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Vol. 7 No.1 2021

CONTENTS

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FOREWORD

The Law Society of Sardar Vallabhbhai Patel National Police Academy publishes the Criminal Law Review Journal every year to coincide with the entry of the new batch of IPS probationers into the field of active law enforcement. The journal takes inputs from faculty, probationers, academicians, legal fraternity and all those involved in law enforcement. Thus, this journal respects and presents the viewpoints from a large spectrum giving a holistic understanding of the issues which are presently being debated upon in our society.

This year, the Law Society has collected articles on topics such as Cyber Crime Investigation, Deaths in Police Firing, Motor Vehicle Accidents, POCSO Act, Drug Menace, Free Speech and Related Issues, Domestic Violence, Plea Bargaining etc. These topics, I am sure, will be of interest to police officers, the legal fraternity and academicians alike.

I would like to congratulate the members of the Law Society for bringing out this volume of Criminal Law Review Journal. We are grateful to the legal fraternity and academicians for their valuable inputs to this journal. I pay my compliments to the Publication Section and others concerned, without whose contribution this publication would not have been possible.

(ATUL KARWAL)
Director

Date: JULY 19, 2021

Sardar Vallabhbhai Patel
National Police Academy
Criminal Law Review 1-19

Plea-Bargaining: A naïve exploration

INDRA BADAN JHA* & CHARU SHARMA**

Penalties which we believe are required as a threat to maintain conformity to the law at its maximum may convert the offender… into a hardened enemy of society; while the use of measures of Reform may lower the efficacy and example of punishment on others.

- H.L.A. Hart

This preliminary exploration dwells upon the theory and practice of the plea-bargaining mechanism. Although Plea-Bargaining was added to the Indian CrPC in 2005, it has been in practice for over half a century in the global legal arena, especially in the USA, where around 90-95% of the criminal trials are disposed by plea-bargains. Despite its prevalence, legal and economic scholars are widely divided in their opinion about the use, efficacy and constitutionality of plea-bargaining as an alternative to criminal trial. While scholars of Economics argue that the use of plea-bargaining can lead to substantial efficiency and welfare gains, legal

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scholars, on the other hand, opine that such tools are unconstitutional, undermine the respect for the Courts, are coercive and discriminatory, have an adverse effect on deterrence and are highly inequitable. The paper explores this controversy in more detail and depth, primarily from an economic perspective. The efficiency and welfare argument of Plea-Bargaining is explored further using tools of "Contract theory" and "Game Theory". Further, some scholars have attempted to answer the question – why is plea- bargaining extensively utilized in certain countries (eg. USA) and simultaneously have severe restrictions on its use (eg. France)? The scholastic opinion on this question could not be more divided, although, there is some consensus that this is largely based on distinctions of common law-civil law and adversarial-inquisitorial legal systems. Finally, the paper explores Indian experience with the plea-bargaining mechanism. Its evolution is studied through the prism of multiple Supreme Court's judgements. The salient features of Indian plea-bargaining mechanism is analyzed to understand the reasons for its under- performance.

According to Black's Law Dictionary (8th edition), Plea-Bargain is "*A negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, usu. a more lenient sentence or a dismissal of the other charges*". Plea- Bargain refers to the legal principle of *'Nolo Contendere'* which literally translates to "I do not wish to contend".

Broadly, there are three typed of Plea-bargaining:

- *Charge Bargain*: The accused has the option of pleading guilty to a lesser charge or to only some of the charges

filed against him. For example where a defendant is charged with both drunk driving and driving with license suspended, he may given an opportunity to plead guilty to only drunk driving.

- *Sentence Bargain*: The accused has an option of admitting guilt and settling for a lesser punishment. For this, he must be informed in advance of the sentence that is likely to be imposed upon him. For example, he is facing serious charges and is afraid of being hit with the maximum sentence, he may plead guilty and be punished with an acceptable sentence.
- *Fact Bargain*: The accused pleads guilty in return for a less incriminating presentation of facts.

The Controversy

Plea-bargaining as a mechanism of out-of-court settlement for criminal cases is a hotly debated topic both in legal and economic research arena. While legal scholars are vehemently opposed to the idea based on sound moral and constitutional ideals, economists espouse the mechanism for being efficient and welfare-enhancing.

Benefits

Plea-Bargain depicts a win-win situation for both the defendant and the prosecution. The defendant receives a lighter sentence than what might have resulted at trial and the prosecution saves time and resources from the excruciating costs of going to trial. Defendant too saves enormous amount of time and money from not going to trial.

According to *Garoupa & Stephen (2008)*, "There are three fundamental lines of reasoning to justify the efficiency of plea-bargaining. First, entering a plea-bargain reduces costs and allows

the prosecutor to allocate resources more effectively. Secondly, it maximizes social welfare because it reduces. Thirdly, it operates just like discretion in regulatory proceedings; hence the presence of a market-approach - which is largely believed to be a good idea - enhances the quality of the prosecution". Plea-Bargain is also supposed to be more responsive to individual cases and conditions and allows the enforcement agencies to pursue more important and serious cases. The economy and efficiency aspect of Plea- Bargain over Court trial has been highlighted by several economic scholars. Landes (1971) & Adelstein (1978) contend that the more costly in financial terms is a trial conviction, the more economically efficient is the plea bargain.

Grossman and Katz's (1983), in their pioneering work, identify two benefits of plea bargaining-an insurance effect and a screening effect. In the former role, it insures society against erroneous outcomes and in the latter role it sorts the guilty from the innocent. Diverting from the previous studies of Plea-Bargain which primarily focused on conservation of economic resources, Grossman and Katz's (1983) concentrated on welfare effects of Plea-Bargain.

Criticisms

Critics of Plea-Bargain propound that Plea-Bargain is coercive, discriminatory, and against constitutional values. Innocent defendants might become susceptible to accept a preferred plea bargain. Indeed, the United States Supreme Court, in approving the practice of plea bargaining, framed the issue in just this way: "*We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would*

falsely condemn them" (Brady v. United States, 397 U.S. 742, 757-758)

Plea-Bargain might have the effect of eroding the respect for courts, could lead to differential sentencing between Plea-Bargain and trials for same crime or even inconsistent punishment for same crime. Some even argue that Plea-Bargain reduces the deterrence effect of penal sanctions. Unfairness in determining the fate of the defendant without full investigation, evidence, and testimony is against the ideals of justice. There is also a rights based objection that the claim of the right to trial does not belong to the defendant only, there are several stakeholders in the criminal justice system with identical rights. Further, it is highly likely like that the poor and ignorant suffer disproportionally.

Countering the Criticisms

The Coercion and adverse effect on deterrence arguments for prohibiting Plea-Bargain has been studied by *Smith (1987)* in detail. He observes that "when actual sentences are compared to expected sentences, little evidence emerges to support the coercion argument". He further postulates that "while certain defendants do appear to reduce their expected probability of incarceration by pleading guilty, defendants in serious cases and offenders with prior criminal histories do not benefit. Collectively, these findings suggest that plea bargaining is a neutral component in the processing of criminal cases which neither erodes the deterrent effect of law nor results in a two tier sentencing system."

