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HUMAN RIGHTS COMMUNIQUE

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Centre of Advanced Studies in Human Rights (CASIHR)

THE CRY FOR DATA PROTECTION

An 'asymmetry of power' is perhaps what best describes the quagmire of data protection issues that one is faced with these days. The ubiquity of internet access and convenience of digitised personal data have led to a skewed balance of power wherein the individual is increasingly beholden to corporate/governmental monoliths; for the most part unknown and unseen. To complicate matters further, questions such as what constitutes 'personal data', who is to be held liable for the breach of said data, what are the precautionary measures to be necessarily undertaken by data holders *etc.* remain without a clear and definite answer.

The varying interpretations of personal data encompass everything from the seemingly mundane such as an individual's name, favourite books, frequently visited places, choice of foods *etc.* to the defining aspects of one's personhood *viz.* political inclination, sexual orientation, biometric data, credit card details, *etc.* Such data being intrinsically linked to an individual's sense of self, of personality and of expression, protection of the same becomes necessary.

The means of collection of personal data too are not without controversy. Proponents of data protection laws often throw up the question of 'meaningful consent' when discussing the methods used for acquiring personal data and rightly so. To hold an individual of ordinary prudence liable for not reading the fine print in an agreement/contract spanning thousands of pages is quite frankly absurd. Indeed such instances only serve to emphasise the need for comprehensive data protection laws in an environment exhibiting a gross asymmetry of power in the realm of contractual relations.

Being so tightly sown into the fabric of modern life, any breach of personal data could result in ramifications far beyond those conceivable by observers today. This article endeavours to shed light on the concept of data protection as topic of contemporary relevance. An attempt is made to examine data protection as aspect of international human rights law, elucidate the forms in which it currently exist, and the need for such laws in India. Further, the recent Cambridge Analytica incident and its implications on India is sought to be analysed.

PERSONAL DATA

Personal data is an umbrella term for any kind of information - a single piece or a set - that serves predominantly two purposes. It can be used to personally identify a person or single them out as an individual. The obvious examples are a person's name, address, photograph *etc.* However, the scope of personal data stretches much further covering more intimate aspects of an individual's identity such as fingerprints, health records, IP addresses, vehicle registration numbers, financial information and so on. Delving deeper into the aspect of 'singling out an individual' leads one to the murky world of internet surveillance. There exists several means through which private entities and even sovereign governments can 'single out' an individual from among a group of people using a combination of information or other 'identifiers' none of which may, individually, be considered personal data. For instance, online advertising companies use tracking techniques to monitor a person's online activity so that they may be able to build a 'profile' representative of the individual with all the data relevant data regarding consumer behaviour.

It is important to note that in such cases, the company does not need to know the name of the person or any such primary information. A unique identifier such as a number or a code coupled with behavioral trends serves the purpose. And it is the pervasive usage of such means to collect personal data that has to led to the current malaise in the realms of data protection. This malaise can more accurately be termed as 'Big Data'.

Big Data refers to the novel ways in which organisations, governments and businesses, combine diverse digital datasets and then use statistics and other data mining techniques to extract from them, both hidden information and surprising correlations. And while it is true that big data promises much in terms of economics and social benefits, it also raises serious concerns regarding data protection and the right to privacy. These fears were brought to the fore in the fallout of the 2016 US presidential election, the Brexit Referendum in UK and other such instances involving large communities of people. It is argued that access to copious amounts of data relating to these communities is what led politicians to exploit their deepest fears and anxieties for political purposes. However, the strongest ground for opposing Big Data in its current form is that of informed consent. The proponents of Big Data argue that whatever information is collected is done so on the basis of informed consent. However, this view is problematic given that empirical studies show individuals neither read not understand privacy policies which anyway rely on ambiguous legalese, and are easily modified by firms. Thus, it is too often that consent remains an empty exercise.

DATA PROTECTION IN IHRL

Most international data protection laws, in their current form, subjects the processing of data to defined legal rules in order to protect the rights of the individual and interests of society. It is closely linked to the right of privacy and though the two overlap in several ways, they remain distinct.

Since personal data is closely linked with an individual's sense of personality and therefore privacy, the need for its protection finds force in all the landmark human rights instruments such as the Universal Declaration of Human Rights (UNDR), the International Covenant on Civil and Political Rights (ICCPR) and the European Convention of Human Rights (ECHR). The Treaty of the European Union establishes that the human rights the ECHR guarantees amount to general principles of EU law.

Recent United Nations (UN) developments also help anchor the right to data protection in the IHRL context. Ever since the Edward Snowden revelation in 2013, deliberations on the right of privacy and data protection have been fixtures in the UN agenda. In 2013, the UN General Assembly adopted a resolution on the right to privacy in the digital age. In 2015, the UN Human Rights Council appointed a Special Rapporteur on the Right to Privacy. These measures, undertaken by the UN, 'firmly puts the issue of electronic surveillance within the framework of international human rights law'.

EU law is perhaps the most advanced one all the laws currently in force with the right to data protection being enshrined at the constitutional level (in the EU Charter of Fundamental Rights), and the European Court of Human Rights has construed Article 8 of the European Convention on Human Rights to include data protection.

