CENTER FOR ADVANCED STUDIES IN HUMAN RIGHTS

CUSTODIAL VIOLENCE: THRESHOLD TO AN ARBITRARY REGIME

INTRODUCTION

Historically, the police have been seen as a protector of people's rights, but the blood on their hands in the recent custodial deaths has offered a view of the other side of the coin. The senseless deaths of the father-son duo in Tamil Nadu, Jayaraj and Bennix, alleged to be the result of torture while in police custody simply for contravening lockdown rules, sounds like nothing short of a scene in a dystopian movie. The incident led to nation-wide uproar, being called India's '*George Floyd Movement*' – referring to the infamous and brutal police killing of the African-American man in the United States of America in May, 2020 while being taken into custody, leading to overwhelming support through the Black Lives Matter movement not just in the country, but all over the world. The renewed discourse on custodial violence in India as a result of the Tamil Nadu deaths was only amplified after the U.P. police encounter and death therein of the gangster Vikas Dubey, which did not come as a shock to many, and is being called a premeditated extrajudicial killing - apparently the 119th since 2017 in Uttar Pradesh alone.[1]

Clearly, these are not isolated incidents. Even before they took place, a petition was filed in the Supreme Court by human rights activist Suhas Chakma in November, 2019, seeking implementation of Section 176(1A) of the Code of Criminal Procedure, 1973, which provides for mandatory judicial inquiry in cases of death, disappearance or rape in police and judicial custody, as well as state-wise information on the same under the Right to Information Act, 2005. It was pointed out that the National Human Rights Commission had recorded 24,043 custodial deaths/rapes between the years 2005-2006 and 2018-2019.[2]

More recently, on July 13, 2020, a miscellaneous application[3] was filed before the Supreme Court with regards to ***Dilip K. Basu v. State of West Bengal,***[4] ***(the judgment that laid down*** a legal framework to prevent custodial violence and death) ***where the petitioner,*** Sr**.** Adv. A. M. Singhvi, asserted that the court must revisit the issue of custodial violence in India.

[1] Manish Sahu , Apurva Vishwanath, *Encounter Impunity on Record: 74 probes complete in UP, Police get clean chit in all,* THE INDIAN EXPRESS, (Jul. 11, 2020) *available at*, https://indianexpress.com/article/india/74-probes-complete-in-up-police-get-clean-chit-in-all-6500071/.

[2] *Plea for Judicial Probe in Custodial Death Cases,* THE HINDU, (Jan. 24, 2020) *available at*, https://www.thehindu.com/news/national/plea-for-judicial-probe-in-custodial-deathcases/article30646740.ece#:~:text=A%20Bench%20led%20by%20Justice,%2D2006%20and%202018%2D2019.

[3] Dilip Basu v. State of West Bengal, M.A., W.P. (Crl.) No. 539/1986, *available at,* https://scobserver-production.s3.amazonaws.com/uploads/beyond_court_resource/document_upload/515/Application.pdf.

[4] 1997 (1) S.C.C. 416.

ANALYSIS

Recent incidents of custodial violence within and outside of India highlights the gross violations of human rights of individuals at the expanse of the police authorities who callously transgressed the law written in black and white and thereby, smothered the constitutional values enshrined in our grundnorm. Before evaluating the situation at hand on the touchstone of jurisprudential analysis, it becomes inevitable to first expound on what the law is that is alleged to have been violated by the police officials in different incidents across the country.

The Constitution of India itself apprehends the possibility of exploitation of the accused at the hands of the authorities. Due to this, Article 21 and Article 22 lay down the foundation to render protection to the accused against any inhumane treatment that can be meted out to them. Extending the same notion, the provisions envisaged in the Indian Evidence Act, 1872, Code of Criminal Procedure, 1973, Indian Police Act, 1861 and the Indian Penal Code, 1860, also delineate the significance of ensuring a safe and secure environment for the accused of any crime. And this dogma of providing protection to an accused finds its basis in the well-established principle of the penal law, i.e. a person is innocent until proven guilty. Hence, it becomes quintessential to give due regard to the rights of such individuals and custodial violence poses as a complete antithesis to the idea envisaged in the legal provisions.

Treading on, it is quite patent that the above-mentioned brutish incidents are no part of a civilised system of existence. Rather, if we ponder a little harder, they reflect the barbaric traits of the 'state of nature'[5] that the social contractualists expounded. In layman's language, state of nature as was described by the social contract theorists, is a prequel stage of any civilisation transforming into a governed civilised society. It was described as a barbaric stage coloured with pessimism and hedonistic tendencies. Hobbes famously argued that it was a *"dissolute condition of master-less men, without subjection to Laws, and a coercive Power to tie their hands from rapine, and revenge and devoid of all the basic security upon which comfortable, sociable, civilized life depends."*[6]

This cruel treatment that was wreaked on to the father-son duo in Tamil Nadu reflects the savageness of 'state of nature' *in praesenti* and it forces one to contemplate if non-abidance of the lockdown notification was a grave enough offense to deserve a punishment that costs your life or not. This trend of custodial deaths due to police ruthlessness is an apt simile for the police to be like the *Leviathan*[7] of the present times, preparing the ground for the society to reverse to the infernal conditions of the state of nature.

