Fibre Optics Network Cables' while the telecommunications authorities are based in West Bengal. Hilly terrain and climatic conditions of Sikkim like landslides etc. augments the damage and delays repairment of the cable which further complicates the situation in case of any major defect as it lacks local control of authorities. This ultimately leads to the complete shutdown of delivery of services electronically together with the collapse in the inter-connectivity of departments, thereby discouraging the people to choose e-Services. Even sometimes internet speed places constraints in implementation. Poor network connectivity affects quality of services in some districts as in the rural areas of Sikkim it is extremely poor.

The Internet is essential for offering electronic services and internet users are potential customers to avail them. The offering of e-Services includes fulfilling the requirement of uninterrupted and continuous connectivity to stimulate participation eventually. Since the major challenge in Sikkim is the internet connectivity on which the success of electronic services depends, regularisation of connectivity particularly in urban and suburban areas of Sikkim where a major chunk of internet users with technical knowledge to avail such services connections reside. In addition, revival of CIC/CSC's may increase the possibility of successful implementation of such services.

Sikkim has a literacy rate 82.6 percent which is quite high in comparison of many other states in India, yet people due to low digital literacy are mostly unaware about various services or schemes of e-Governance, its modalities, who can avail them and similar information related to services. Moreover, people are not very tech savvy, their age factor or technological understanding discourages them from using such e-Services.

Government can launch digital training for them about how to use tech gadgets, access government web-sites to avail services and use mobile applications. These trained individuals should be used for providing training to the next batch and can be the part of training institutes etc. The increased digital literacy, trained volunteers, integrated departments and citizen-centric services offered by the Sikkim IT department will play a phenomenal role in ensuring participation. Further an emphasis on the use of various ICT devices/ modes must be made by the state. Technology attracts youth very much. They are ready to do experiments, learn many new things which is very vital for e-Governance implementations. Therefore, this potential of youth could be used for successful establishment of e-Governance in the State.

Further, most services follow a procedure of two steps verification, from online applications to offline/physical verification which is not only time-consuming but complicated too. An Aadhar linked online service not only saves the time of the applicant but also eases the process of verification because no individual can obtain multiple Aadhaar numbers. The biometrics enabled Aadhar linking will definitely put a check on false claims. Thus, linking Aadhaar with services or schemes offered by the government will save the public's precious time, increase efficiencies and reduce the issues of corruption. This will enhance the trust in electronic services which is a major challenge for implementing e-Governance service and an inordinate hurdle to achieve the goal of a paperless economy. Nonetheless, the state should mandatorily focus in complete shift towards e-Governance by reducing the paper documentation as is required in some services. The emphasis should be on efficient delivery of electronic services like if it is certificate it should be digitally signed and made available on the DigiLocker portal and accessible to the holder as when needed.

In Sikkim, the rural population is high in comparison to urban population. Thus, a lot of people are unaware about various services launched by the government. Further hilly terrain disconnects people staying in villages from the mainland, which aggravates during rainy seasons. Managing medical needs, medical emergencies become a challenge. Thus, if the government launches e-Governance initiatives/applications it will be beneficial for the people staying in such a distant place. These applications can be launched for calling a taxi or consulting a doctor for small medical issues. Trained medical persons based on location can attend them.

These issues need to be taken care of by the government to make e-Governance a success in Sikkim.

Conclusions

It is very evident that e-Governance initiatives in Sikkim are facing issues of connectivity. This connectivity failure de-motivates people to utilise and avail various online services. Sikkim is facing issues of internet connectivity due to several reasons ranging from disruption in telecom services to weather conditions, from digital literacy to awareness. These issues are not just on the part of people, even departments offering services face issues in offering and implementing online services. Poor internet performances besides obstructing the horizontal flow of communication between state departments discourage people to avail them.

It is an accepted fact that in any participatory democracy people are back bone and therefore their role is of significant importance. The technological advancement in

information and communication has brought a paradigm shift in the system of governance and paved the way to become an inalienable part of democracy. The omnipresent technology provides a platform and opportunity to the people to participate in the system of governance.

Past few years have seen enormous progress around the world and many countries have already implemented the electronic form of government. The technology due to its accessibility is bringing people closer to each other and towards the government. This has enabled economic growth rates that were earlier unfathomable. This eventually lifted people out of poverty. The increased rows have also led to rising inequality, both within and across the country and to greater vulnerability to the people not familiar with the new technology trends. Although burgeoning new tech gadgets, technology revolutions, and newly-fangled ideas to use the same have helped many 'States' and people move forward, some 'States' or some parts of the 'States' appear to have been left behind. They are still facing trouble in adoption and acceptance of the new tech trends and this leads to limited opportunities for advancement.