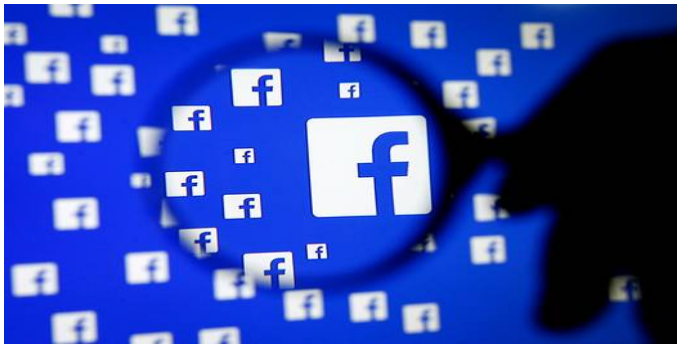
In April 2016, the EU passed the General Data Protection Regulation (GDPR) with this regulation coming into effect from May 25, 2018. The GDPR is an expansion of the previously enacted Data Protection Directive, 1995 (DPD), which is still the most stringent among all international data protection regulations. The DPD was based on recommendations first proposed by the Organisation for Economic Co-operation and Development's (OECD). The directive is founded on seven principles:

- Subjects whose data is being collected should be given notice of such collection.
- Subjects whose personal data is being collected should be informed as to the party or parties collecting such data.
- Once collected, personal data should be kept safe and secure from potential abuse, theft, or loss.
- Personal data should not be disclosed or shared with third parties without consent from its subject(s).
- Subjects should grant access to their personal data and allowed to correct any inaccuracies.
- Data collected should be used only for stated purpose(s) and for no other purposes.
- Subjects should be able to hold personal data collectors accountable for adhering to all seven of these principles.

With the passage of time several limitations of the DPD became apparent and therefore, the GDPR is an essential step to strengthen citizens' fundamental rights in the digital age and

facilitate business by simplifying rules for companies in the digital single market. A single law will also do away with the current fragmentation and costly administrative burdens. The successes and failures of this experiment in the EU is likely to lay the foundations for Data Protection regulations in the rest of the world.

CAMBRIDGE ANALYTICA



As mentioned before, personal data primarily serves two purposes, to identify a person or to single him/her out as an individual. The latter part can, however, be extended to groups of similar individuals and even large communities. Such information, the access to which enables the possessor to manipulate and exploit the vulnerabilities of an entire community, and the rampant disregard with which it is protected is what is at the centre of the Cambridge Analytica scandal.

To quickly recount the facts: a university researcher used facebook to host an application he had designed to predict the personality of users. The app, called 'thisisyourdigitallife' was used by more than 270,000 people and in the process, it collected personal data not only of the participants but also of their friends on social media. All this data is then alleged to have been sold by the researcher to Cambridge Analytica who in turn, used it for dubious political objectives.

When news of this scandal broke, the shockwaves were felt as far and wide as Kenya and India with the epicentre being the United States of America. The main allegation against Cambridge Analytica is that it misused the personal data of millions of Facebook users to flood them with targeted advertisements and political propaganda which then played a significant part in swaying actual election results. This case, which is unprecedented in may ways, poses several challenges even for countries who have implemented a data protection regime. And for the rest of the world, to which India belongs, it just highlights the urgency with which such laws are needed.

In the United States, the Federal Trade Commission has begun an investigation into Facebook's privacy practices. State and Local governments in the US have also filed suits against Facebook. In the U.K., the Information Commissioner's Office (ICO) recently executed a search warrant against Cambridge Analytica. This was done in furtherance of the the ICO's investigation into the use of personal data analytics for political purposes, which is the allegation facing Cambridge Analytica.

In this context, the lack of a statutory data protection law in India becomes glaringly obvious. And as such, legal liability for theft of data, if at all, arises only out of contractual relations. The said relations being: between the researcher and Indian Facebook users, and between Facebook and its Indian users, with the relation between facebook and the researcher being beyond the scope of Indian law. Regarding the former, there is almost no chance of the researcher being liable under Indian law.

Concerning the relationship between Facebook and its Indian users, it is well within the realms of possibility that facebook is protected under Indian law as merely an intermediary that facilitated transaction between app developers and users. Thus, as per Section 79 of the Information Technology Act, as amended in 2008, Facebook may be protected under the safe harbour principle. The nature of this provision requires that the less knowledge Facebook had of its users' activities, the less liability it would incur in case of a breach. And considering that the Supreme Court of India in *Shreya Singhal* v. *Union of India* stated that intermediaries need only take down content upon the serving of a court order, it is entirely likely that, under Indian law, the entire Cambridge Analytica scandal and all the political controversy it created, would not result in any liability for any party.

THE FUTURE

That something like the Cambridge Analytica scandal had to break out exactly when India had constituted an expert committee on data protection was perhaps written in the stars. Indeed, the Committee headed by Justice Srikrishna is now responsible not just for formulating a functional data protection law for India but also for ensuring that the same works in harmony with other such laws in different jurisdictions. For a nation endeavouring to brings the entirety of its population under an online database premised on biometric information, the significance of this committee and its prospective recommendations cannot be understated.

To avoid the utter helplessness we currently find ourselves in after Cambridge Analytica, it is necessary that the new law incorporate elements of extraterritoriality of jurisdiction, make concerted efforts to clearly define the ambit of personal information, detail mechanisms with which to tackle the onslaught of Big Data, and also pay special attention to ascertaining the meaning of informed consent from the users of data.

The implementation or 'back-end' aspects, i.e. the processes to ensure that these general principles are respected, should be delivered in clear and lucid terms, which need to be created or defined at the national level. The main drawback of the EU DPD was that a few key terms, of seminal importance to its enforcement, were not clearly defined.