On the other hand, the alleged fake encounter of Vikas Dubey that has been the hot potato for the Indian masses especially the political and legal fraternity is a heavy blow to the Austinian school of law which emphasises that '*law is the command of the sovereign*'[8] and in the contemporary times any enactment made by the legislature is the 'law' of our country. Though the majority of the people have failed to realise their folly in encouraging such trends of encounter in the society, there are a few who have raised their voices against it. And the purpose behind taking such a difficult stance is not because the latter category of people doesn't realise the heinousness of Vikas's crime but because they have realised that unravelling the truth and subjecting a criminal to his fate, is the onus of the judiciary and any transgression of the powers of one organ of the government by the other, will be detrimental to the whole legal set up of the country in the long run.

Since, the police authorities have failed miserably to abide by the laws, such an act of deviance attracts the Austinian sanctions.[9] And the order[10] to constitute an inquiry committee to probe the verity of the Vikas Dubey's encounter by the Apex Court and the order of the Madras High Court[11] for a judicial inquiry into the alleged custodial murders of the father-son duo delineate the significance of the sanction theory of Austin to keep a check on the law and order situation in society.

[5] *Hobbes Moral and Political Philosophy*, STANFORD ENCYCLOPAEDIA PHILOSOPHY, (2002) *available at*, https://plato.stanford.edu/entries/hobbes-moral/?PHPSESSID=764cd681bbf1b167a79f36a4cdf97cfb#StaNat.

[6] *Ibid.*

[7] *Leviathan*, ENCYCLOPAEDIA BRITANNICA, *available at,* https://www.britannica.com/biography/Thomas-Hobbes/Political-philosophy.

[8] *John Austin*, STANFORD ENCYCLOPAEDIA OF PHILOSOPHY, *available at,* https://plato.stanford.edu/entries/ austin-john/.

[9] Michael Payne, *Hart's Concept of a Legal System*, WILLIAM & MARY LAW REVIEW (1976).

[10] Radhika Roy, *It is the State's Duty to Uphold the Rule of Law: SC Suggests to Constitute Committee Headed by Former SC Judge to probe Vikas Dubey Encounter,* LIVELAW, (Jul. 20, 2020) *available at,* https://www.livelaw.in/top-stories/it-is-the-states-duty-to-uphold-the-rule-of-law-sc-to-constitute-committee-headed-by-former-sc-judge-to-probe-vikas-dubey-encounter-160174.

[11] Madurai Bench of Madras High Court v. State of Tamil Nadu, Suo moto W.P. (M.D.) No. 7042/2020 in Madras High Court.

This stance of the Supreme Court seconds the idea that all the laws of the country must be obeyed to prevent a state of chaos or a state of anomie. Even the Kelsen's Pure Theory of Law propagates this principle stating that, *"the grundnorm is not the Constitution but a thought or a feeling that the Constitution ought to be obeyed and all the laws of the nation derive its validity from the grundnorm itself.that the Constitution ought to be obeyed and all the law s of the nation derive its validity from the grundnorm itself."*[12] Hence, irrespective of the fact whether the act done was right or wrong or if the act was done with bona fide intention or not, any act done in contravention to the established legal principles and provisions will be a fallacy and deserves a rebuking punishment. If the makers and executioners of the law twist and peruse the law as per their whims and fancies, such acts are sure to cause injustice and violation of the human rights of the people across the nation. And as Martin Luther King has rightly said '*injustice to anyone is a threat to justice everywhere'*, if such trends of breach of law are not put to an end, the posterity is sure to witness a society that is attributed with fear, and danger and is like a quagmire devoid of all rights and liberties that our ancestors had gifted us after their long struggles and legion sacrifices.

Further, the petitions that have been filed in the courts of law, apprehending the fear of prevalence of the brutish acts of custodial death, are an attempt to alarm the system and the people at large to take legal as well as social cognizance of the social plague that is taking huge toll on the lives of the accused persons merely on account of the fact that there is a blot of doubt on their innocence in the society. It raises a deeper question for the people to answer that whether the line between the meaning of the accused and the convict has disappeared in the contemporary times that it takes no time for the authorities to brush aside all or any rights that is available to the person by virtue of her/his existence. And Hohfeld's *Model of Rights*[13] explicates similar paradigm through a complementary set of binary pairs, i.e. rights and duties.

The principal aim of Wesley Newcomb Hohfeld's project was to clarify juridical relationships between the relevant parties.[14] And the first pair of the juridical pairs becomes handy in order to highlight the very purpose of the above-mentioned petitions on custodial death. The first pair in the Hohfeld's model is 'rights' and 'duties' and the concept can be explained *via* a brief illustration. If 'A' is the seller of goods and 'B' is the buyer. Then after the sale and purchase of the goods (X) by A and B respectively, B has the 'right' to have the goods delivered and A has the 'duty' of deliver these goods to B. And this because A and B are 'legally bound' by the act of sale and purchase.

Applying the same logic between the two actors, i.e. the police authorities and the accused, it can be tacitly understood that both these actors are bound under a legal set up wherein both have their own rights and duties against each other. If the police officials have a legal claim to take custody of the accused and interrogate him for the accused crime, then it is the legal duty of the accused to cooperate to the investigation. However, the corollary interpretation of the same is also true. The accused is conferred with certain rights like presenting her/him before the magistrate within 24 hours (Sec. 76 CrPC) or being informed about the reason of the arrest (Sec. 50 CrPC) and the like and so the police officials are also legally bound to follow the law as it is their duty against the accused person's legal claim over her/his rights. But to our dismay, police authorities have time and again shunned their duties and the augmenting cases of custodial violence and deaths are one such example wherein this model of rights is highly violated.