Digital India plan provides services in electronic form for availing these services. People need tech gadgets and devices for accessing services available online. Indians are not economically rich; people here live below the poverty line and thus cannot afford costly tech gadgets. Thus, providing devices on subsidised rates with tutorials on how to use them will increase the most needed people participation. And people when finding electronic gadgets at an affordable price will come forward to become part of electronic governance. In addition, the law on e-Governance in India is legislated but there is absence of mandatory provision to implement the same in the government departments. It is therefore suggested that the law may be amended in this light and it should be made compulsory for the government departments to implement e-governance protocols.

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WOMEN AND RAPE LAWS:A SOCIO-LEGAL SLUGFEST TO CHANGE THE MINDSET OF SOCIETY

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Abstract

Every Indian woman has a very specific and unique role in the social unit called family. After a long journey of sufferings, she could mark reasonable recognition within the four walls of the family and outside in the society. Now she actively participates in every decision-making process whether it be within the family or outside the family in her professional life. India though known for its diversity and unity both, has now also been known to be a place where most women are struggling in an ultra-modern society creating a quirky eerie to her dignity stigmatizing her status in society. On one hand we have Constitution of India which provides right tolife with dignity and liberty under the obligation of fundamental rights, but on the other hand women are struggling to attain this right it is provocative and full of vendetta in this incumbent judicial system, right to life with dignity is guaranteed by the State, due to some ill-intentioned people this fundamental right is thwart. As a matter of security where at one side state provides security to women against actions of such ill-intentioned people on the other side the most common crime against women is sexual assault in the present day society which isnot only a crime against the body of women but also creates ill impact to her mind and it shelve the egalitarianism , as society puts one major obligation to women is principle of maintaining piousness of her body and mind, therefore due to sexual assault her body and mind are considered impure for marriage association and all this belief inculcate in the mind of rape victims, which put a women in a dark sphere of her agony life. Hence it can be presumed society plays a crucial role to maintain guaranteed dignity promised to every woman by our Constitution. "No Constitutional promise can prevail without stupendous society" Theauthors will try to unleash and ascertain that how women in ancient society did not face such a hate from the side of then society, and what was the reason that women were under great time in Ancient Indian society. Further authors will analyze various legal and judicial aspects including psychotic disorders to understand the whole concept.

Key words-

Rape Law, Criminal Psychology, Criminal Law Amendment, Trauma of rape victims, Male psychology in sexual assaults.

Introduction

When we talk in legal sermonize about crime the broad spectrum is occupied by gender based crime i.e. crime against women in the society, for reasoning out this question of crime against women in society we can start analysing from primitive or ancient Indian societies where condition of women were great because we have evidences that they couldtake part in administration, they were also entitled for higher education, they were equally entitled for participation in 'Vedic Yagyas', some of the examples of such females

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are Apala , Ghosha, Gargi, etc. However, in general also women had good participation in societal actions. When we start analysing in a comparative manner the crime against women in ancient society with that of present-day concept, in general we will find that in those days civil wrongs and crimes were intermingled, we can also understand this through an example like in civil wrongs progenies of VilomVivaha (Anuloma or Pratiloma) were not in good position because they were not entitled to live in the village and the only crime observed against women which we can assess here, was Raksha Vivah, wherein a man would forcefully consume a female against her will and without her consent.

The ancient Indian society was unassuming enough which we can assess with some incidents like when the Yavan invaders arrested women after they concord the area/ jana, they use to consume the women and then release them from their custody, after which women without second doubt were again adopted back by the society after following the ritual of purification as described in Deval Smriti.[1] It is important to briefly explain that this smriti is specifically devoted to the purification of Brahmins, Kshatriyas, Vaishyas and Shudras that was taken away by 'mlecchas'. The Vigyanishwer developed purification ritual and a large ceremony was held at the bank of river Saraswati.[2]

In Mauryan period, Chanakya[3] explained that we must follow deterrent policy against wrong doers, further he explained that capital punishment cannot be given to a Brahmin, while others may be granted capital punishment, for Brahmana's if they were found indulged in doing sexual offences against a woman then in such a condition engraving the vagina as a symbol of penalty on their forehead or banishment was suggested. So, the whole society treats him accordingly and no atonement granted for this action of Brahmin. Therefore, we can assess that condition of women was much better in ancient ages as then they had all rights to live with human dignity.