Further discussion will be required to clarify how regulations can appropriately consider and address the presence of risk in *ex-ante* scenarios. Possible criteria or avenues for determining the risk involved in specific categories or acts of data processing include:

- the scale on which personal data is processed (e.g. more stringent requirements could be applied to the processing of personal data based on numbers of data subjects involved);
- the privacy sensitive nature of the data being processed, and more specifically whether the nature of this data causes it to be more likely to result in harm, considering the full context of the data processing (e.g. the processing of health-related information, racial information, etc) and
- the field of activity of the data controller, as a proxy for the risk of harm (e.g. financial services, health care, legal services).

While risk is often difficult to determine *ex ante*, the strength of a risk-based approach lies precisely in the need to evaluate how risk changes dynamically as data processing practices evolve (e.g. because of changes in the scale of data processing, or expansions to other fields of business). As practices change and as risk changes, the measures needed to ensure compliance will evolve as well. In this way, a risk-based approach stresses the importance of implementing a sound data protection culture, rather than meeting one-off compliance formalities.

The position in India, as a result of *Puttaswamy* v *Union of India* is, in general, the same as the EU: Privacy is a fundamental, inalienable right with the ability of governments to derogate from it requiring considerable justification. Therefore, the new GDPR may be of particular relevance for the committee's consideration.

With the threats posed by data theft being so numerous and harmful, one can only hope that the legislative reactions will be commensurate both in terms of vigour and effectiveness.

SPECIAL LEGISLATIONS: THE NEED FOR A BALANCED APPROACH

The purpose and intent of any legislation is to promote as well as protect the rights, liberties and interests of society in general or of any section or class thereof, with its enforcement being binding in nature. Further, law making ensures the regulation of human conduct which is quintessential to civil life. But, the legislation made for furthering the objectives so defined are to be within the contours of the Constitution. The same can be said to be the jurisprudence being followed while making of any particular legislation in India. The Indian Constitution ensures equality before law in addition to prohibiting any discrimination on the basis of certain classification as mentioned under Article 14. The law making in any state machinery reflects the social structure and the contemporary challenges being faced by the different elements of the society as well as the system. The legislation on any subject-matter, therefore, reflects the efforts made by the state to tackle those issues in an efficient and effective manner. Therefore, in the Indian context, owing to centuries of institutionalised discrimination under the combined aegis of the caste system and patriarchy, social realities have an added impact on law making. For the same purpose, Article 15 of the Constitution of India allows the state to give form to specific provisions dealing with the legal protection and advancement of women, children, socially backward classes or for the Scheduled Castes and the Scheduled Tribes.

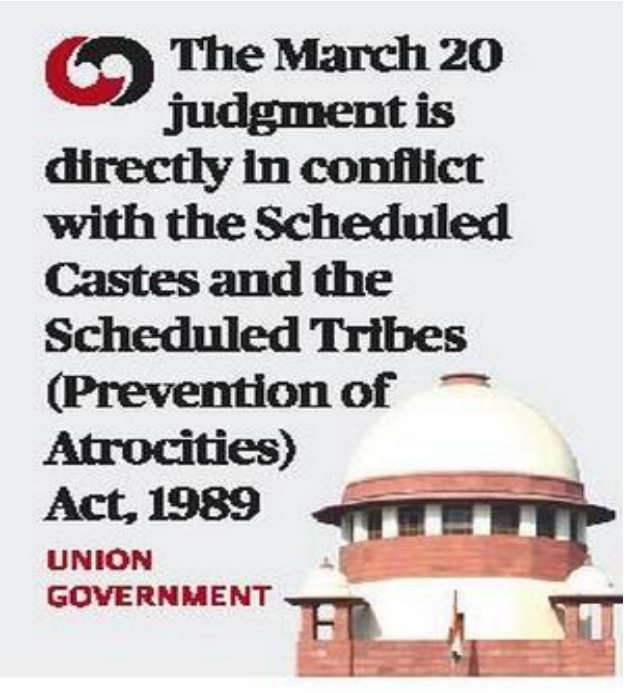
But do these special legislations frustrate the purpose for which they were formulated? Are they prejudicial to the rights of others? In this regard, some legislation(s) have been on the receiving end of great criticism as being prejudicial, being misused and contrary to the purpose for which they come into force. Such legislations include the provision of 498-A of the Indian Penal Code, 1860, Domestic Violence Act, Dowry Prohibition Act as well as the SC/ST (Prevention of Atrocities) Act, 1989 which has been doing the rounds in the media after the recent Supreme Court directive. The question which arises in response to making of such legislation(s) is the effective implementation of such laws and the same not being a barrier to the rights of others. For the same purpose, it is important to examine the controversy surrounding the two of the legislations in brief.

SECTION 498-A, INDIAN PENAL CODE, 1860

The addition of section 498-A in the code was made in the year 1983 as a response to a growing number of incidents of married women being subjected to cruelty by their husbands and his relatives. The same was a result of the social and cultural factors affecting women on a large scale, and as a step to safeguard the rights, liberties and uphold the dignity of women, the provision was enacted. The offence under the same was made cognizable, non-compoundable and non-bailable. In course of time, reports of misuse of the provision in the form of registration of false cases and malafide implication of relatives started to come in. Later, the judiciary in several cases noted the provision being used as a weapon to implicate the husband and his relatives noting the need for a serious relook of the provision by the legislature in the larger interest of the society. The judiciary also gave certain directions to the police authorities with regard to the steps to be taken on receiving complaints under the provision. As a result of the controversy surrounding the provision, the matter was taken up by the Law Commission to make recommendations pursuant to a reference made by the Law Ministry on whether the said provision required any amendment. In response to the same, the law commission reiterated its previous stand of making the offence compoundable with the permission of the court but answered in negative on the question of the amendment of the provision. The view of the commission on retaining the provision without any changes was in observance of the greater societal needs and realities.