CONCLUSION

The jurisprudential analysis of the rising number of custodial violence cases supports the claim that is being made by different activists before the honourable apex court about the lack of stringent enforcement of law in the instant case. The plea against the dormancy of the existing provision of Section 176 (1A) of the Code of Criminal Procedure, 1973 or the recommendation of the 113th Law Commission Report to insert Section 114 B (1) in the

[12] Rakesh Kumar, *Structural Analysis of the Indian Legal System through the Normative theory*, 41 JILI (1999).
[13] Nikolai Lazarev, *Hohfeld's Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights*, MURDOCH UNIVERSITY ELECTRONIC JOURNAL (2005).
[14] *Ibid.*

Indian Evidence Act, 1872 for prosecution of a police officer in cases of custodial deaths,[15] is not a far-fetched cry but is rather the need of the hour. The cases of violence at the behest of the authorities not only robs an individual of her/his rights, but it also shakes the confidence of the masses in the constitutional structure of the country and at the same time compromises with the sanctity of the democratic republic that India is.

In a country which has earned its freedom from the clutches of its oppressor through innumerable sacrifices and exorbitant patience of 200 years, it is very saddening to witness it wearing back the shackles of lawlessness and arbitrariness and letting the pious human rights and constitutional values to seep through like sand.

It is high time that the authorities and the people of our nation and abroad hear to the mayday call and step up to prevent any further damage by respecting the law and order of the respective nations and at the same time starting to give due regard to the rights and liberties of an individual that she/he deserves by virtue of their existence. If not, then ignorance of the plight of custodial violence victims will be the threshold to the time when oppression will be at its zenith, arbitrariness will be the basis of all acts and no one will escape the fear of being the next victim of that society.

Contributions are invited for the next issue of CASIHR Newsletter. The last day is 25th October 2020 which can be mailed on casihr@rgnul.ac.in

INTERNATIONAL NEWS

Russia's top medic quits over COVID-19 vaccine

Professor Alexander Chuchalin resigned after he failed to block the registration of the vaccine based on "safety grounds". He specifically accused the two leading medics involved in the development of the vaccine, Prof Alexander Gintsburg and Prof Sergey Borisevich, of flouting medical ethics in rushing the vaccine into production.

Chad inquiry finds 44 prisoners died in hot, overcrowded cell

An inquiry by the Human Rights Commission of Chad found that a group of 44 prisoners died in one night in April in a prison in the country. While the government claims that all the 44 prisoners were Boko Haram militants who poisoned themselves, the Commission's report described the cause of their death to be scorching heat, thirst, and hunger.

Sudan introduces reforms to move away from strict Islamist rule

After more than 30 years of Islamist rule, Sudan has outlined wide-reaching reforms including allowing non-Muslims to drink alcohol, and scrapping the apostasy law as well as public flogging. The reforms come after long-time ruler Omar al-Bashir was ousted last year following massive street protests.

UK SC rules that Paedophile hunters' do not violate human rights

The Supreme Court of UK has ruled that gathering evidence in covert sting operations by "paedophile hunter" groups does not breach a person's human rights. Dismissing an appeal by Mark Sutherland, Lord Sales said in a unanimous judgment: "The interests of children have priority over any interest a paedophile could have in being allowed to engage in criminal conduct."

US removes Saudi Arabia from list of worst human traffickers

The US State Department's 2020 Trafficking in Persons Report said the country had made "key achievements" in the last 12 months. It implemented its first ever national referral mechanism to provide care to victims of trafficking.

[15] Aadhyaa Khanna, Chetan Chawla, *The Enshrinement of Custodial Violence in India,* BAR AND BENCH (Jul. 17, 2020), *available at* https://www.barandbench.com/apprentice-lawyer/the-enshrinement-of-custodial-violence-in-india.

UAPA AND THE SUPPRESSION OF POLITICAL DISSENT

INTRODUCTION

Even amidst an unprecedented pandemic ravaging the entire world, a categorical crackdown on dissent and unobtrusive violation of basic human rights are still happening in the world's largest democracy through state-sanctioned national security legislations. During the course of the nationwide lockdown enforced by the Central Government since March 2020, numerous arrests have been made under the draconian Unlawful Activities (Prevention) Act, 1967 (**'UAPA'**) against various political dissenters including *Bhima-Koregaon* activists Gautam Navlakha and Anand Teltumbde; Kashmiri journalists like Masrat Zahra; protestors of the Citizenship (Amendment) Act, 2019 (**'CAA'**) like Umar Khalid, Safoora Zargar and Meeran Haider; '*Pinjra Tod*' activists like Natasha Narwal and Devangana Kalita among many others.[16]

The UAPA, which was most recently amended in the year 2019, has always been a controversial piece of legislation which has met with opposition from the members of the civil society as being violative of fundamental democratic ethos. The law divests enormous powers into the hands of the government which gets legal authorization to brand an individual or a group as 'unlawful', thus weakening the threshold between political opposition and criminal activity[17] which was also apparent in the recent political witch-hunts against dissenters. The general legal presumption of 'innocence unless proven guilty' is not applicable to provisions of the UAPA which puts the onus on the concerned individual or organization to prove the same.[18] Thus, the clampdown on journalistic freedoms, restraining activism and voices of opposition is emboldened magnanimously by the provisions of this law.