Medieval period of India, saw a different condition of women in society as there was deterioration due to continuous invasion and establishment of rulers who had different cultures, it was the period of struggle for culture and religion both, hence the rights of women were curtailed, and many more unprecedented practices started to minimise the rights of women in then Indian society. All this was happening in the medieval society because crimes against women were increasing rapidly.

During the period of British India many reformists and activist started to work upon the poor social conditions of female in the society who were considered as the marginalized section of the society during this period and many reforms were also started for betterment of women. As reported by various travellers' ratio of sexual crime against female body were increasing rapidly in the society and, that is how later in British period

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[1]Devala Smriti at, https://archive.org/details/devala-smriti/mode/2up, visited 14/08/2022.

(36. Now, I will proclaim a greatly auspicious expiatory rite. This rite is for women who were captured by mlecchas with force and then raped wherever they were taken.

37. I will explain the appropriate rite for all the Brahmin, Kshatriya, Vaishya

and Shudra women who were abducted by the barbarians.)

[2]Mishra. Dr Jaishanker, Prachin Bharat Ka Samajik Itihas, Bihar Hindi Granth Academy, January 2013.

[3]The Position of Women in Kau?ilya's Arthasastra at, https://www.jstor.org/stable/44252408,visited 14/08/2022.

all such actions were placed in Indian Penal Code, but psychology of offenders and victim should also be considered when we are analysing the action of crime for punishment or fixing the criminal responsibility. We have objective to develop such society in which male and female must be equal in all aspect of human dignity.

Statement of Problem

As very rightly said by Manu in Manu Smriti no society is complete unless and until every house has a woman with a glowing face because her glow is the mirror to the inside conditions of heart and soul but as pointed out in the introduction part also this glow vanishes away when forceful physical relations are made with any women. Though this fact is also established rape has taken place in all the periods whether it be ancient or modern, the only change is how she is treated after rape. Ancient society is named ancient today but was more modern as they had a concept of acceptance of such females through the process of purification as mentioned in Devala Smriti, even we have seen in the Mauryan time symbolic vagina engraving on forehead of rapist was done as punishment to make him feel embarrassed in the society. Modern society is a society of failure because these raped women are staying in the society with the stigma of being robed out, we have failed stringent laws as they are unable to bring back glow on the face of raped women. Today women are physically raped once and socially raped hundred times in the name of getting justice and media trial. The gravity of pain increases day by day and her inner beauty, glow decreases day by day. Now the question arises what should be done to restore her back completely to the pre rape stage and who should be held responsible for not letting this happen. Hence this article.

Research Objectives

1. To analyse the safety of women with safeguards.
2. To estimate the gravity of physical, mental, and emotional pain in every rape.
3. To determine various psychotic disorders to be the causative factor behind many rapes.

Research Questions

This leaves some unanswered questions mentioned below-

1. Whether the present socio-psycho societal structure is the root cause of rape against women?
2. Whether mental ailment or psychotic disorder a defence in sexual crime against women?
3. Whether the proverb "criminals are born criminal",[4] applicable in sexual crimes against women too?

Present Socio-Psycho Societal Structure and Rape Laws in India

At the very outset of this article authors would like to create clarity about what the law in India was and how the law changed with changing scenario of the society in perspective of crime against women and specifically rape. To make this understandable let us start

[4]The 'born criminal'? Lombroso and the origin of modern criminology at, http://www.historyextra.com /period/victorian/the-born-criminal-lombroso-and-the-origins-of-modern-criminology, visited 20/08/2022.

with some incidences which brought out the law as it stands today. Authors for this would take you to a journey of events bringing about all said above in modern world.

Let us start dealing with the first research question. In the month of May, 2020 when a heinous incidence marked spot light of the nation this was not glorifying enough to be known but was an urge to be disclosed being heart of historic event when academia for the first time intervened for some important changes in Criminal Laws, this query statement will take no longer than a second to recall the incidences of Mathura rape case[5] and its aftermath resulting in first Criminal Law Amendment Act, 1983. This brings a very important question on the surface whether Amendment of 1983 could really make any change for the women as far as the matter of rape is concerned?

Yes, we are focusing on police the safeguards who are supposed to administer the law and order within every state territory, as every state are duty bound to provide security to the citizen, but the history calls that police which is hands of State and Administration have been found engaged many a times destroying the modesty of woman. Incidents chronologically from present scenario the spotlight brings focus on 19th October 2020 when all the news channels outburst with a shameful event where and 20 year old accused of murder alleged that she was repeatedly raped by police officials for 10 days behind the bars in Mangawan town of district Rewa in Madhya Pradesh this incidence could find some light when a legal team comprising of four members, Additional District Judge, Law Officer and Two Lawyers visited prison on 10th October 2020 for inspection and where the women narrated her misery to the team subsequently she also told that she has narrated the incidents to prison warden but she did not believe her besides she also told that accused cops had threatened to implicate her father in the murder case if she talked about it to anyone.