From a moral standpoint, critics have argued that Plea-Bargain is primarily a 'contract of enslavement' and people cannot make enforceable promises to enslave themselves. However, such criticisms are not uncontested. *Scott and Stuntz (1992)* have argued that "Plea bargaining is different. The defendant's liberty is not

being traded for something else; rather, a risk of "enslavement" (prison) is being traded for a certainty of somewhat less enslavement. This risk cannot be eliminated in any other way; a defendant who wishes to preclude the possibility of a long sentence can do so only in a system that allows prosecutors to offer shorter sentences in exchange for eliminating costly trials"

Economic Analysis of Plea-Bargain

Plea-Bargain, essentially, is constrained decision-making, wherein, finite agents (prosecutor and defendant) acting under resource constraints, such as constraints of information, time, money, etc. negotiate with one another to maximize their utility. The prosecutors and defendants are agents for the State (or victims) and the accused, respectively, and therefore, Plea-Bargain can also be analysed as a two-person simultaneous/sequential game. *Harris and Springer (1984)* formulate an extensive game- theoretical model of Plea-Bargain as a game and support the hypothesis that attorneys representing defendants with extensive criminal records will be more likely to go to trial.

Solving an elementary two-player game (prosecutor and defendant), *Bhide (2007)* shows that “if trials are good indicators of guilt, then plea bargains will lead to more innocent defendants standing trial and more guilty defendants accepting plea bargains”. Although, the analysis assumes certain heroic assumptions like perfect trails, evidence being public knowledge, perfect information about the payoffs, etc., it is a useful analysis in terms of expanding our understanding about the plea-bargaining system.

Plea-Bargain exude rational decision making among agents. For instance, as *Smith (1987)* notes, "A defendant's decision to plead guilty may be rational if the sentence he receives by pleading guilty is implicitly based on both the probability that he would be

convicted at trial and the likely sentence if convicted". For example, if the likely sentence following a trial conviction is ten years and the defendant estimates that his probability of conviction is .7, then a plea to a sentence of seven years represents a rational choice. In this example a sentence reduction of 30% would be a rational compromise between the defendant and the state".

Landes (1971), first developed a theoretical model for economic analysis of plea bargaining and concluded that the decision to settle (i.e. Plea-Bargain) or go to trial depends on the probability of conviction by trial, the severity of the crime, the availability and productivity of the prosecutor's and defendant's resources, trial versus settlement costs, and attitudes toward risk.

Subsequently, *Adelstein (1978)*, expanded Landes's model by including time-discounting variables as important determinants of decision to go to trial or settle. His analysis rests on a discrepancy predicted by Landes. While Landes postulated a positive correlation between policy measures subsidizing legal expenses of indigent defendants and incidence of trials, the empirical evidence suggests otherwise.

However, since Plea-Bargain is closed-door process, data related to it not readily available and therefore much of the research is based on personal interviews, observations and questionnaires. *Harris and Springer (1984)* have categorised the relative perceived importance of factors that affect Plea-Bargain:

1. Strength of the case (such as evidence, witnesses, etc.)
2. gravity of crime and harm to the victim and other aggravating/mitigating circumstances
3. Defendant's priors and antecedents
4. Extra-legal characteristics of the defendants such as age, sex, marital status, employment, etc.

Economic critique of Plea-Bargaining

The rationality assumption of classical economic theory, a mainstay economic model of analysis in law and economics literature, widely utilized to highlight the efficiency and desirability of Plea-Bargain has been vehemently questioned, especially in the recent past. Herbert Simon's theory of bounded rationality has shown the bounds and restrictiveness of rationality. Similarly, Daniel Kahneman's insights from psychological research, especially concerning human judgment and decision-making under uncertainty, have profound effects on economic research and policy prescriptions. Thaler and Sunstein's Nudge theory has shown the importance of choice architecture in determining agents' behaviour and outcomes.

Efficiency of Plea-Bargain has been questioned from the perspective of behavioral economics. If Plea-Bargain negotiations are assumed to be susceptible to various cognitive biases and judgement errors, which is a cogent assumption, then the bargaining process cannot be expected to generate efficient results. For example, anchoring (an irrational bias towards an arbitrary benchmark) the benefits of trial to the remote possibility of acquittal may skew the preferences of the defendant. Similarly, recently documented biases like loss aversion and prospect theory have identical effects. Framing effects (i.e. stereotypes and anecdotes that act as mental filters and induce people make different decisions depending on how choices are presented to them) play a crucial role in Plea-Bargain negotiations. Studies have shown that such biases lead individuals to over or under estimate the likelihoods of certain events, for instance the likelihood of conviction at trial, and thus distort their utility functions forcing them to take sub-optimal decisions.

Further, the likelihood of opting for a Plea-Bargain depends, to a large extent, on the risk- preference of the defendant as well. A risk averse innocent defendant might be more inclined to accept the pre-trial bargain to avoid the risk of wrongly being convicted at trial. This problem is, in essence, the 'adverse selection' (problem of lemons) problem. Due to information asymmetry and lack of proper signalling, it is extremely difficult to properly screen and separate the innocent defendants from the guilty ones. . The pool of defendants includes both high-cost insureds (guilty defendants whose conviction is extremely likely) and low-cost insureds (including innocent defendants whose conviction is much less likely). But the latter cannot effectively separate themselves from the former. They therefore must either buy the insurance (accept the deal) or else self-insure by going to trial. Because of risk aversion, many of them will likely buy the insurance notwithstanding its high price, leading to a misallocation of criminal punishment.

Plea-Bargain and deterrence

A vast majority of literature in economic analysis of law, especially since *Becker (1968)*, is surrounded around policy prescriptions that prefer the deterrence effect of penal sanctions over retributive or reformative effects. In the seminal article, *Becker (1968)* suggests that optimal deterrence level of punishment is the product of probability of conviction and sentencing. Thus, if the probability of conviction is low, say due to low level of resources spent on enforcement and prosecution, then for effective deterrence, sentencing/punishment must be high. However, with respect to Plea-Bargain, it is confounding to observe the apparent neglect of research examining the impact of Plea- Bargain on deterrence.

Givati (2011) succinctly observes that "In theory plea bargaining has two effects on deterrence. On the one hand, when plea bargaining is used shorter sentences are imposed on those who plead guilty, which reduces deterrence. On the other hand, when plea bargaining is used more convictions can be obtained and the probability of conviction increases, which increases deterrence". If the effect of shorter sentences dominate that of higher conviction rate, then Plea-Bargain has a reverse impact on deterrence and vice-versa. Most studies postulate that effect of increased probability of conviction dominates the effect of shorter sentences implying that Plea-Bargain does not reduce deterrence.

Contrary to the widespread perception of being “soft” on crime by weakening deterrence, *Berg and Kim (2018)* utilizing a model of multiple co-defendants show "that plea bargaining unambiguously reduces crime. The benefit of improved informational efficiency more than offsets the crime-incentivizing effect of offering discounted sentences to defendants who plea bargain. Plea bargaining is therefore socially efficient whenever the risk of wrongfully convicting innocent defendants is sufficiently small".

Comparative Economics of Plea-Bargain

A comparative analysis of Plea-Bargain across nations with different legal systems is a useful tool to understand its intricacies and efficiency. It must, however, be mentioned beforehand that the extant literature in this area is severely restricted. A natural question to ask is - why is Plea-Bargain widely utilized in certain nations (like the USA) while being heavily restricted in others (like European nations)? Prima facie, the division is based on the distinction between common-civil law systems.