SC/ST (PREVENTION OF ATROCITIES) ACT, 1989

The socially marginalized sections of the society have been victims of discrimination as well as atrocities due to a number of social, cultural and historical reasons. The basis of such discrimination is rightly characterized as unreasonable, owing to the very idea of its inception being based on the premise of birth in a certain community;. The lawmakers, to deal with such a grim situation incorporated certain provisions in the Constitution itself in order to safeguard their rights. In addition, provisions of the Indian Penal Code and the enactment of the Protection of Civil Rights Act, 1955 came to the rescue of victims for the protection of their civil and constitutional rights. Despite these measures, existing legislations were found to be inadequate to deal with the ever-growing problem of atrocities committed against the Scheduled Caste and Schedule Tribes. Certain incidents of atrocities leading to assassinations and massacres prompted the government, as a necessary response, to call for making of a special legislation in the form of the SC/ST Act (Prevention of Atrocities) Act, 1989. The act provided for prevention of atrocities and establishment of special courts to try the matters, apart from making available measures for relief and rehabilitation of the victims.



THE CONTROVERSY

The country came to a halt on multiple occasions in response to the two-judge decision by the apex court in the case of *SK Mahajan v. State of Maharashtra* delivered on 20th March, 2018. The case involved directives by the court in matters under the SC/ST Act to protect public servants and private citizens from arbitrary arrest. The decision was made by the court citing National Crime Record Bureau's (NCRB) data regarding the high rate of acquittal in cases filed under the act. The court observed that filing of false cases leads to misuse of the act, thereby affecting

the rights of the other party who is being falsely implicated. Therefore, the act devoid of any procedural safeguard, required guidelines to be followed by the authorities before initiating prosecution and making any arrest. The decision led to an uproar among the members of marginalised communities who claimed that the judgment had rendered the act toothless, and the directives so issued diluted the act gravely.

ANALYSIS

The controversy involving the verdict is with regard to the directives which are contrary to the provisions of the act. For instance, the act bars grant of anticipatory bail to the accused which is a statutory right under section 438 of the Criminal Procedure Code. The judges in the instant case have observed the same as being violative of the right to life and personal liberty. They further enunciated on this matter by observing that though the right under section 438 is part of a procedural law which is a statutory right, the same has to pass the test of being just, fair and reasonable. This was based on the argument that the grant of anticipatory bail on appreciation of the facts cannot be denied, as safeguarding the interest of one party cannot be done at the behest of denying some rights to the other. On the contrary, the Supreme Court has held in *State of M.P. v. Ramrishna Balothia* (1995) that bar on anticipatory bail under the act is not violative of rights under Article 14 and 21. Further, the observation of the court is keeping in view the NCRB data which highlights the number of acquittals in cases filed under the provisions of the act. The same cannot be said to have given a correct picture involving the state of affairs, as acquittal does not necessarily imply the case being motivated by some ulterior motive to cause hardship to the opposite party. The acquittal can be attributed to improper investigation, lack of evidence, witness turning hostile or improper prosecution/appreciation of the case. Also, the act under section 22 gives protection to public servants for actions taken in good faith.

THE LEAP FORWARD

In 1987, the then prime minister Rajiv Gandhi promised a separate legislation in his Independence Day speech. This finally paved the way for Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. It was enacted on September 11, 1989. The rules were formulated in 1995. The Act was a leap forward as it recognised new types of offences not covered in the Indian Penal Code and PCRA, defined various atrocities against SCs/STs, prescribed stringent punishment and enhanced minimum punishment for public servants

The apex court, further, by formulation of procedures to be followed has stepped into the domain of the legislature; an act for which the Indian judiciary is often criticised. It is also to be noted that the case was regarding quashing of an FIR registered under the act and not a Public Interest Litigation or a matter challenging the validity of the provisions. The act took the form of a welfare legislation keeping in view the social realities of the SC/ST communities, the denial of their rights and the hardships faced in enjoying their rights. The vires of the act is also endorsed by the provisions of the constitution whether specifically dealt by Article 14, 15 and 17 and the same in no possible manner is an impediment to the right of others.

CONCLUSION

The approach to be taken in such situations and other such matters of significance is of balancing the interests of the society in order to avoid any disagreement among the masses. But, do special legislations have to do away with the punishment of the person indulging in misuse of the same by registering false cases? The legislature has provided for punishment for false or malicious complaint and false evidence in certain statutes, for instance, in the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. The special laws should be wholesome to the extent that it must contain an inbuilt provision for securing justice for those who are falsely implicated with mala fide intent under it. The same is not the situation concerning the Prevention of Atrocities Act.

Further, even going by the limited observations of the court regarding the cases (in absence of comprehensive data), the registration of false cases are not limited to section 498-A and the Prevention of Atrocities act; it encompasses the domain of other special and general laws as well. The corollary to the same is whether on the basis of a number of false cases (whose real numbers are unknown in absence of an empirical study); the special laws be diluted against the purpose and object for which they are formulated? How should the interest of the needy and the greater interests of the society be maintained? The answer lies in the approach which needs to be taken by the judiciary and legislature keeping in view the contemporary times and the social realities; striving for balancing the rights of the stakeholders.