Taking you to the starting journey point authors would bring your attention to a case famously known Mathura rape case an incidence similar to the incidence of 19th October 2020 where a young orphan woman Mathura who lived with her brother Gama worked as a labourer at house of Nishi. Mathura subsequently developed physical relations with Nishi's nephew Ashok. They decided to get married to each other but after report filed by Gama on March 26, 1972, about Mathura's kidnapping all concerned parties were brought before the police at the police station from where except Mathura, everyone walked out after recording their statements around 10:30 p.m. Now when all others left after statement the first appellant Ganpat who apparently asked Mathura to stay back in the Police Station closed the door and switched off the lights and took her to washroom and raped her, after Ganpat the second appellant Tukaram after enjoying with Mathura's body tried to rape her but could not do so as he was heavily drunked. When time passed family called out name of Mathura from outside but there was no response, when Mathura came to family she narrated everything which subsequently called for quick medical examination where it was asserted that her age was between the bracket of 14 to 16 years and it was found that her hymen revealed old rupture with no injury on her body and on doctor's advice first information report was filed. Matter instituted in Session court and acquittal was given to the accused believing Mathura to be habituate to sex and that it was not a rape. Contrary to view of session judge about

[5] Tukaram v State of Maharashtra(1979 SCC 143)

presence of semen the Bombay High Court held this was because of a simple fact that Mathura was examined when around 20 hours were passed and when examination took place meanwhile it can easily be presumed that she had taken a bath to clean herself and also said to the usage of word "gentleman" for accused of rape by Session Court is perplexing that how while convicting the accused for rape this Court has referred to them as gentleman.

Further, in the year 1979 striking down the judgment of Bombay High Court by restoring acquittal of accused policemen and agreeing to the Session Courts view of 'consensual sexual intercourse' where it was asserted that as Mathura did not raise an alarm for any help it means that she impliedly consented to sex. Supreme Court also agreed with Session Courts viewpoints that she was "habitual to sex" and entire story to sound "Virtuous before Ashok" who was waiting for her lover outside the police station. She was a shocking liar because she could not point out exact appellant who had raped her, hence one who can go against her initial testimony by changing accused from Tukaram to Ganpat possibly can smartly lie about everything else too and the court declared that this alleged intercourse was a "peaceful affair".

The aftermath of this Judgment stirred up the nation with sleepless nights to many and resentment largely from the nation including legends in academics demanding for more sensitivity towards the feeling of victim putting their human rights and dignity. The outburst of repulsion was in the form of an open letter to then Chief Justice of India by legendary academicians of renowned university of the nations and the open letter ended up in the form of Amendment Act, 1983. Now, here we need to know how rape laws stands in India.

Interpretation of Rape Laws

Here when we only focusing upon rape laws as they stood before 2013 Amendment in Criminal Law as its specifications would be discussed later in order of chronology. According to Section 375 of Act of 1860 this heinous action called rapes is a forceful process of intercourse by a man upon women (not being his wife and if wife then under fifteen years of age) without her consent which means free from any undue influence or coercion at the same time also important to mention here that provided she is mature enough mentally i.e. having sound mind, physically i.e. she has completed sixteen years of age and also not intoxicated losing her mental stability.

If above action in absentia of mentioned conditions been done by any man then he shall be punished as per IPC, section 376 of Act of 1860 which provides rigorous imprisonment to any such rape criminal for not less than seven years extending to imprisonment for life and if this man is in position of authority as police officer, public servant, management person or staff member of Jail, remand home, institution for women and children, hospital or if the women raped is pregnant or if her age is less than twelve years or where offender along with others committed gang rape in pursuance of common intention, then the provision calls for punishment of rigorous in nature not less than period of ten years extending to imprisonment of life.

Criminal Law (Amendment) Act 1983

After Mathura act, this first criminal law amendment had brought evident changes in Section 376 of Act of 1860 by adding clauses A, B, C and D. Where A is punishment given to man for raping own wife during judicial separation, B is punishment for raping

custodial woman by public servant, C is punishment for raping inmates of Jail, remand home and other such institutions by superintendent and D is punishment for raping women in hospital by hospital management/ staff members. Stern changes have also been made in Section 228 of Act of 1860 protecting respect and dignity of raped women by keeping her identity undisclosed and whosoever by a medium of print publishes her identity (name), shall be punished with the term extending to two years. This is the reason why in entire judgment of Delhi gang rape case victim has been mentioned as '*Nirbhaya*'.