Adelstein and Miceli (2001) endeavours to comparatively analyze the criminal procedure system by juxtaposing the

efficiency principle onto an adversarial system (characterized by an aversion to false convictions) and an inquisitorial system (characterized by a desire to justly punish the guilty) and conclude that "plea bargaining will increase social welfare in adversarial systems but not in inquisitorial ones". This is also found to be true in practice.

But, *Givati (2011)*, develops a formal model in an attempt to engage with the aforementioned inquisition and his conclusion is in stark contrast to the one postulated by *Adelstein and Miceli (2001)*. But he acknowledges this discrepancy and attributes to differing assumptions regarding prosecutorial resources in the two models. Such analyses, however, have little relevance for India and it has a hybrid legal system with features of both common and civil law embedded in it which encapsulates both adversarial and inquisitorial characteristics. But, it can be safely said that Indian legal system is primarily adversarial and closely follows the common law.

The Indian Experience

The courts in India, especially the apex court, has been vehemently apprehensive of pre- trial negotiations and settlement. In *Madanlal Ramchandra Daga v. State of Maharashtra* (1968), the Hon'ble Supreme Court said that "*In our opinion, it is very wrong for a Court to enter into a bargain of this character. Offences should be tried and punished according to the guilt of the accused. If the Court thinks that leniency can be shown on the facts of the case it may impose a lighter sentence. But the Court should never be a party to bargain by which money is recovered for the complainant through their agency. We do not approve of the action adopted by the High Court"*.

This stance of the Supreme Court was re-iterated in *Kasambhai Abdul Rehman Bhai Sheikh* v. *State of Gujarat* (1980), where it categorically called Plea-Bargain as being "*unconstitutional and illegal*". The Hon'ble SC, apparently annoyed by the use of Plea-Bargain, chided the Hon'ble HC of U.P. in *State of U.P. v. Chandrika* (1999) and opined that "*It appears that the learned Judge has overlooked the settled law or is unaware that concept of `plea bargaining' is not recognized and is against public policy under our criminal justice system. Section 320 Cr. P.C. provides for compounding of certain offences with the permission of the Court and certain others even without permission of the Court. Except the above, the concept of negotiated settlement in criminal cases is not permissible. This method of short circuiting the hearing and deciding the criminal appeals or cases involving serious offences requires no encouragement. Neither the State nor the public prosecutor nor even the Judge can bargain that evidence would not be led or appreciated in consideration of getting flee bite sentence by pleading guilty*".

However, attracted by the efficiency of Plea-Bargain especially in context of rising caseloads and increased pendency of courts along with the success of Plea-Bargain in USA, several administrative committees recommended adoption of Plea-Bargain in Indian criminal judicial system. The 142nd report of the Law Commission in 1991 advocated for plea bargaining in wake of delay in disposal of cases and the time spent by accused in jails before the commencement of trial, which sometimes exceeds the maximum punishment which can be awarded to them. Thus, it recommended a detailed structure for incorporation of plea bargaining. Subsequently, 154th and 177th report the commission re-iterated the importance of utilizing Plea-Bargain. Malimath committee too recommended the implementation of Plea-Bargain.

Finally, accepting the aforementioned recommendations, the legislature passed a law incorporating a new chapter on Plea bargaining (Chapter XXIA – Sections 265A to 265L) in the Criminal Procedure Code, 1973 in 2005 which came into effect from 05.07.2006.

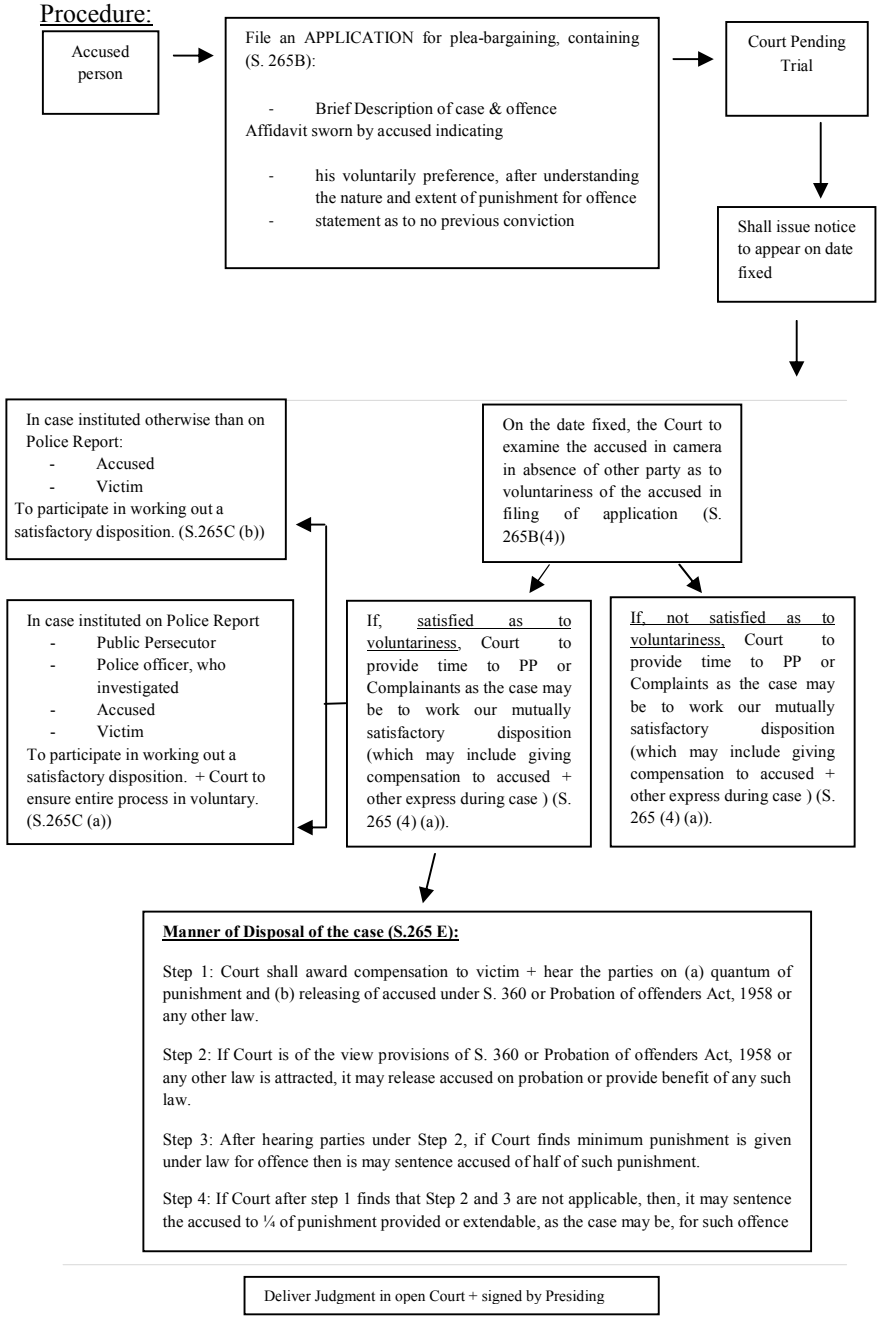
Salient Features of the Indian Plea-Bargain law