COUNTERINTUITIVE IMPLEMENTATION OF UAPA

On August 8, 2019, the Unlawful Activities (Prevention) Amendment Bill, 2019 acquired the assent of the President and thus, the Unlawful Activities (Prevention) Act, 1967 stood amended to that effect. While the original legislation gave the government the power to designate certain groups as terrorist organizations, the present legislation places overarching and absolute powers in the hands of the executive. UAPA, as it stands

[16] Asimita Bakshi, *From Pinjra Tod to Kashmiri Journalists: What's the deal with UAPA,* LIVEMINT, (May 31, 2020) *available at*, https://www.livemint.com/mint-lounge/features/from-pinjra-tod-to-kashmiri-journalists-what-s-the-deal-with-uapa-11590915249625.html.
[17] Anushka Singh, *Criminalizing Dissent,* ECONOMIC AND POLITICAL WEEKLY, (Sept. 22, 2012) *available at,* https://www.epw.in/journal/2012/38/commentary/criminalising-dissent.html.
[18] Section 38 (1), The Unlawful Activities (Prevention) Amendment Act, 2019.

today, further stipulates that the government may declare individuals as terrorists under the Act if they satisfy the criteria set in the Act.

It would be ironic to note here, however, that the Act does not expressly define what can be considered as an act of terrorism and thus, provides sweeping powers to the administrative authorities. Since then, the Act has been used to detain scores of dissenters, on grounds of partaking in unlawful or terrorist activities under the Act, and to curtail any form of ideological or political opposition. It would also be pertinent to note here, that this arbitrary use has not been made just to truncate the civil liberties of an individual but also interferes with journalistic expression.

So far, several student protestors, scholars and journalists have been brought within the definition of terrorists under UAPA, by adopting overly broad interpretations of the provisions contained therein, and have subsequently been detained. It would be pertinent to state here that it is not just the administrative authorities who have made an unreasonable and arbitrary use of the provisions of the Act, but a similar construction has also been adopted by the judiciary. One of the most brazen misuse of the instant legislation was in the case of Safoora Zargar, a research scholar at Jamia Milia Islamia University, who was detained by the police on 22 criminal charges. In the present case before the Patiala House Court, the District Judge had held that blocking a road as a part of protest falls within the meaning of the term *unlawful activity* under the Act. The present was a preposterous inference drawn by the court, especially considering the fact that road blockade during a protest, is a fairly common occurrence in the country.[19]

However, the more egregious observation of the court was to hold that '*when you choose to play with embers you cannot blame the wind to have carried the spark a bit too far and spread the fire.*'[20] It must be noted here that the present metaphor used by the court to justify the detention of the defendant, completely flouts the years of jurisprudence of the Supreme Court on the issue which relies on the expression *'spark in a powder keg'*[21] that states that there should be an imminent connection between a speech or act and its alleged unlawful consequence for a person to be held liable for the same. Going by this unreasonably expansive interpretation furthered by the District Court in Safoora's case, any person can be brought within the contours of the Act and can, therefore, be designated a terrorist. Thus, while the statement of objects and reasons of the Act may suggest that the purpose of the Act is to provide protection from unlawful activities, it is, in actuality, being used as a tool to suppress political activism and to legitimize and institutionalize *unlawful* detention.

ANALYZING THE ABUSE OF POWER THROUGH THE LENS OF HUMAN RIGHTS LAW

Time and again, the Act has been used to abridge the freedom of individuals to speech and expression under Article 19 of the Indian Constitution. This curtailment has been done on the pretext that such an act/ speech can be restricted under Article 19(2) on grounds of *public order* or *in the interest of sovereignty and integrity* of the state. It must, however, be remembered here that a discussion on violating or exceeding the scope of the freedom of speech and expression, in such a situation, needs to be assessed under three prongs, i.e. discussion, advocacy and incitement.[22] Here, unless an act or a speech qualifies as incitement, the right to free expression cannot be interfered with.[23]

Thus, upon subjecting the recent booking of Masrat Zahra under the draconian legislation,[24] to the present test, it becomes apparent that the same was violative of the safeguards and freedoms provided under the Constitution, since the act of expressing or promoting a particular view or opinion, cannot be considered as incitement, without any immediate and proximate nexus between such a speech and its subsequent unlawful consequence. Additionally, such a curtailment of the right to dissent under the Act is not in line and stands in clear and blatant violation of not

[19] *Cannot Block Road indefinitely, says Supreme Court,* THE TRIBUNE, (Feb. 11, 2020) *available at,* https://www.tribuneindia.com/news/nation/cannot-block-road-indefinitely-says-supreme-court-38903.

[20] Aditi Singh, *When you Choose to Play with Embers, you cannot Blame the Wind, Delhi Court rejects Safoora Zargar's Bail Plea in Delhi Riots Case,* BAR & BENCH (Jun. 5, 2020) *available at*, https://www.barandbench.com/news/litigation/delhi-court-rejects-safoora-zargar-bail-plea-in-delhi-riots-case.

[21] S. Rangarajan v. P. Jagjivan Ram, (1989) 2 S.C.C. 574.

[22] Shreya Singhal v. Union of India, (2013) 12 S.C.C. 73.

[23] Arup Bhuyan v. State of Assam, (2011) 3 S.C.C. 377.