TRIVIA

Claudette Colvin was the first person arrested for resisting bus segregation, 9 months before Rosa Parks, but was not used as a figurehead for the civil rights movement because she was an unmarried, pregnant, teenager.

In 2014 more than 1/3 of governments around the world, 62 out of 160 locked up prisoners of conscience – people who were simply exercising their rights and freedoms.

A RIGHT BEYOND RECOGNITION: MARITAL RAPE

It's not Consent if you make me afraid to say "NO"

- A Marital Rape Victim

Marital Rape is a concept which many find hard to comprehend. When one contemplates the word rape, the propensity is to consider only an outsider, a stranger, a pernicious individual, as someone capable of committing such an act. Typically, one does not consider rape with regards to marriage. Women themselves find it difficult to believe that a man can assault his better half. All things considered, by what means can a man be blamed for assault on the off chance that he is benefiting his matrimonial rights. It is demonstrative that a lady has no privilege to her own particular body, and her will is liable to that of her significant other. In spite of conjugal rape being perhaps the most normal and repulsive type of masochism in the Indian culture, it is well disguised up behind the iron drapery of marriage. While the legal definition varies, marital rape can be defined as any unwanted intercourse or penetration (vaginal, anal, or oral) obtained by force, threat of force, or when the wife is unable to consent. In spite of the pervasiveness of conjugal assault, this issue has gotten moderately little consideration from social researchers, experts, the criminal equity framework, and bigger society in general.

The word 'rape' has been derived from the term *'rapio'*, which means *'to seize'*. Rape is therefore, forcible seizure, or the ravishment of a woman without her consent, by force, fear or fraud. 10 to 14 percent of all married women and at least 40 percent of battered wives in the United States have been raped by their husbands. Marital rape is an act in which one of the spouses indulges in sexual intercourse without the consent of the other.

MARITAL RAPE AND LAWS IN INDIA

Presently in India, marital rape is not a criminal offence. The Supreme Court of India has aptly described it as 'deathless shame and the gravest crime against human dignity'. It is protected under an exception to the statutory provision of rape, under Section 375 of the Indian Penal Code, 1860. The exception reads as follows:

"Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

This exception is draconian on two counts: firstly, on account of its refusal to term non-consensual sexual intercourse with a woman by her husband as rape; secondly, because of the fact that non-consensual sexual intercourse with a minor wife is also not termed as a rape.

Beyond the age of 15, there is no remedy the woman has. The Indian Penal Code was amended in 1983 to make way for the criminalization of spousal rape during the period of judicial separation. In 2005, the Protection of Women from Domestic Violence Act, 2005 was passed which although did not consider marital rape as a crime, did consider it as a form of domestic violence.

On the 11th of October, 2017, the Supreme Court of India passed a landmark judgement in the matter of *Independent Thought v. Union of India*, wherein it read down an exception to the statutory provision of rape, under Section 375 of the Indian Penal Code. The Court has held that it should meaningfully be read as "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." The change in this rule has been the increase of age from sixteen years previously to eighteen years.

This Landmark judgement protects the interests of minor children, and brings the law into consonance with all other statutes, which deal with the protection of children's rights, like the Juvenile Justice (Care and Protection of Children) Act, 2012, Prohibition of Child Marriage Act, 2006 and the Protection of Children from Sexual Offences Act, 2012.

Recently, the Gujarat High Court reiterated the need for the legislature to criminalise the sexual attacks on women, by their husbands. It was stated that "The total statutory abolition of the marital rape exemption is the first necessary step in teaching societies that dehumanized treatment of women will not be tolerated and that marital rape is not a husband's privilege, but rather a violent act and an injustice that must be criminalized." This need was also recognised by the Justice Verma Committee, which recommended the criminalisation of the same.

The Legislature has however, yet to take any action for the same and often defends its stance that there is no need for the criminalization of marital rape. Maneka Gandhi, the Union Minister for Women and Child Development stated in Parliament "the concept of marital rape as understood internationally cannot be suitably applied in the Indian context due to various factors like level of education, illiteracy, poverty, myriad social customs & values, religious beliefs, mindsets of the society to treat the marriage as a sacrament etc."

42ND LAW COMMISSION REPORT

The Law Commission of India in its 42nd report put forward the necessity of excluding marital rape from the ambit of Section 375. Many women's organizations and the National Commission for Women have been demanding the deletion of the exception clause in Section 375 of the Indian Penal Code which states that "sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape".

However, the Task Force on Women and Children set up by the Woman and Child Department of the Government of India took the view that there should be wider debate on this issue. The mandate of the Task Force was to review all existing legislation and schemes pertaining to women. Of the four

recommendations made by the Task Force vis-à-vis rape under the Indian Penal Code, the most significant pertains to the definition of rape. It took the position that the definition of rape ought to be broadened to include all forms of sexual abuse. As per the recommendation, the Law Commission's proposed definition of "sexual assault" could be adopted in place of the existing definition of rape in Section 375 IPC as "*it is wide, comprehensive and acceptable*".

172ND LAW COMMISSION REPORT

Even the 172nd Law Commission report which was passed in March 2000 had made the following recommendations for substantial change in the law with regard to rape.