Now before we move forward to discuss another big fat amendments in the further years, we should again go through another incidence involving public servant as an accused that is ofa case[6] where a young female Vimla a student of class VIII, studying in the same class from last three years alleged that the appellant who is apparently a teacher in the same school had brought her into fear of failing in the class again and did intercourse with her. Vimla conceived and was taken to a hospital in Satna by appellant where abortion took place. The prosecutrix came back and filed first information report and give statement that she is only thirteen and half years old but her statement proved to be untruthful as she was found above eighteen years of age and as per this finding Court categorically held that teacher was not at all guilty of rape crime as prosecutrix was a consenting party in the said matter but the learnt trial judge had an opinion that the school in question was a government school and teacher serving in school was public servant in this capacity hence crime was committed under section 376-B of Act of 1860and sentenced him to imprisonment(rigorous) in nature for two years with fine of rupees 1000.

So let us again understand to find out more situation where rape done by people in authority as stands today after under rape law. Rape according to Amendment Act of 2013 is an offence against human body and is categorized in Chapter XVI in Act of 1860 from Section 375 to Section 376(A-E).Section 375[7] defines at first that who commits this crime and on whom. Rape is committed by a man on a woman (both the terms man and women are defined under Section 10[8] which says male or female human being of any age group is considered men and women) here again author would like to clarify rape is an offence against woman by man hence rape laws punishment would be given to man if proved guilty but again what about man who falls in category of child below age of seven and twelve years as defined in Section 82 and 83 of the Act of 1860. Section 82 is *Doli incapax* and Section 83 is *Doli capex*.

We should also consider the Victim -Offender theory, even though Under Indian Penal code we do consider criminal Intention but not the effect on victim's mind we should also consider it to make the conclusion on nature of Penalty, Judicial care should be for both victim and offender.

In Indian law child below age of seven years is in his infancy a period of life which is considered as a period of defect of understanding wherein a child below seven is under

[6]Omkar Prasad Verma v State of Madhya Pradesh (2007)4 SCC 323

[7]Section 375 of Indian Penal Code, 1860

[8]Section10 of Indian Penal Code, 1860 - "Man". "Woman"- The word "man" denotes a male human being of any age, and the word "woman" denotes female human being of any age.

natural disability to differentiate between righteous and wrongful action, good and bad. This can better be understood by understanding psychological aspect of child given by Swiss psychologist Jean Piaget who says it is incredible to see development of child's ability to think and to find reasons for that, this is also famously called as Cognitive development.[9] Development of cognitive skills of child is divided into four stages:

-Sensorimotor (Birth to 2 years),

-Pre-operational (2-7 years),

-Concrete Operational (7-11years) and

-Formal Operational (11 years and above).

In first two stages child recognizes his own body and learns to use language with object classification by single feature, in the third stage he learns object classification with several dimensions with ability to think logically about object and events and then in the last fourth stage he starts thinking logically about abstract issues and understand it hypothetically.

Like this when psychological aspects are applied in legal Section 82[10] of Act of 1860, we can understand that this child is in his pre-operational stage and where his thinking is only egocentric and also it is very difficult for him to understand viewpoint of others hence we can now understand why below seven years of age no child is punished for his crimes. Discussing further about Section 83[11] of Act of 1860, which take the bracket of age group above seven and below twelve, children of this age bracket are more in concrete operational group where though they form mental representation of series of actions but still they can only relate to concrete objects to which they have direct sensory access else not, hence here we can understand that though child can draw map route but would not be able to follow as they have no overall picture of the same and purely becomes question of child's level of understanding. When we discuss about the interpretation of Section 83 it is supported by above psychology that no child above seven years and below twelve years shall be punished as proved he is not able to comprehend his action with consequences. Further understanding children within the bracket of above 12 and under 18 years of age, when we consider this age bracket neither they fall in class of immature mind nor they can be considered fully matured, for a better understanding of this statement we shall refer to section 2(12)[12] and 2(13)[13] of Act of 2015which at first will clarify what are these class under eighteen human considered as and how law looks upon them if at all they come in conflict with law? This provision of

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[9]Atkin & Hilgard's, Introduction to Psychology, 16th edition, Cengage Learning, 2019.

[10]Section 82 of Indian Penal Code, 1860- Act of a child under seven years of age- Nothing is an offence which is done by a child under seven years of age.