[24] Arshu John, *Crackdown amid Corona: Kashmir Police book Photojournalist Masrat Zahra under UAPA to send a message,* THE CARAVAN, (Apr. 20, 2020) *available at*, https://caravanmagazine.in/media/kashmir-fir-photojournalist-masrat-zahra-crackdown-coronavirus.

just the provisions contained in the Indian Constitution but also of international frameworks such as the Universal Declaration of Human Rights, 1948 and the International Covenant on Civil and Political Rights, 1966.

Another glaring instance of misuse of the provisions contained in the UAPA by the authorities is with regards to conditions for bail which are antithetical to the basic principle of criminal jurisprudence of the presumption of innocence. This situation can be seen from the tragic case of the 79-year-old poet and activist, Varavara Rao, who was denied medical care at the Taloja jail in Mumbai. Furthermore, even after being in a pitiable state, Rao was denied bail five times and even at the peak of the pandemic, despite his vulnerability to the outbreak inside of prison.[25] This can be viewed as a flagrant violation of the UN's Basic Principles of Treatment of Prisoners, 1990 which states that access to healthcare should be provided to prisoners without any discrimination on grounds of their legal situation. Thus, the UAPA stands in violation of fundamental international regulations which provisions for safeguarding human rights.

CONCLUSION

The UAPA, with its dangerous provisions of excessive powers vested into the hands of the State, thus brings the concept of *'Orwellian State'* closer to home. The non-conformity of the said law with international standards laid down around protection of human rights directly aligns with a pattern observed in modern-day populist governments all around the world. The recently passed Anti-Terrorism Act, 2020 by the Government of Philippines and the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region by the Chinese Government are some of the examples of this trend of authoritative anti-terror and national security laws springing up in different countries around the globe. It was observed that the common citizens, particularly the journalists, political dissenters and other members of the civil society, faced the brunt of the mighty state in the face of the stringent provisions of these laws which contravenes basic human rights of the people. All that was observed in the recent cases of arrests made against activists and protestors in India stands in stark contrast to the country's vibrant constitutional principles which intrinsically uphold individual rights.

NATIONAL NEWS

Safoora Zargar bailed on humanitarian grounds

On 23rd June, Safoora Zargar, a research scholar from Jamia Milia Islamia, who was in custody for her alleged role in the conspiracy to block the roads during the February Delhi riots, was granted bail by the Delhi High Court on humanitarian grounds. It has been specified, however, that the decision has not been taken on the merits of the case and should not be made a precedent.

Prashant Bhushan found himself in the middle of contempt of court

The Supreme Court has held lawyer Prashant Bhushan guilty of contempt of court for his tweets against the Chief Justice of India (CJI) S.A. Bobde and his four predecessors, that alleged inactivity by the Court during the coronavirus pandemic. The Apex Court has let him off in the contempt case with a fine of Rs. 1.

Permanent Commission to Short Service Commissioned Women Officers

On 23rd July, the Government of India issued an order for grant of permanent commission to short-service commissioned women officers in all the ten streams of the Indian Army. According to Colonel Aman Anand, this will empower women to shoulder larger roles in the army.

Discontinued pension for widowed women of Bhopal Gas Tragedy

The NHRC has sought action taken reports (ATRs) from the chief secretary of Madhya Pradesh and two Union Ministries' secretaries in response to a complaint made by two gas tragedy survivors' organizations, which highlighted that the pension to 5000 women, widowed as a result of the Bhopal gas tragedy of December 1984, was discontinued arbitrarily since December 2019, despite Rs. 4.57 crore still lying unused with the government out of the Rs. 30 crore fund allocated for this purpose by the Ministry of Chemicals and Fertilisers in 2013-14.

[25] *Don't kill Varavara Rao in Jail: Health of 80-yr-old accused in Elgar Parishad Case deteriorating, Authorities negligent, says family,* FIRSTPOST, (Jul. 12, 2020) *available at*, https://www.firstpost.com/india/dont-kill-varavara-rao-in-jail-health-of-80-yr-old-accused-in-elgar-parishad-case-deteriorating-authorities-negligent-says-family-8588291.html.

RAPE VICTIMS AND THE APATHY OF THE JUDICIARY

INTRODUCTION

'A minor girl raped and murdered. A 40- year old woman raped and murdered.'

We encounter such devastating news headlines every day. It is estimated that a woman is raped every fifteen minutes, out of which 99% of these crimes go unreported. An exponential increase in the number of rape cases in India has cast a spotlight on the issue of gender-based sexual violence in the country and the repugnant culture of victim-blaming. One of the rapists of the Nirbhaya case was quoted in the documentary stating that, *"a girl is far more responsible for rape than a boy, because a decent girl won't roam around at 9 o'clock at night. Housework and housekeeping are for girls, not roaming in discos and bars at night doing wrong things, wearing wrong clothes. About 20% of the girls are good."* If women are not *'good,'* men have a right to *'teach them a lesson'* by raping them. *'When being raped, she shouldn't fight back. She should just be silent and allow the rape.'*

Most of the rapists accused or convicted of rape have traces of this psychopathic view-point; however, they are not the ones to be blamed. The emotional, mental and physical trauma a rape victim goes through is inconceivable. However, despite undergoing psychological suffering, the society remains apathetic to the victim. The victims of rape are idiosyncratically vulnerable to be blamed for their assault, relative to victims of other crimes. In general, individuals, both male and female, react to such cases by harshly blaming the young woman for being raped, and declare the perpetrator's innocence.