- 'Rape' should be replaced by the term 'sexual assault'.
- 'Sexual intercourse as contained in section 375 of IPC should include all Forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.
- In the light of Sakshi v. Union of India and Others, 'sexual assault on any part of the body should be construed as rape.
- Rape laws should be made gender neutral as custodial rape of young boys has been neglected by law.
- A new offence, namely section 376E with the title 'unlawful sexual conduct' should be created.
- Section 509 of the IPC was also sought to be amended, providing higher punishment where the offence set out in the said section is committed with sexual intent.
- Marital rape: explanation (2) of section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence.

Rape is a reprehensible act that leaves a body defiled. Rape victims in the criminal justice system are often forced to relive the event. However, it is even worse for victims of marital rape, because they can never leave the scene of the crime. There is hence, a serious need to reform the current law to criminalise marital rape.

Shafin Jahan v. Asokan K.M & ORS (Hadiya's Case)

"It is not just her freedom to choose, her physical freedom has also been curtailed. She is effectively a prisoner at her father's house right now"

_Kavita Krishnan, Women's rights activist

INTRODUCTION

The case of *Shafin Jahan* v. *Asokan K.M.* (Hadiya's case) which had a bearing on inter-religious marriages and a woman's right to marry, the case concerning the cherished value of liberty of an individual, the infamous case which was titled by media as 'Love Jihad' was a unique one. The rights of an adult woman were being questioned in the case. The allegation that a radical organisation was involved in influencing the girl to change her religion and further her parents' concern that she was to be taken out of India, made the case all the more complex. The Supreme Court, through its order dated 08.04.2018 and judgement dated 09.04.2018 annulled the Kerala High Court Judgement.

FACTS

Ms. Akhila Asokan alias Hadiya was a Hindu by birth. During her college education , she converted to Islam and started residing at her friend's house. Her father, unaware of her whereabouts, filed a Writ Petition of Habeas Corpus before the Kerala High Court. When the girl appeared before the high court, her father came to know about the conversion of her religion; he alleged that she had been forcefully converted.

Following this, another writ petition was filed by her father alleging that she was likely to be taken out of India. But later, Akhila appeared before the court and declared that she had married Shafin Jahan, a Muslim and produced the marriage certificate, on which her name was mentioned as Hadiya. The court saw this move with suspicion, because the investigation carried out showed that Shafin Jahan was accused of criminal offence and had radical tendencies.

The High Court in its final order granted Akhila's custody to her father and declared the marriage null and void. Challenging the order of Kerala High Court, Shafin Jahan filed an appeal in the Supreme Court. The Supreme Court, on further investigation, restored their marriage.

ISSUES RAISED

- Can a High Court annul a marriage under Article 226 of the Constitution of India?
- Was an NIA probe necessary?

JUDGEMENT

The Supreme Court set aside the judgment of Kerala High Court that had annulled the marriage of Hadiya and Shafin Jahan and thus restored the marriage. The Court further made clear that the investigation by the NIA in respect of any matter of criminality shall continue but without any interference in the marriage. A 3-judge bench consisting of the Justice Dipak Misra, Justice AM Khanwilkar and Justice DY Chandrachud removed Hadiya from the custody of her father and also sent her back to college after she expressed her wish to continue her studies.

CASE ANALYSIS

Article 226 of the Constitution of India, gives a wide range of powers to the High Courts, for enforcing the rights conferred by Part III of the Constitution and 'for any other purpose'. It has been argued that the High Court can annul a marriage if it is satisfied that the marriage had been orchestrated under suspicious circumstances. There is a lack of decisions which address this specific issue raised by the Supreme Court in *Shafin Jahan* v. *Asokan K.M.* case (*Hadiya* case).

In *Asokan K.M.* v. *Superintendent of Police*, the initial writ petition in the Kerala High Court, it was held that marriages can be nullified based on aggravating facts and circumstances. The Court did a thorough analysis of the circumstances which led to the marriage and observed that the case was not an ordinary one. The Court, keeping in mind the aggravating circumstances and the plight of Akhila's parents, declared the alleged marriage null and void.

The second issue framed by the Apex Court questioned the necessity for a central level investigation. In August 2017, the SC directed the Kerala Police to assist the National Investigation Agency in examining whether this case is an isolated one or a bigger conspiracy is involved. The Apex Court in *Bharati Tamang* v. *Union of India,* enunciated principles which allowed Courts to ensure the effective conduct of prosecution. Giving a wide range of powers to Courts to ensure that there are no instances of miscarriage of justice, the Courts, if need be, can even constitute Special Investigation Team(s) or entrust the responsibility to CBI or any other independent agency to carry out an independent probe into the case. The High Court has, therefore, inherent and wide powers under Article 226 of the Constitution and can direct NIA to undertake investigations to better appreciate the suspicious and complex chain of events.

Sh. Asokan K.M., father of Akhila, on 16.08.2016 filed a writ petition claiming that there was a risk that his daughter could be taken away to Syria to join extremist organisations like ISIS. He further claimed that the conversion was suspicious as it was assisted by a certain radical Muslim organisation and under coercion/misrepresentation.

Further, the marriage between hadiya and Shafin took place immediately and without informing the Court while said petition was still *sub judice*. Interestingly, in a subsequent hearing on 21.12.2016, Shafin Jahan accompanied Akhila, who stated that he intended to take her abroad where he was working. This contradictory statement created a reasonable doubt in the eyes of the Court and therefore, it was justified to order a probe.

The debate on 'love jihad' is politically motivated and has ulterior motives. Love jihad is a bogey. In a country as diverse as ours, assuming, though not accepting, even if a few hundred such cases are there, this cannot be termed as 'love jihad' or an organised effort by some Muslim radicals to convert Hindu girls.