- Plea-Bargain is acceptable for all offences with maximum sentence of up to 7 years, except offences affecting the national socio-economic conditions (notified by the Central Government) or when the victims are women and children below the age of 14 years.
- It can only be initiated by the defendant without prior criminal defendant after the case reaches the judicial stage
- Voluntariness of the defendant in opting for Plea-Bargain has be to ascertained by the Magistrate while examining the accused *in camera* where the other party shall not be present
- After its satisfaction of voluntariness, the Court shall provide time to the Public Prosecutor, Investigating Officer, victim and the accused to work out a 'mutually satisfactory' disposition of the case which too shall be a voluntary process closely monitored by the Court
- If a mutually satisfactory disposition is reached then the Court hears all the parties and passes a judgement on sentence. If the minimum punishment for the offence has been provided by law, then the Court may sentence the accused to half of such punishment. Where no minimum punishment is provide under the law, the Court may award one-fourth of the maximum possible sentence for such offence. The Court also has the discretion of releasing the accused on probation. Additionally, the Court shall award

compensation to the victim in accordance with the disposition

- If voluntariness cannot be ascertained or if mutually satisfactory disposition cannot be reached, then the case shall proceed in the manner provided by CrPC.
- The judgment delivered by the Court under section shall be final and no appeal (except the special leave petition under article 136 and writ petition under articles 226 and 227 of the Constitution) shall lie in any Court against such judgement.
- Plea-Bargain does not apply to any juvenile or child as defined in Juvenile Justice (Care and Protection of Children) Act, 2000

A flow-chart of the process of Plea-Bargain is given below:



Source - https://criminallawstudiesnluj.wordpress.com/2019/03/14/tracing-the-development-of-plea-bargaining-in-india-part-ii/

Reasons for failure of plea-bargain in India

According to official data, a meagre 0.045% (4,816) of the criminal cases were settled under the Plea-Bargain law in 2015 which further declined to 0.043% (4,887) in 2016. Moreover, number of under-trial prisoners also show an upwards trajectory. Thus, the Plea-Bargain law failed to achieve either of the two objectives that it was intended to fulfil.

Biswas (2012) notes that the failure of Plea-bargaining in India is primarily due to its crude replication of the American model without necessary modifications catering to Indian socio-economic and cultural conditions. *Sekhri (2017)* observes that the Indian Plea-Bargain law is highly regulated and there are greater restrictions on inducing pleas in India than in USA. He further mentions that there are multiple options available to the defendant which could lead to a more attractive outcome than the Plea-Bargain itself. The defendant can opt for compounding of offences which essentially avoids the stigma of 'conviction' present in Plea-Bargain, or move the High Court which can terminate the case entirely or go for quashing of the FIR or even withdrawal of cases on application by the prosecutor. These more attractive possibilities and options severely restrict and dis- incentivize the utilization of Plea-Bargain mechanism. Moreover, contrary to the efficient two-party negotiation model of the US, the India model has a format of three-party or even four-party negotiation model that too under the watchful eye of the Court. This makes the negotiation process all the more complex and cumbersome.

Conclusion

This paper is simply an attempt to explore the mechanism of Plea-Bargaining, its effectiveness and efficiency. Mostly, from the perspective of economic analysis of law, the paper endeavours to understand the reasons for its existence and the issues that surround it. The availability of research literature on the impact and performance of plea- bargain in India is seriously lacking. In the roughly 15 years since the advent of Plea- Bargain in the Indian Criminal Judicial system, studies analysing its flaws and concerns should have been voluminous. There is substantial scope of research in several aspects of Plea-bargaining in India, inter-alia, its structural issues, the incentive mechanism, and empirical studies.

Studies, especially the ones from an economic perspective, do show scope of substantial efficiency and welfare gains through plea-bargaining, yet the extremely low level of its utilization is confounding. The lack of usage of Plea bargain in India is all the more perplexing given its huge success in USA which too has a common law and adversarial legal system, much like India.

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Criminal Law Review 20 - 36

POCSO: Law and Current Stand on Moot Questions

SUBHANSHU JAIN* & RAJ PRASAD**

Protection of Children Against Sexual Offences Act was specifically formulated to deal with offences including child sexual abuse and child pornography. The Act increased the scope of reporting offences against children, which were not earlier covered under the Indian Penal Code. It expanded the definition of sexual assault to include non-penetrative sexual assault as well as aggravated penetrative sexual assault (Sections 3 to 10), and also included punishment for persons in positions of trust of authority like public servants, staff of educational institutions, police etc. This law recognises sexual harassment of a child which involves touch, and also that which doesn't (Sections 11 and 12), such as stalking, making a child expose themselves or exposing themselves to a child, and so on.

It also defined the procedure for reporting of cases, including a provision for punishment for failure to report a case or false complaint. The act is gender neutral; it recognises that boys can be victims of sexual violence as well. It provided procedures for

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recording of the statement of a child by the police and court, laying down that it should be done in a child-friendly manner, and by the setting up of special courts. This child protection law is also unique because it places the burden of proof on the accused, following 'guilty until proven innocent' unlike the IPC.

This article tries to summarise case laws in Q&A format hoping that special laws like the POCSO Act receive special attention and the case law shared is used for ensuring child-sensitive handling of the victims and their cases.

Does delay in filing of FIR become a probable defence for the accused?

"There may be cases where there is direct evidence to explain the delay. Even in the absence of direct explanation there may be circumstances appearing on record which provide a reasonable explanation for the delay." ***(Ramdas &Ors. v. State of Maharashtra, (2007))***

There are cases where much time is consumed in taking the injured to the hospital for medical aid and, therefore, the witnesses find no time to lodge the report promptly. There may also be cases where on account of fear and threats, witnesses may avoid going to the police station immediately.

Cases where the victim and the members of his or her family belong to such a strata of society that they may not even be aware of their right to report the matter to the police and seek legal action.

Reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. ***(State of Karnataka v. Manjanna)***

Children are abused by persons known to them or who have influence over them. The victims often keep mum due to social stigma, community pressure or total dependency on the perpetrator etc. ***(Jnanedar Nath Das v. State, 2016)***

In the case of ***TulshidasKanolkar v. The State of Goa, (2003)*** the accused had taken advantage of the victim's underdeveloped mental faculties and raped her on multiple occasions. The victim unaware of the actions and because of her mental state, could not convey the accused's wrongdoings immediately. When her parents saw the victims swollen legs, she was taken to the hospital where the fact of her pregnancy was disclosed.

What are the parameters used by the courts to determine age of the victim?

Section 94 of the JJ Act, 2015 provides for the procedure to determinate the age.

In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining -

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board

Is the medical opinion binding?

Evidence afforded by radiological examination is no doubt a useful guiding factor for determining the age of a person but the evidence is not of a conclusive and incontrovertible nature and it is subject to a margin of error. When the school record of the prosecutrix is available, then it is not necessary to look for any other evidence and the school record is conclusive because at the time of admission of the child, nobody could have anticipated the present situation and under Section 35 of Evidence Act, the school admission register is relevant.***(Rakesh v. State of M. P. 2019)***

Should the Courts take into consideration the mental age of a child victim with mental disability or should it follow the physical age as determined through due procedure?