This virulent tendency is not restricted towards the society but also administrative authorities. A report by the Human Rights Watch entitled *'Everyone Blames Me: Barriers to Justice and Support Services for Sexual Assault Survivors in India,'* shows that victims of rape and sexual assault face severe humiliation at police stations and hospitals. Police is often reluctant to register their complaints, or file FIRs and the witnesses of the offence receive negligible or no protection. In hospitals, medical professionals practice the degrading and insulting two-finger tests and make characterizations about whether the victim was habituated to sex, thereby violating her dignity and outraging her modesty.

The heinous and horrific *Nirbhaya* case of 2012 stunned the conscience of the country, made international headlines and revealed the extent of sexual abuse against women in India, compelling lawmakers to amend Indian rape laws. In 2013, the Central Government introduced some judicial reforms and the Criminal Law (Amendment) Act, 2013 (**'Act'**), also known as the '*Nirbhaya Act'* was enforced. Moreover, the then Chief Justice of India launched fast track courts for the speedy disposal of rape cases.

THE RAPE VICTIM AND THE COURTROOM

The gap between practice and policy still remains a huge obstacle where violence against women, especially rape, is concerned. Women continue to be vulnerable in the criminal justice system, because conversations surrounding rape in the courtroom are fraught with rape myths and stereotypes. The underlying assumption of these false notions is that a 'genuine' rape victim can be identified by certain 'typical' patterns of behaviour. The implication is that damaging inferences can also be drawn by the courts from the behaviour of the victim, if it does not fit the bill of how a woman 'ought' to have behaved in case of her sexual violence.

Unfortunately, amidst many progressive decisions on rape laws, the judiciary in many instances has taken a patronizing approach, legitimizing structural patriarchy. In a very recent decision of the Karnataka High Court,[26] anticipatory bail was granted to a man who had been accused of raping a woman on the pretext of marriage. Various textbook myths and stereotypical notions were recorded as the 'reasons' for granting bail to the accused, including comments about the victim not objecting to having drinks with the accused and going out late at night. The High Court further observed that it was *'unbecoming of an Indian woman'* to fall asleep after having been *'ravished'*. Another implication made by the court as a reason to grant bail was the fact that the victim is lying if she did not immediately report her violation to the police. The fundamental issue is that the court has relied on presumptions about how a woman reacts to rape, when in fact, there is no universal script. Each rape victim's experience and circumstances are different.

Another important issue in rape adjudication is the legal ambiguity around consent. This stems from another stereotype that a 'genuine' victim would try to physically resist the assaulter. In another decision[27] of the Delhi High Court pronounced in 2017, the legal understanding and discourse around consent was set back several decades when the court held that a *'feeble no'* and no actual physical resistance on the victim's part *'may mean a yes'* and it would not be sufficient to establish a lack of consent. The most damage caused by such rape myths and stereotypes is that the victims, rather than the accused, come under scrutiny. The blame is shifted towards the victims to find out whether they could have avoided the rape, or *'asked for it'*.

In yet another decision[28] of the Punjab & Haryana High Court, which stood in clear violation of the current rape laws with respect to the Indian Evidence Act, 1872; the court granted bail to the three accused but also brutally attacked the complainant and the credibility of her story. Apart from the court's questions on the victim's habits of consuming cigarettes, alcohol and comments about her sexual conduct; it was held that the crime was not *'gut-wrenching'* enough to hold the accused persons liable. The court while preaching on morality and the voyeuristic mind of the victim strengthened the false patriarchal belief that a woman's *'promiscuity'* can be inferred as consent.

CONCLUSION

What we have observed over time immemorial, is a certain form of apathy towards rape victims in court rooms. Not only has this led to injustice being caused in individual cases, but has also led the solidification of a toxic narrative which exists as judicial precedent and continues to influence future decisions. This reflects the lack of understanding of victimology, but largely a lack of understanding of basic human psychology. The recent Karnataka High Court decision has revealed that judges need to be sensitised to the psychological trauma that victims go through. Moreover, this calls for a greater inclusion of victimology in the curriculum of law schools, so that a generational difference can be creating progressive courtroom practices and narratives.

For this toxic narrative to be overturned, the larger goal is to break the shackles of patriarchy. But to achieve that, steps like active participation in understanding a victim's mental state have to be taken. This also calls for a greater understanding of mental health at large, and a step towards weaving the notions of a better mental health in the legal framework. This dearth in understanding of bas ic feelings and reaction to trauma has led to a double sentencing, one in the eyes of the society, and other more dismally, in the eyes of the court.

[26] Rakesh B. v. State of Karnataka, Cr. P. No. 2427/2020 in Karnataka High Court.
[27] Mahmood Farooqui v. State (Govt. of NCT of Delhi), 243 (2017) D.L.T. 310.
[28] Vikas Garg v. State of Haryana, Cr. M. No. 23962/2017 in Cr. A. No. S2396SB/2017 in Punjab & Haryana High Court.

ANALYSIS OF THE DRAFT ENVIRONMENTAL IMPACT ASSESSMENT NOTIFICATION, 2020

INTRODUCTION

The Ministry of Environment, Forest, and Climate Change of India, in March, 2020 released the Draft Environmental Impact Assessment Notification, 2020 under the Environment (Protection) Act, 1986. This draft notification seeks to replace the Environmental Impact Assessment Notification, 2006 which is currently in place, and is being widely criticized by environmental activists and NGOs alike, as an attempt at diluting the process of impact assessment. While many environmental groups have demanded that the draft notification be withdrawn on account of it being a regressive measure, its' supporters maintain that it is a much needed step in the direction of development and freedom from the red tape.