[11]Section 82 of Indian Penal Code, 1860- Act of a child above seven and under twelve of immature understanding-Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

[12]Section 2(12) of Juvenile Justice (Care and Protection) Act, 2015- "Child" means a person who has not completed 18 years of age.

[13]Id, Section 2(13) - "Child" means a child who is alleged or found to have committed an offence and who has not completed 18 years of age on the date of commission of offence.

section 2(12) of Act of 2015 earlier appeared as section 2(k) in Act of 2000.[14] This section explains as to who is child or juvenile for the purpose of this Act, accordingly a child or juvenile is someone who is below eighteen years of age, this legal provision is also in consonance with Section 3 of Act of 1875 that defines majority age of an Indian, where unless any particular personal law applies and who is domiciled (not necessary that every resident is domicile but every domicile is resident) in India shall attain majority at completion of his eighteen years of age but there is also an exception that minors who are under the guardianship that is appointed by Court such minor shall attain majority once he complete his twenty first birthday. Next is interpretation of section 2(13) of the same Act which says any child who is alleged to do or who has been found doing any action which is an offence under criminal law will be considered as juvenile in 'Conflict with Law' if at the date on which he was alleged or found doing crime, has not completed the age of eighteen years. Therefore, as per the law age of majority by both Act of 2015 and 1875 shall be eighteen and not even a single day less than that shall be considered for any reason whether it is majority or considering punishable for crime. After learning all about the various age brackets from under seven to even one day less than eighteen no imprisonment can be awarded by any law. Now understanding both the section 2(12) and 2(13) in a psychological aspect of delinquency[15] in this age covers a broad range of behaviour like unacceptable social behaviour of bunking school, like status offence of consuming alcohol and heinous criminal acts of rape and murder. Youth crime occurs due to many causative factors like biological, psychological and socio-environment factors. As done for the previous children author would put emphasis on psychological factors for understanding reason for criminal action as serious as sex crimes. Psychologists have found now that there are incontrovertible evidences that adolescence period is of significant changes in brain structure affecting brain functions. Maturation of brain is at substantial level in both aspects. There are noteworthy four structural changes- Firstly, due to decrease in gray matter in prefrontal region of brain; this is a process through which unused connections between neurons are eliminated, this process takes place in early adolescence resulting in major improvement in basic cognitive skills and logical reasoning. Secondly, activity of neurotransmitter- dopamine that happens around puberty through which emotions are processed resulting experience of reward and punishment, this activity also initiates in early adolescence. Thirdly, there is an increase in white matter in the prefrontal cortex for initiating the process of myelination in which a white fatty substance sheathed the nerve fibre improving efficiency of brain circuit. The process of myelination continues till late adolescence and early adulthood, and this is responsible for higher order cognitive functions like planning ahead, risk weighing and making complicated decisions. Fourthly, after initiation of myelination there is increase in strength in connections that regulate emotions. Here the most effective to mention is strengthening connections establishing self-control making cable networking region in brain. Now let's understand that due to above mention four structural changes in brain what are the predominant functional changes with the help of test done via Functional Magnetic Resonance Imaging (FMRI). Firstly, while performing task of self-control, an adult brain uses a wider

[14] Juvenile Justice (Care and Protection) Act, 2000.

[15] Kumar.Navin, "Criminal Psychology", Lexis Nexis, 2015.

network of brain as compared to adolescence which makes self-control easier. Secondly, crucial changes are seen the way brain responds to rewards and punishments, interestingly differences are more consistently observed when anticipating reward then in reality receiving it actually. Heightened sensitivity is anticipated to rewards motivate adolescents to engage in acts of risk like fast driving, experimentation with drugs etc. Thirdly, responding to arousing stimuli is very high during adolescence and gradually peer pressure declines as they grow into adulthood and then they become better able to put brakes on impulses that are aroused by friends. Though, after understanding that why adolescents behave the way they behave but still psychologist not able to get answer to the most prominent question that when adolescent brain becomes adult and when brain of adolescent is developed to handle public policy as if at all the brain accelerator is pressed before a good braking system in place it would not be surprising that commission of crime peeks around the age of sixteen. This can also be seen that it is approximately this age only (+-) one year when adolescent or juvenile start experimenting with alcohol, marijuana, automobile crashes and attempts of suicide.