The Indian law, in fact promotes, so called 'love-jihad' by allowing marriages between persons belonging to different faiths. The Special Marriage Act, 1954 governs inter-religious marriages. It is strange that the Kerala High Court which itself was convinced due to the girl's and boy's testimony in the case that it is not a case of undue influence on the girl which made her perform a sudden U-turn in the decision of marrying a person of other religion. Here, marriage took place after a matrimonial advertisement was given by the girl and, therefore, it is not a case of 'love jihad.'

Parental custody ends upon a child attaining the age of maturity. In this case, the girl attained maturity eight years ago, yet her custody was given to her father by the High Court. Her individual autonomy to take her own decisions had been seriously undermined.

The Kerala High Court judgment reflects patriarchy as it considers women vulnerable. Moreover, the validity of a marriage cannot be decided by any high court if the parties are adult.

CONCLUSION

Individualism is the central theme of civil liberties under our Constitution. Individual autonomy in terms of choices of food, dress, religion etc. has now been upheld by the Apex Court in the Nine-Judge Bench Privacy Judgment. Conversion to another religion as well as the option of marrying a person of one's own choice are an integral part of individualism with which the state and others should have no concern. Thus, courts cannot probe the validity of marriage if the two adults have married under applicable personal law.

It is a sad commentary of our judicial system that initially Hadiya's marriage was annulled by the High Court of Kerala on the grounds of a report submitted by the National Investigation Agency (NIA) to the Supreme Court of India (SC), saying that Hadiya was a victim of indoctrination and psychological kidnapping, and that their claims of their marriage being arranged through a matrimony website were "bogus" but in March 2018, the Supreme court restored Hadiya's marriage, 10 months after the Kerala High Court annulled it.

The Kerala HC was justified in ordering an NIA probe in the case because clearly it was not an ordinary case and had created suspicion and doubts in the eyes of the Court. The media simply stops itself to saying that Court has no right to interfere in the marriage of two consenting adults.

However, they clearly missed out on the contumacious facts and circumstances which led to the marriage intending to defeat the purpose of court proceedings. The marriage is indeed a sham and the NIA investigation would allow the Court to better appreciate the pattern of love-jihad which is prevalent in Southern states.

As for the question of annulling a marriage which doesn't depend on any pattern, the author believes that the High Courts have a wide range of power and jurisdiction under Article 226. If the circumstances so demand and there is a clear case of misrepresentation and coercion, the Court should indeed annul a marriage (depending solely on the facts and circumstances). The Supreme Court has an opportunity to analyse and hear both sides of the story as it will do and lay down the law which is required to mitigate such sham marriages.

LEGISLATIVE ANALYSIS OF THE PREVENTION OF ATROCITIES ACT, 1989.

INTRODUCTION

The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 has been enacted by the legislature to provide relief and rehabilitation to the members of the SC and ST Community. The Prevention of Atrocities Act, hereinafter, **POAC**, was passed as a successor to the Untouchability (Offences) Act, 1955 which was later renamed as the Protection of Civil Rights Act, 1955. However, the question subsists that after more than 60 years of enforcement, have these laws been able to serve their purpose and prevent instances of atrocities against the SC and ST Community. Recently, after the Supreme Court's decision in the case of **Dr. Subhash Kashinath Mahajan v. The State Of Maharashtra, 2018[1],** there has been a major hullabaloo regarding the judgment diluting the effect of the POAC Act. Protests broke out throughout India after the Judgment thereby aggravating an already volatile situation. However, the Supreme Court rejected the Review Petition filed against the Judgment. The Supreme Court Bench of Justice U.U Lalit and Justice Adarsh Kumar Goyal directed that;

"In absence of any other independent offence calling for arrest, in respect of offences under the Atrocities Act, no arrest may be effected, if an accused person is a public servant, without written permission of the appointing authority and if such a person is not a public servant, without written permission of the Senior Superintendent of Police of the District."

The major drawback of the Act has been its faulty implementation. Moreover, its provisions have also been termed as harsh and majority of the cases filed have led to acquittals as the claims were mostly vexatious and aimed at making false charges against the accused. As per the National Crime Reports Bureau (NCRB) data on cases of atrocities against SC and ST disposed by the courts in 2016, there is a 25.7 per cent conviction rate in the 1,44,979 cases filed by SC complainants under the Act, whereas there is a 20.8 per cent conviction rate of the 23,408 filed by ST complainants.[1]

Therefore, the Judges in the Subash Kashinath[1] Case remarked that

"At the same time, the said Act cannot be converted into a charter for exploitation or oppression by any unscrupulous person or by police for extraneous reasons against other citizens as has been found on several occasions in decisions referred to above."

KEY PROVISIONS OF THE ACT

- Section 3 of the Act provides for a category of offences committed by an individual not a member of the ST-SC community which are punishable under the Act for not less than six months but which may extend to five years and with fine. The 2015 Amendment of the Act made the list more exhaustive and included "manual scavenging".
- The Act provides that any public servant not an S.C or S.T who willfully neglects his duties under the Act, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to one year.