Supreme Court held that that according to Section 2 (d) of the POCSO Act, the term "age" cannot include "mental" age as the intent of the Parliament was to focus on children, that is, persons who are physically under the age of 18 years***. (Ms. Eera Through Dr. Manjula Krippendorf v. State Govt. of NCT of Delhi &Anr 2017)***

Provisions relating to bail under the Criminal Law Amendment Act, 2018

No anticipatory bail can be granted under Section 438 of the CrPC in the following cases:

- rape - Section 376(3) of the IPC
- rape of a minor below the age of twelve years - Section 376 AB of the IPC
- gang rape of a minor below the age of twelve years - Section 375 DB of the IPC

- gang rape of a minor below the age of sixteen years - Section 376 DA of the IPC

A new Sub Section (IA) has been added to Section 439 of the CrPC, which mandates presence of informant or any person authorised by him at the time of hearing application for bail to a person accused of rape of girls of age less than sixteen years.

A second proviso is added to sub-section (1) of Section 439 of the CrPC requiring the High Court or the Court of Session to give notice of the bail application to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application in all cases of rape of minors below the age of twelve years and sixteen years, including gang rape.

Can the victim approach a superior court for cancellation of the bail granted to the accused by a lower court?

Section 372 of the CrPC provides the victim the right to go for an appeal, in the relevant court, against any order passed by the Court acquitting the accused or convicting for a lesser offence. Reading into the said section and relying on the judgment of the Supreme Court in ***Puran etc. v. Rambilas and another etc., (2001)***, this court held that the right to appeal against an order of the lower court, as given to the victim, will include the right to seek cancellation of bail if the victim is aggrieved against such an order.

Whether 'consent' of a minor prosecutrix should be a mitigating factor for the accused in bail applications?

A minor girl can be easily lured into giving consent for sexual intercourse since she does not have the capacity to understand the implications thereof. Such consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action.

The Court further held that it shall take into consideration the presumption under Section 29 of POCSO Act while dealing with an application for bail filed by a person who is accused of offences under Section 3, 5, 7 and 9 of the POCSO Act. ***(Sujit v. State of Kerala, 2018)***

Investigation

Under the Criminal Law Amendment of 2018, the police is mandated to complete the investigation within 2 months from the date on which the information was recorded by the officer in charge at the police station.

Whether the irregularities in conducting investigation have an impact on the case?

Court held that acquitting the accused on the fact that there is defective investigation on the part of the IO would be adding insult to injury caused to the victim.***(Karnel Singh v. State of M.P. 1995)*** In Virender v. The State of NCT of Delhi, Delhi High Court issued guidelines for the police to follow during investigation of cases:

(i) On a complaint of a cognizable offence involving a child victim being made, concerned police officer shall record the complaint promptly and accurately

(ii) Upon receipt of a complaint or registration of FIR for any of the aforesaid offences, immediate steps shall be taken to associate a scientist from Forensic Science Laboratory or some other Laboratory in the investigations.

(iii) The investigation of the case shall be referred to an officer not below the rank of Sub- Inspector, preferably a lady officer, sensitized by imparting appropriate training to deal with child victims of sexual crime.

(iv) The statement of the victim shall be recorded verbatim.

(v) The officer recording the statement of the child victim should not be in police uniform

(vi) The statement of the child victim shall be recorded at the residence of the victim or at any other place where the victim can make a statement freely without fear

(vii) The statement should be recorded promptly without any loss of time.

(viii) The parents of the child or any other person in whom the child reposes trust and confidence will be allowed to remain present

(ix) The Investigating Officer to ensure that at no point should the child victim come in contact with the accused.

(x) The child victim shall not be kept in the police station overnight on any pretext, whatsoever, including medical examination.

(xi) In the event, the Investigating Officer should so feel the necessity, he may take the assistance of a psychiatrist

(xii) The Investigating Officer shall ensure that the child victim is medically examined at the earliest preferably within twenty four hours (in accordance with Section 164A CrPC) at the nearest government hospital or hospital recognized by the government

(xiii) The Investigating Officer shall ensure that the investigating team visits the site of the crime at the earliest to secure and collect all incriminating evidence available

(xiv) The Investigating Officer shall promptly refer for forensic examination clothings and articles necessary to be examined, to the forensic laboratory which shall deal with such cases on priority basis to make its report available at an early date

(xv) The investigation of the cases involving sexually abused child may be investigated on a priority basis and completed preferably within sixty days of the registration of the case. The investigation shall be periodically supervised by senior officer/s

(xvi) The Investigating Officer shall ensure that the identity of the child victim is protected from publicity.

(xvii) To ensure that the complainant or victim of crime does not remain in dark about the investigations regarding his complaint/FIR, the complainant or victim shall be kept informed about the progress of investigations.

(xviii) Whenever the SDM/Magistrate is requested to record a dying declaration, video recording also shall be done with a view to obviate subsequent objections to the genuineness of the dying declaration.

(xix) The investigations for the aforesaid offences shall be personally supervised by the ACP of the area. The concerned DCP shall also undertake fortnightly review thereof.

(xx) The material prosecution witnesses cited in any of the aforesaid offences shall be ensured safety and protection by the SHO concerned, who shall personally attend to their complaints, if any.

(xxi) Wherever possible, the IO shall ensure that the statement of the child victim is also video recorded.

How would the court determine the competency of the child witness?

As a general rule, Section 118 of The Indian Evidence Act, 1872 (IEA) states that "All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, by tender years, extreme

old age, disease, whether of body or mind, or any other cause of the same kind."

State v. Sujeet Kumar, acknowledged the following parameters given for the courts to follow while assessing the competence of a child witness to testify:

- Adequate intelligence and memory to store information;
- The ability to observe, recall, and communicate information;
- An awareness of the difference between truth and a lie;
- An appreciation of the meaning of an oath to tell the truth;
- An understanding of the potential consequences of not telling the truth.

In ***Virender v. The State of NCT of Delhi***, the court held that if satisfied that the testimony of the child witness is a voluntary expression of what transpired and is an accurate impression of the same, no corroboration of the testimony is required.

Corroborative Value of Medical and Scientific Evidences

1.Whether the evidence given by an expert witness can be considered direct evidence?

No, the value of such evidence lies only to the extent it supports and lends weight to direct evidence of eye-witnesses or contradicts evidence.

Dayal Singh v. State of Uttaranchal Such report is not binding upon the court. If eye-witnesses' evidence and other prosecution evidence are trustworthy, have credence and are consistence with the version given by the eye-witnesses, the court will be well within its jurisdiction to discard the expert opinion."

The expert evidence has only corroborative value

2. Whether non-examination of the 'expert witness' is always fatal to the prosecution case?

No, ***Asgar Ali v. State (NCT of Delhi)*** the non-examination of doctor and non-production of medical report would not be fatal to the prosecution case, if the evidence of prosecutrix and other witnesses is worthy of credence and inspire confidence

In cases where the eyewitness and the medical evidence is consistent with each other, conviction of the accused is more likely ***(Rajkumar v. State of MP).***

3. What is the weightage of medical evidence in the cases of rape?

It is to be noted that the definition of rape in the Indian Penal code and penetrative sexual assault in the POCSO Act is quite wide to include penetration by any object and to any extent. This has further reduced the scope for reliance on medical examination.