Here it will be fault of author not to discuss the landmark '*Nirbhaya*' case.[16] Before the authors discuss about the involvement and treatment of Juvenile in this case it is utmost important to see gravity of circumstances through running facts this case also becomes credible mentioning here as it is originator of Justice J.S. Verma committee formulated to suggest valid amendments in present law dealing with sexual crime more sternly in future to come resulting in Criminal Law Amendment, 2013. The running facts would more be based on the medical report of the female raped indicating brutality of inhuman human's. This incident took place in on 16 of December, 2012 in National Capital of India (Delhi), as already mentioned above this case is also known as '*Nirbhaya*' case, as original name of the victim not to be disclosed. *Nirbhaya* (Victim of rape) along with her friend after watching movie in a mall, catched the bus back to her home from Munirka bus stand at around 8:30 p.m. in a cold winter night wherein her male friend who was beaten badly by iron rods and she was brutally raped (Vaginal penetration, Rectal penetration, unnatural oral sex, putting hand and iron rod in vaginal and rectal region to pull out her internal body organs) and assaulted by six men who were already present in the bus (one of them treated as a Juvenile in conflict with law in this case). After all enjoyment was over, the victim along with friend both robbed with all possible dignities were thrown naked out of the moving bus at Mahipalpur flyover where from the police took both victims in serious condition to Safdarjung Hospital, Delhi for immediate treatment, as both were profoundly bleeding. Reports of doctor further clarified deep bite marks were present on her breasts, inner thighs, lips and also on private parts of her body. Talking particularly about the juvenile who was treated as one conflicting with the law under section 2(13) of Act of 2015 was released after three years of institutionalization and placed in some part of country as a measure of rehabilitation, also suggested in Beijing Rules, 1985 to lead a normal life whereas other five co-criminal, where one committed suicide and rest four were punished with death sentence marked the difference between fixing criminal responsibility between juvenile and adult offenders. This law abiding action of juvenile not being tried as an adult co-offenders called for a lot of outcry from public, which on suggestions made by Verma Committee report resulted

[16]Mukesh and another vs. State (NCT of Delhi), (2017) 6 SCC 1.

in Amendment Act of 2015 treating any juvenile between the ages of 16 to 18 committing heinous crime to be dealt as an adult.

Before we move further here at this juncture it becomes evident to understand 2013 amendment which is mentioned below-

Criminal Law (Amendment) Act 2013

After '*Nirbhaya*' ferocity of incident reins by Justice J.S. Verma's Committee who suggested in its report that turned into Amendment Act putting more stringent provisions relating to women like inclusion of offences for sexual harassment, assaulting woman to disrobe, capturing/watching women in private acts (Voyeurism), or following woman and her contacts for personal interaction despite her repeated express disinterest. This amendment extend from previous section of rape that explained merely penetration to sexual intercourse constitutes rape but the new section reads rape to be one which can be non-penetrative including oral sex and section also exempts medical intervention as one act not constituting rape. Report suggested various criminal actions under statute, which were pressing need, and finally placed in Amendment Act, but all the above actions are based on some mental or behavioural disorder on that basis of behaviour we can categories several kind of rape in Law, like Penetrative rape, Statutory rape (no penetration only touch to vegina) Marital Rape, Date rape (during an exploratory platonic romantic meeting between man and woman) Gang rape, male rape. J.S. Verma committee considers all such psychotic behaviour under the law. Our view is that committee was known to the pressing need of affected society therefore they consider as crime. And they believe that criminal are born criminal, all mentally decorated men may not do attempt of sexual assault only those who are born criminal but this theory of criminals are born criminal is partially accepted because having along debate so we cannot apply in a crude form, it required refining. Further this theory is based on genetic behaviour of pattern for which we required data but we have even no single homogenous group of rapist population as there are multi-factorial causative factor, which operate differently. Here we observed 100 medical reports therefore we categorized in some homogenous disorder. So that theory of criminals are born criminal is partially accepted because we required time line data so cannot apply, it required more data refining to prove or disprove theory of Lombroso in case of rape offenders.

Some Myth about rape: when we are exploring behavioural aspects we should consider myth about rape in our society , like Women ask for sex by the pattern they dressed and behave , they enjoying being raped, women are raped only by stranger , women could avoid being raped if they really want to , rapist are crazy animals,

Mental Ailment or psychotic Disorder of offender: Since last three decades several reports suggest that mental health issues underlie sexual violence and offending particularly rape we are discussing some of them which are directly falling under:

1. ICD 10 for sexual preferences:

Till now we have looked upon mind-sets as to why are different ages crime and criminals are looked upon differently in the eyes of law but these ages are tender ages as we have seen it is completely in formation state not properly letting the person understand his behavioural outcome, but the same is not the case when we discuss about adult doing it on females. Hence adults are punished under the penal provisions of the law. Having said this it also becomes utmost duty of author to explore that what makes an adult to

enter into crime like rape and outraging the modesty of women. One important factor is social psychological factor by which individual are influenced by actual social conditions of their life. One thing to be noted here that no individual commits crime in isolation. Criminals are deeply affected by influential factors like family, community, religion, society and sometime governmental functioning also. Criminal who have been exposed to sexual activities in their early ages directly or indirectly are often seen indulged more towards forceful sex with females. When said forcefully sex it does not only tend towards sexual activity with other female but also includes wife in the form of marital rape. Other than social factors impacting mind of person to commit crime there are more abnormalities for creating sexual preferences for opposite gender pushing such person to have forced sex. These psychological disorders by ICD 10 (International Classification of Diseases and Related Health) under disorder for sexual preferences are as follows:

2 Fetishism- State of mind of a person attracting towards non-living object stimulating his sexual desire and gratification. Fetishes are human body extensions like clothing, footwear and some texture of rubber, leather etc. Fetishism is exclusively limited to males where they are aroused sexually by any female wearing these extensions of his choice.

3 Exhibitionism- This is a persistent tendency again only in males to expose their genitalia to strangers or even anyone in public place. This is exclusively limited to heterosexual males who are exposed to females. This ends up in action followed by masturbation. Important is that this behaviour is manifested generally at the time of stress and urge is difficult to control as excitement is very high as often seen.

4. Voyeurism- Also known as *Scoptophilia*. This is again persistent behaviour to look at people engaged in sexual activity specially undressing. This is also high excitement ending to masturbation and also this peeping act is not known to people who are being observed. Though now it is considered as criminal action after 2013.

5. Paedophilia- Sex craving for children of Pre pubertal or early pubertal ages. It can be in some cases craving only for male child or in some cases it can be only female child or it can also be for both. Again it is male dominant disorder. It also include men molesting own children and children's friend and peers.

6 Sadomasochism- Infliction of pain or humiliation as a preferential factor for sexual arousal falls in this category. If one only pleasured by receiving pain it is masochism and on other side if only pleasure by providing pain it is sadism. It is normal occurrence in a pleasant sexual activities but regarded as psychological disorder if becomes the source for erotic arousal. It is also treated as cruelty if done by and for one partner pleasure only.

Sexual maturation disorder- Conflicting with failed sexual identity in adolescent finding it changing or also considered as state leading to any kind of identity and sexual preferences issues leading to high level tension in continuing relations with partners.

7. Paraphilia- It is more prominent in males and means desire for abnormal kind of love making and it includes behavioural pattern of fetishism, sadomasochism, pedophilia, voyeurism and exhibitionism leading sufferer to involve in Criminal action of sexual offences.

There are other six different motivating dimensions also to focus on rapist like-

Opportunistic rapist , Anger rapist , sexual rapist , sexually non sadistic rapist, sexually sadistic rapist, vindictive rapist , Very importantly all the above mentioned ailment behaviour does not adversely affect the intention of wrong doer, he think wrongfully and do accordingly, he can control himself because he know that it is wrongful action, and law violating, he must not get defense of his mental ailment except medically certified ailment, which should be testified by the Law of Nation by the help of judicial system, our point of submission is these ailment must be recognize and cure it by first family so we can stop or minimize such offence against women and help in making of egalitarian society promised by our constitution of India.

Conclusion

Psychological impact on victims as per many studies have now come to consensus that the victim of rape other than the social and physical stigma of rape also suffers many psychological deep-rooted impact in fact the impression of these is such that it leads to heart breaking after effects like suicidal attempt and many psychiatric disorders. Even some guidelines are available for rape victims for their medico legal care, but the way of handling is not satisfactory therefore post traumatic care are more prominently observed, affecting females raped in childhood and adult ages of their life. Mother of all psychological impact on victim originate from the myth of society based on sexual assault against women makes her unholy and disrupt her piousness, we need to break this to avoid any psychiatric disorder and try to develop a judicial care for such victim. A close room psychiatric handling of victim, for some months may be one option to make aware the society at large that rape is an offence because it is against her will or without her consent which is forcefully done by male but in its repercussion it does not makes her unholy anyway and also not to make sexual offences as a sensitized matter from the female perspective to bring her in extremely highlighted or neglected world but rather we need to hold men as an unholy character for doing such an shameful act with the body and mind of any female. As it should only be the offender to be punished and not the victim to be victimized again and again.

Dehradun Law Review

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