The process of environmental impact assessment (**'EIA'**) attempts to regulate those industrial and development projects and activities that make use of natural resources and affect the environment. Ideally, no project is approved if its implementation is deemed to have adverse consequences for the environment. However, the proposed notification could spell trouble for nature, if passed without implementing changes due to its several contentious provisions.

Presently, the EIA process involves the appraisal of an upcoming project with a view to anticipating and mitigating any negative impact on the health of people or the environment. The projects get prior Environmental Clearances (**'EC'**) based on the EIA, but construction cannot start before public consultation is held to take into account the concerns of the local people who would be affected by the project and other stakeholders. The material concerns raised during the consultation process have to be duly addressed and accordingly, changes have to be made to the EIA report before it is finally submitted before the concerned regulatory authority for appraisal. However, the changes proposed under the draft notification would significantly weaken the system in place to protect the environment by doing away with public consultation in case of certain projects, making it easier to get clearances, allowing for ex-post-facto clearances, and barring anyone except the developer of the project or a government authority from reporting violations.

PROBLEMATIC CHANGES

The draft notification proposes the expansion of the list of projects that do not have to undergo the process of public consultation and can directly seek prior EC. All linear projects in border areas including oil and gas pipelines, highways, expressways, multi-modal corridors, and ring roads, all off-shore projects located farther than 12 nautical miles, and all projects involving strategic considerations in the opinion of the Central Government are exempted.[29] The draft notification defines border areas as area falling within 100 kilo meters aerial distance from the Line of Actual Control with bordering countries of India, which would essentially cover a sizeable region of the resource-rich and biologically diverse North-Eastern parts of the country. Worse yet, it mandates that the government is not liable to release any information

[29] Clause 14 (2), Draft Environmental Impact Assessment Notification, 2020.

relating to strategic projects into the public domain.[30] This empowers the Central Government to declare projects to be of strategic importance discretionarily and, work around the public consultation stage without providing any justification.

Furthermore, construction of all projects listed under the B2 category like, irrigation modernization projects, Common Effluent Treatment Plants (**'CETP'**), building construction and area development projects, and elevated roads or standalone flyovers or bridges are also exempted. All projects in respect of inland water ways have been placed under the B2 category, and are therefore, excused from the public consultation process even if they lie in Eco-Sensitive Zones or Ecologically Fragile Areas. This measure leaves little scope for public participation, covering a great range of projects in its wide ambit. It would jeopardize the transparency and credibility of the EIA process and allow the concerns and suggestions of the people who would be directly impacted by such constructions to be bypassed arbitrarily.

Moreover, as per the 2006 notification, the concerned State Pollution Control Board (**'SPCB'**) or Union Territory Pollution Control Committee (**'UTPCC'**) was required to hold a public hearing within a time frame of 45 days[31] from the date of the receipt of request letter from the applicant at or in close proximity to the sites of construction, whereas the new draft notification proposes shortening this period to forty working days from the date of receipt of the request letter from the project proponent. This seemingly small reduction in the time period to voice concerns and raise objections assumes great significance in remote project locations that do not have access to information channels and where people are unaware of their rights in this regard.

The new draft notification also introduces a list that extends exemptions to 40 different types of industries and industrial projects from seeking prior EC or prior Environment Permission **('EP'**) under Clause 26, which includes activities and projects such as dredging, solar thermal power plants, and coal and non-coal mineral prospecting. These projects can now be developed even in eco-sensitive areas without securing clearances, posing a threat to their biodiversity and natural resources. Perhaps the most concerning proposal in the new draft notification is the provision allowing for ex post facto clearance to projects that begin operations without seeking one.[32]

The projects which illegally begin construction, excavation, or expansion beyond the specified limit without obtaining a prior EC can be legalized by the Appraisal Committee on submitting remediation and resource augmentation plans corresponding to 1.5-2 times the ecological damage assessed and economic benefit derived due to violation,[33] as long as they are at a permissible site and have expanded in a sustainable manner under the environmental norms. If not, closure of the project is to be recommended along with directions of remediation and a late fee. Additionally, an action would be initiated under the Environment (Protection) Act, 1986 against the project proponent. The proposed system does not prioritize the protection of the environment and is poised to cause irreversible damage to the environment. Any amount of compensation cannot be a suitable trade-off for damage to the environment in the name of commercial advancement that the draft purports.

Another major flaw in the draft is that it intends to empower only the proponent of a project or any government authority to report the violations by any project. Local communities whose health is dependent on these projects, environment activists and organizations which work to preserve the nature, researchers, and the general public is set to be made powerless in the face of violations.

Another adversity that this draft perpetuates is its prospective ramifications on the flora and fauna in different parts of the country**.** It has been widely debated and vehemently criticised by the environmentalists and activists for its prospective impact on the environment. The existing draft has reduced environmental clearance to a mere formality and tends to invalidate the real purpose of evaluating a project before it starts. The various protests across the different parts of the country stem from the uniform application of the draft irrespective of the specific biodiversity that these places witness which is attributable to their location. One such protest was introduced in Assam where this draft was defined as

[30] Clause 5 (7), Draft Environmental Impact Assessment Notification, 2020.
[31] Appendix 4, ¶ 4, Draft Environmental Impact Assessment Notification, 2020.
[32] Clause 22, Draft Environmental Impact Assessment Notification, 2020.
[33] Clause 22 (7), Draft Environmental Impact Assessment Notification, 2020.