Moreover, there is recognition in law of non-penetrative sexual offences, which cannot always be corroborated with medical evidence.

Explanation 2 to Section 375 IPC does not state that a women needs to physically resist the rape or have physical injuries during such resistance to prove that rape has taken place.

He further argues that in light of Section 146 of the IEA, past sexual history or conduct of the prosecutrix is inadmissible as evidence in a court of law.

Section 53A CRPC which deals with medical examination of accused of Rape does not mention anything about potency examination.

4. Whether the testimony of a child prosecutrix can be accepted when it is not corroborated with medical evidence?

Ranjit Hazarika v. State of Assam - opinion of the doctor that no rape has been committed, which is based only on the absence of injuries and non-rupture of hymen, cannot be the reason for rejecting an otherwise cogent and trustworthy testimony of a child prosecutrix.

However in certain cases the medical evidence might be present but the direct evidence is unreliable/infirm ***(Hemraj vs State of Haryana, 2014)***

5.Whether the two-finger test is constitutional and valid in law?

No, ***Lillu and Ors. v. State of Haryana, 2013***, medical procedures used to examine the rape victim must not violate their right to provide consent or go against their right to dignity. Further, that the medical procedures carried out should be humane and health should be an important consideration.

In this regard, it was held that the two-finger test violates the right to dignity and privacy and even if the result is affirmative, the reading of the test must not ipso-facto be used as a way of valid consent. Moreover, the Supreme Court held that the comment with respect to the victim's sexual history is immaterial and/or her consent is inconsequential as the victim in the said case is a minor.

6.Whether the court can re-examine the samples collected by FSL?

Yes, ***The State Govt of NCT of Delhi v. Khursheed, CRL.A. 510/2018*.**

7.Whether doctors are mandated to conduct medical examination in cases that are not referred to them by the police?

Yes, Section 27 of the POCSO Act and Rule 5 of the POCSO Rules also makes it clear that the registration of an FIR or a legal or magisterial requisition is not necessary for a hospital or medical practitioner to provide emergency medical care to a minor victim of

sexual crime. Section 357 C of the CrP Cthat was added as a result of the Criminal Law Amendment of 2013, also requires the hospital to conduct the medical examination and provide necessary care and treatment without waiting for documentation or requisition. Failure to do so is a punishable offence under Section 166B of the IPC.

Right of Child to Take Assistance of Legal Practitioner

POCSO Act, under Section 40 provides for right of child to take assistance of legal practitioner.

In the absence of parents, guardians are allowed to act on the behalf of minors. But who are these guardians?

As per Section 2(31) of the JJ Act, 2015, the definition of the term 'guardian' in relation to a child, means his natural guardian or any other person having, in the opinion of the Committee or, as the case may be, the Board, the actual charge of the child, and recognised by the Committee or, as the case may be, the Board as a guardian in the course of proceeding.

The Delhi High Court in ***Delhi Commission for Women v. Delhi Police, (2010)*** laid down certain guidelines which defined a 'guardian'. "Guardian" includes besides the natural guardian, support person or any person appointed by the Child Welfare Committee for a specified period to take case of the victim during the pendency of the trial.

Victim Compensation

Provisions of law Section 33 of the POCSO Act read with Rule 7 of the POCSO Rules

Deo Kumar Rai vs State of Sikkim - court held that Section 7(1) of POCSO Rules, the special court can, in appropriate cases, on its own or on an application filed by or on behalf of the child, pass an

order for interim compensation to meet the immediate needs of the child for relief or rehabilitation.

1. Can compensation payable to the victim be linked to the financial capability of the accused?

Delhi Domestic Working Women Forum v. Union of India, (1995)

The judgement delinked the question/quantum of compensation from the financial capability of the accused. This is correct, as the victim's rehabilitation should not be dependent or contingent on the accused's financial ability or inclination.

2. Can the Special Courts decide and determine the amount of compensation? Who is responsible to disburse the compensation as per the provisions of the POCSO Act read with the rules?

Under the POCSO Act and Rules, the special courts can decide the question of victim compensation and also determine the quantum of compensation and accordingly make a direction for award of compensation. The said compensation shall be payable by the State Government through schemes or funds established for such purpose.

3. What are the kinds of compensation available?

As per Rule 7(1) and 7(2) of the POCSO Rules, a victim is entitled to both interim compensation for meeting the immediate relief and rehabilitation needs of the child and final compensation, irrespective of the outcome of the case in terms of conviction, acquittal or discharge, and also if the accused remains untraced or unidentified.

1. Compensation under Section 357 of the CrPC is payable by the accused.

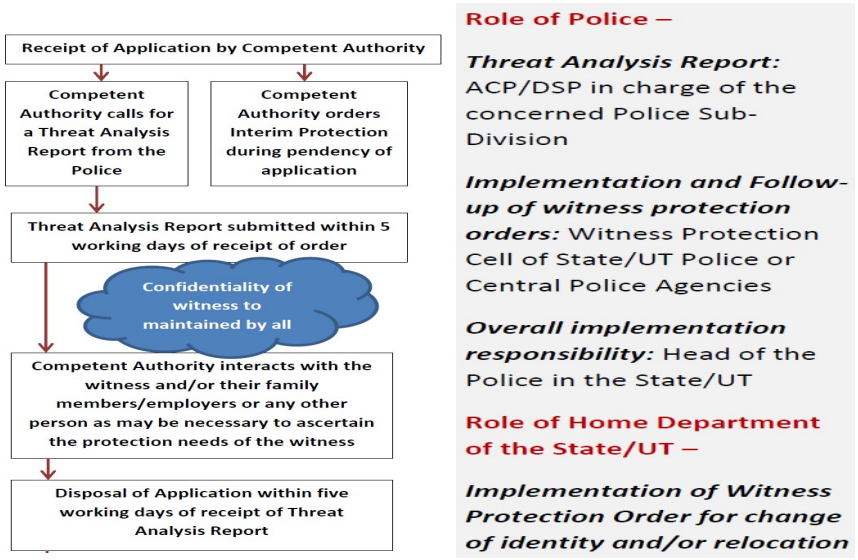
2. Keeping in view the rehabilitation needs of a victim and the limitations of Section 357 of CrPC, Section 357A, Victim Compensation Scheme, has been inserted in the CrPC. It is for the State Governments to make funds available for payment of compensation upon recommendation of the court to a victim of crime.
3. Compensation to male child victims – yes, since the Act is gender neutral.