- Section 8 of the Act deals with presumptions regarding certain acts, *firstly,* that any person finally assisting the accused shall be presumed to, unless the contrary is proved, have abetted the offence; *Secondly*, regarding a group of persons committing a crime which is a sequel to any existing dispute regarding land or any other matter, it shall be presumed that the offence was committed in furtherance of the common intention *or* object. The following Sections raise a presumption on the accused which increases the onus on him to rebut it.
- The Act provides for the purpose of ensuring speedy trial. Accordingly, the State Government shall, with the concurrence of the Chief Justice of the High Court, specify for each district a Court of Session to be a Special Court to try the offences under this Act.
- As per Section 18 of the Act anticipatory bail cannot be provided to an accused under this Act. Thereby, creating an extraordinarily high burden on the accused to prove himself/herself innocent in the future.
- Moreover, the provisions have been made stricter as the Probation of Offenders Act is not applicable to any person who has attained the age of majority.
- The Act will override any other law or custom, as per Section 20 of the Act.
- Section 21 of the Act provides for broad measures that should be taken by the Government for the effective implementation of this Act. It has been on this ground that Governments have repeatedly failed as they have not been able to provide a solution to the problem at grass root level.

CRITICAL ANALYSIS

Cumulatively the Act provides for a harsh treatment against the accused as there are multiple provisions in the Act which are extremely tough for him/her. Provisions preventing Anticipatory bail, making the provisions of the Probation of Offenders Act not applicable and presumption of certain offences make this special act extremely harsh; therefore, it becomes imbalanced and adversely impacts the rights of the accused. The underlying theme behind the Act is to create deterrence in the society by making acts which aim to humiliate members of the SC-ST Community punishable as per the law. Even though the legislative intent behind passing the Act was nobel and bonafide, the Act has been used vexatiously and the conviction rate has been a mere 25.7% Furthermore, Human Rights Watch, an international Human Rights watchdog in its 2016 Report categorically mentioned the POAC and stated that the law has been occasionally used against individuals with malicious intent. A 2015 report by PEN International concluded, "*Arguably does not rise to the level of hate speech. Again, the vague and overbroad language of the act, which targets humiliating rather than hateful speech, makes it ripe for abuse.*" Therefore, the ambiguities and draconian provisions in the legislation exist at multiple facets. The Legislature should bring amendments to the law, and provide for reliefs such as anticipatory bail. Moreover, the Government should attempt to dislodge its burden under Section 21 for effective implementation of the Act

TRIVIA

Around 28 countries have laws which completely ban abortion even in cases where a woman's life or health is in danger and in cases of rape.

Because a large number of black males are unable to shave without severe irritation, Domino's was found in violation of the 1991 Civil Rights Act for requiring all their employees to be cleanly-shaven.

INTERNATIONAL NEWS

- **Iraq: Women And Children With Perceived Ties To Is Denied Aid, Sexually Exploited And Trapped In Camps**

Iraqi women and children with perceived ties to the armed group calling itself the Islamic State (IS) are being denied humanitarian aid and prevented from returning to their homes, with an alarming number of women subjected to sexual violence, Amnesty International said in a new report published today. The research carried out by Amnesty International shows that women and children in IDP camps across Iraq are denied food and health care as a result of their perceived ties to IS.

- **Icc Prosecutor's Unprecedented Bid To Bring Justice To Rohingya**

International Criminal Court (ICC) prosecutor, Fatou Bensouda, asked the court's judges to rule on whether the ICC "can exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh."Bangladesh is a member of the ICC, but Myanmar isn't. This distinction is critical because, since the ICC lacks jurisdiction over Myanmar, the most obvious path to justice for victims of crimes committed against ethnic Rohingya is through a United Nations Security Council referral to the court. The prosecutor's legal argument is an attempt to assert jurisdiction over "deportation," one of the well-documented crimes attributed to Myanmar's armed forces against the Rohingya. Since crossing a border is a legally required element of the crime of deportation,victims being forced to cross into the territory of Bangladesh would be a part of that "conduct." It's for the judges to decide on the merits of the argument. But the prosecutor's decision to seek a ruling on whether the ICC can act based on existing jurisdiction speaks to the gravity of the situation.

- **Egypt: Looming Humanitarian Crisis in Sinai**

The Egyptian government campaign against an affiliate of the Islamic State group in North Sinai has left up to 420,000 residents in four northeastern cities in urgent need of humanitarian aid. The government should provide sufficient food for all residents and allow relief organizations such as the Egyptian Red Crescent to immediately provide resources to address local residents' critical needs. The military campaign against the Islamic State-affiliate in North Sinai has included imposing severe restrictions on the movement of people and goods in almost all of the governorate. Residents say they have experienced sharply diminished supplies of available food, medicine, cooking gas, and other essential commercial goods.

NATIONAL NEWS

- **AFSPA Removed From Meghalaya After 27 Years**

The Centre has withdrawn the Armed Forces Special Powers Act (AFSPA) totally from Meghalaya as well as from 8 police stations in Arunachal Pradesh.AFSPA gives special powers and immunity to the armed forces deployed in areas declared "disturbed" under the Act.Human rights activists in the northeast have been agitating for withdrawal of AFSPA and even scrapping of the law, a demand that became louder in the wake of the rape-cum-murder of Manipuri woman Thangjam Manorama in 2004 for which the locals blamed Assam Rifles personnel.

- **Union Cabinet approves Ordinance for death penalty for rape of girls under 12 years**

The Union Cabinet on Saturday approved promulgation of an Ordinance to provide death penalty for rapists of girls below 12 years, according to a senior government official. The Criminal Law (Amendment) Ordinance provides for stringent punishment of a jail term of minimum 20 years or life imprisonment or death for rape of a girl under 12 years.

Contributions are invited for the issue of the CAHIHR Newsletter. The last date is and it can be mailed on casihr@rgnul.ac.in