'extremely dangerous'.[34] If implemented this draft might result in indiscriminate exploitation of resources to suit the narrative of development in areas where such projects would breed catastrophic results.

CONCLUSION

The importance of environmental clearances, EIA and incompetency of the existing system to ensure environment protection was depicted by the episodes like a gas leak in Visakhapatnam at LG Polymers where the plant operated for decades without any environmental clearance[35], fire due to oil and gas spill in Assam's ecological zones[36] and the non-disclosure of essential information regarding the impact assessment of international airport project in Mopa Goa which was vehemently criticised by the Hon'ble Supreme Court.[37] Owing to such incidents in the recent past it was expected from the government to impose greater liabilities on such dwellings, but the current draft does not seem to address these issues rather it is designed to favour the ease of doing business even if it corresponds to diluting environmental safety. Further with every passing amendment the quality of assessment criteria has been gradually deteriorating since 2006, scoping of projects and scrutiny has been gradually reduced and with this draft the government has given a final blow to the environment protection.

The draft notification perpetuates a loose policy for assessing the impact of various projects and upholds the long-held tradition of creating escape routes for violators. It is necessary that serious ramifications must be seen by those project proponents who take environmental safety as a secondary concern. Further, it is advised that while assessing the impact of any project a preordained sum calculated on the basis of the project cost and its impact must be reserved for remediation of the environment.

While we through our judicial precedents promote the 'polluter pays principle,' this draft might endorse pollute and pay principle which is in absolute contradiction with what this principle stands for.[38] So the ex- post facto clearances to projects in violations must be completely done away with. Further The draft notification perpetuates a loose policy for assessing the impact of various projects and upholds the long-held tradition of creating escape routes for violators. It is necessary that serious ramifications must be seen by those project proponents who take environmental safety as a secondary concern. Further, it is advised that while assessing the impact of any project a preordained sum calculated on the basis of the project cost and its impact must be reserved for remediation of the environment.

While we through our judicial precedents promote the 'polluter pays principle,' this draft might endorse pollute and pay principle which is in absolute contradiction with what this principle stands for.[39] So the ex- post facto clearances to projects in violations must be completely done away with. Further, as assessed in the initial part of the article greater discretion has been introduced on the part of the government to categorise projects as 'strategic' and place such projects out of public scrutiny making it all the more opaque. Such decisions must be reviewed by an independent body.

Preserving the environment should never be a mere formality, in fact, it should always be the pivotal force in determining the veracity and reasonability of our actions. The practice of EIA essentially must dwell in the cost-benefit analysis of the actions undertaken in the name of development and modernization must be accompanied by a well-structured remediation plan to deal with the damage that is so caused by undertaking such projects.

[34] Utpal Parashar, *Terming it Anti-northeast, Assam Groups and Parties up ante against Draft EIA 2020*, HT, (July 28, 2020) *available at*, https://www.hindustantimes.com/india-news/terming-it-anti-northeast-assam-groups-and-parties-up-ante-against-draft-eia-2020/story-973anIqcppVby9lDtcN6WP.html.

[35] Tiasa Adhaya, *Doomsday is Here: Eco-calamities ravaging India*, THE TELEGRAPH, (July 31, 2020) *available at*, https://www.telegraphindia.com/opinion/environmental-disasters-knocking-on-india-footsteps/cid/1787837.

[36] Ratnadeep Choudhary, *Assam Pollution Panel Wants Baghjan Oil Fields Closed, says No Clearance*, NDTV, (June 20, 2020) *available at*, https://www.ndtv.com/india-news/assam-pollution-panel-wants-baghjan-oil-fields-closed-says-no-keyclearances2249588#:~:text=The%20Assam%20Pollution%20Control%20Board,the%20gas%20well%20fire%20accident.&text=In%20the%20order%2C%20the%20PCB,to%20establish%20and%20operate%22%20permission.

[37] Hanuman Lakshman Aroskar v. Union of India, (2019) 15 S.C.C. 401.

[38] Research Foundation for Science v. Union of India, (2005) 13 S.C.C. 186.

[39] Research Foundation for Science v. Union of India, (2005) 13 S.C.C. 186.

-CENTER FOR ADVANCED STUDIES IN HUMAN RIGHTS (CASIHR)-

MEMBERS

SHRISTI SHARMA	PRIYA AGRAWAL	SWANTIKA KUMAR RAJVANSHI
BIPASHA KHATANA	KRITIKA KUMAR	ASTHA SHARMA
GUNJAN SINGH	RISHABH CHABBARIA	KHUSHALI MAHAJAN
JESSICA KAUR	ROHAN G.P. SINGH	DHAWAL

-HUMAN RIGHTS COMMUNIQUE-
VOL VI ISSUE IV
CENTRE FOR ADVANCED STUDIES IN HUMAN RIGHTS
Rajiv Gandhi National University of Law, Punjab
[Accredited by NAAC with 'A' Grade
Sidhuwal- Bhadson Road, Patiala-147006 | www.rgnul.ac.in | casihr@rgnul.ac.in
-FOR PRIVATE CIRCULATION ONLY-