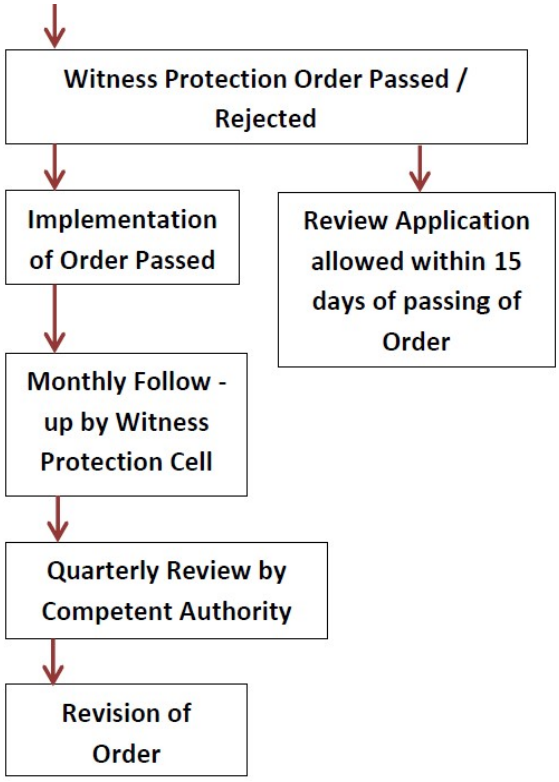
4. Are there any limits to the quantum of compensation that can granted by Special Courts?

The Minor Through Guardian Zareen v. State (Government of NCT Delhi),2015,"the reading of Section 33 of the POCSO Act would show that the power has been given to the Special Court to grant compensation and there is no outer limit which has been fixed while granting the compensation"

Protection of vulnerable witnesses

Mahender Chawla & Ors. Vs. Union of India & Ors. 2016 approved a National Witness Protection Scheme.





Permissibility of compromise:-

Shimbhu v. State of Haryana, (2013) the Supreme Court held that a compromise between the accused and victim in rape cases to reduce the sentence of the accused convicted is impermissible.

The court held that rape is a non-compoundable offence against the society and thus, there cannot be a compromise between parties when the offence has been committed.

The Court further held that it is difficult to ascertain whether the victim gave her free consent for such settlement, as it is possible that she was coerced or forced by the convicts.

Presumption of Guilt:-

There is a statutory presumption of guilt under Section 29 of the POCSO Act when 'a person is prosecuted for committing or abetting or attempting to commit offence under Sections 3, 5, 7 and section 9 of this Act'. Under this statutory presumption of guilt, the Special Court shall presume, that 'such person has committed or abetted or attempted to commit the offence, as case may be, unless the contrary is proved'

However, there shall be strict adherence to procedural requirements when there is a statutory presumption of guilt. The investigation to establish a prima facie case against the accused needs to fair and judicious, and there should no spectre of doubt about its veracity.***(Mohan lalv.State of Punjab)***

Mandatory Reporting under POCSO Act:-

Under Section 21 sub-section (1) of POCSO Act, "Any person who fails to report the commission of an offence...shall be punished with imprisonment of either description which may extend to six months or with fine or with both."

Further, under Section 21 sub-section (2), the punishment is more stringent if such non- reporting is by "Any person, being in-charge of any company or an institution, in respect of a subordinate under his control". This provision applies to schools and child-care institutions.

The POCSO Act under Section 20 obligates "personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities" to inform the police of "coming across any material or object which is sexually exploitative of the child (including photographic, sexually-related or making obscene

representation of a child or children) through the use of any medium", and the failure to do so is an offence under Section 21.

Conclusion

POCSO Act, 2012is a comprehensive law to protect the children from offences of sexual assault, harassment and pornography, while safeguarding the interests of the child at every stage of the judicial process by incorporating child-friendly mechanisms for reporting, recording of evidence, investigation and speedy trial of offences through designated special courts. Enforcement of act in true spirit by keeping various guidelines given by courts will surely create deterrent against such crimes.

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Criminal Law Review 37- 47

Role of the Investigation Officers in Motor Vehicle Act Cases

SAI PRANEETH* & CHANDEESH**

Under the Motor Vehicle Act-1988, there are lot of offences and violations. This paper will focus on the offences of Road Accidents where the Police have a crucial role to play. Road accidents in India kill more people than some epidemics, but the Central and the State governments refuse to see it for what it is - a national crisis. The antiquated traffic management and transportation system resulted in 1,50,000 deaths and left more than half a million injured last year, affirming the country's status as among the riskiest in the world for road users. Significantly, the counts for deaths and injuries in accidents are viewed as less than accurate. The 'Road Safety in India' status report 2015 from the Indian Institute of Technology, Delhi, says injuries requiring hospitalisation are likely to be underestimated by a factor of four and for all injuries by a factor of 20.

For everyone undertaking a road journey, the risk of a fatal accident has been rising steadily: absolute fatalities in 2014 showed a 6 per cent average annual growth rate compared to 1970 figures.

* *IPS (Probationer) 72 RR, Tamil Nadu Cadre*
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Data also show that more than half of those killed last year were in the productive age group of 15 to 34, pointing to a calamitous loss of young lives. This is a public health emergency that requires immediate action. One of the most productive measures to bring down accidents is zero tolerance enforcement. Strong policing reduces the risk for vulnerable road users such as pedestrians and two-wheeler riders, who must be compelled to wear helmets.

Several reasons cause road accidents, some of them are- drunk driving, over speeding, driving under the influence of drugs, overloading of vehicle, over speeding, poor light condition, driving on the wrong side of the road, driving in adverse weather condition, defect in motor vehicle, defect in road condition, fault of passer-by etc. The government has taken several efforts to curb the problem of road accidents by implementing measures like strengthening automobile safety standards, generating awareness programs, improving the road infrastructure, strengthening enforcement and streamlining trauma care assistance programs, etc.

Despite such a massive scale of destruction due to Road Accidents, the Investigation Officers(IOs) are not trained well to deal with these cases. Most of them ignore the rules, verdicts of the Apex Court and continue to commit mistakes leading to acquittals and injustice to the victims. Thus, in this paper we will primarily talk about the key aspects which the IOs dealing with Road Accidents should focus upon analysing and listing the important directives of the Supreme Court.

Duties of the Investigating Officers

By studying various important judgements, guidelines of various state governments the following are the important duties of the IO in Road Accident Cases:

1. To get the scene of accident photographed from such angles as to clearly depict, and in case of inability to do so, prepare a site plan, drawn to scale, as to indicate the lay-out and width etc of the road(s) or place, as the case may be, the position of vehicle(s), or person(s) involved, and such other facts as may be relevant so as to preserve the evidence in this regard, interalia, for purposes of proceedings before the Claims Tribunal;
2. To gather full particulars of the insurance certificate/policy in respect of the motor vehicle involved in the accident and to require the production of documents mentioned in sub-section (1) of Section 158 of the Act, and thereupon either to take the same in possession against receipt, or to retain the photocopies of the same, after attestation thereof by the person producing the same;
3. To verify the genuineness of the documents mentioned in by obtaining confirmation in writing from the office/authority purporting to have issued the same;
4. To submit detailed report regarding an accident to the Claim Tribunals, in Form "A" by not later than thirty days of the receipt of notice in Form "B", accompanied by requisite documents which shall include copy of report under Section 173 of the Code of Criminal Procedure, 1973(2 of 1974), medico legal certificate, post-mortem report (in case of death), first information report, photographs, site plan, photocopies of documents, report regarding confirmation of genuineness thereof, if received, or otherwise action taken;
5. To furnish to the applicant information and particulars about the accident in Form "A" within thirty days, on receiving the application in Form "C" by the person who wishes to make an application for compensation and who is

involved in an accident, or his next of kin, or the legal representative of the deceased, or the insurance company, as the case may be.

6. Provided that such information shall be given to the insurance company on payment of a fees of rupees ten only per page;
7. To not release and impound the vehicle involved in the accident, when it is found that it is not covered by policy of insurance of third party risks, taken in the name of the registered owner, or when the registered owner fails to furnish copy of such insurance policy, and bring this to the notice of the Magistrate having jurisdiction over the area, where the accident occurred.
8. To report to the Magistrate as to why the registered owner has not been prosecuted for offence punishable under Section 196 of the Act, where such prosecution has not been preferred, despite existence of facts constituting such an offence.
9. Accident Information Report in Form No. 54 of the Central Motor Vehicle Rules, 1989 ('AIR' for short) shall be submitted by the police (Station House Officer) to the jurisdictional Motor Vehicle Claims Tribunal, within 30 days of the registration of the FIR. In addition to the particulars required to be furnished in Form No. 54, the police should also collect and furnish the following additional particulars in the AIR to the Tribunal: (i) The age of the victims at the time of accident; (ii) The income of the victim;(iii) The names and ages of the dependent family members.
10. The AIR shall be accompanied by the attested copies of the FIR, site sketch/mahazar/photographs of the place of occurrence, driving licence of the driver, insurance policy

(and if necessary, fitness certificate) of the vehicle and post-mortem report (in case of death) or the Injury/Wound certificate (in the case of injuries). The names/addresses of injured or dependant family members of the deceased should also be furnished to the Tribunal.

11. Simultaneously, copy of the AIR with annexures thereto shall be furnished to the concerned insurance company to enable the Insurer to process the claim.
12. The police shall notify the first date of hearing fixed by the Tribunal to the victim (injured) or the family of the victim (in case of death) and the driver, owner and insurer. If so directed by the Tribunal, the police may secure their presence on the first date of hearing.
13. To comply with the provisions of Section 158(6) of the Act in letter and spirit.
14. To ensure the following with regard to the applications filed under the Act:
    - Every application for payment of compensation shall be made in Form "G" and shall be accompanied by as many copies, as may be required, to the Claims Tribunal having jurisdiction to adjudicate upon it.
    - There shall be appended to every such application:-
        - An affidavit of the applicant to the effect that the statement of facts contained in the application is true to the best of his/her knowledge/belief, as the case may be, and further if the applicant(s) has/have earlier preferred any claim petition with regard to

the same cause of action, and if so, what was the result thereof;

- All the documents and affidavits for the proof thereof, and affidavits in support of all facts on which the applicant relies in context of his/her claim, entered in a properly prepared list of documents and affidavits:
- Proof of identity of the applicant to the satisfaction of the Claims Tribunal, unless exempted from doing so for reasons to be recorded in writing by it;
- Passport size photograph(s) of the applicant (s) duly attested by the advocate on record.
- Reports obtained in Form "C" and Form "D" from investigating police officer, and registering authority; and if no such report(s) have been obtained reasons thereof;
- Medical certificate of injuries, or the effect thereof, other than those included in Form "C".

15. To file certified copy of criminal record such as site plan and mechanical inspection report of both the vehicles;
16. To ensure inquiry as contemplated under Sections 168and 169 of the Motor Vehicles Act, 1988;
17. To ensure the following with regard to the Insurance Company: -
    - The company moves an application in Form "C" before the investigating officer with

prescribed fees and gather full information about the accident, at the earliest, after receiving information about it, or on receipt of notice from the Claims Tribunals under Rule 13.

- The company ascertains and verifies facts about insurance of motor vehicle(s) involved in the accident and confirm the same to the Claims Tribunal within thirty days of receiving notice of the claim case.
- The company moves application before the concerned registering authority in Form "F" and gather information about the motor vehicle(s) involved, and the driving licence(s) held by the driver(s) thereof as per details mentioned in Form"D".
- The company deposits the written statement in the Claims Tribunal, the amount equivalent to the compensation, awardable on the principle of no fault liability under Section 140 of the Act in such cases where the information received in Form "A" and Form "D" confirms death or permanent disability to have been caused as a result of the use of the motor vehicle covered by the insurance certificate/policy issued by it.

Recent Important verdicts of the Supreme Court

1. Case name: **National Insurance Company Limited v. Pranay Sethi**

In a landmark judgment passed by Five-Judge Constitution Bench of the Supreme Court in October, 2017, the Supreme Court

has issued guidelines for computation of compensation under the Motor Vehicle Act, 1988.

In the case, the Supreme Court Bench headed by Chief Justice Dipak Misra was hearing a reference made to the Bench in the case of National Insurance Company Ltd. v. Pushpa & Ors., in view of divergence of opinion of the Supreme Court in the cases of *Reshma Kumari & Ors. v. Madan Mohan* and *Rajesh and Others v. Rajbir Singh and Others* with reference to Sections 163A and 166 of the Motor Vehicles Act, 1988 (the Act) and the methodology of computation of future prospects.

The SC held that: -

1. While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.
2. In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

Some of the factors on which the Bench expounded and issued guidelines were addition of future prospects to determine the multiplicand, deduction towards personal and living expenses (where the deceased was married and where the deceased was a

bachelor), and the selection of multiplier and also detailed on the reasonable figures on conventional heads.

2. Case name: **United India Insurance Co. Ltd. v. Sunil Kumar & Anr.**

In this recent case, the core issue revolved around the scope of Section 163A of the Motor Vehicle Act, 1988. The grant of compensation under Section 163A of MV Acton the basis of the structured formula is in the nature of a final award and the adjudication there under is required to be made without any requirement of any proof of negligence of the driver/owner of the vehicle(s) involved in the accident.

That claimant is not required to establish proof of negligence has been made explicit by Section 163A (2). Though the said section does not specifically exclude a possible defence of the Insurer based on the negligence of the claimant but permitting such defence to be introduced by the Insurer to be contemplating any such situation would go contrary to the very legislative object behind introduction of Section 163A of the Act i.e. final compensation within a limited time frame on the basis of the structured formula to overcome situations where the claims of compensation on the basis of fault liability was taking an unduly long time.

3. Case Name: **Bajaj Allianz Insurance Company Vs. Union of India.**

Supreme Court passes directions for speedy disposal of accident claims.

The apex court, in its directions passed on March 16, gave thrust on using information technology tools by all stakeholders such as police, MACTs, insurers and claimants for ensuring speedy disposal of claim cases and the payment of compensation to the victims of road accidents as well as their kith and kin.

The jurisdictional police station shall report the accident under Section 158(6) of the (Motor Vehicle) Act (Section 159 post 2019 amendment) to the tribunal and insurer within the first 48 hours either over email or a dedicated website, the court directed on the reporting of the Accident Information Report.

Then police later file the detailed accident report after collecting the documents relevant to the accident and for computation of compensation and shall verify the information and documents, it said.

These documents shall form part of the Report. It shall email the Report to the tribunal and the insurer within three months. Similarly the claimants may also be permitted to email the application for compensation with supporting documents, under Section 166 to the tribunal and the insurer within the same time, it said.

The MACT shall issue summons along with the police's detailed report or the application for compensation, as the case may be, to the insurer by email, it said, adding the insurer shall email their offer for settlement/response to the Report or the application for claim to the tribunal along with proof of service on the claimants.

4. Case Name: **Suryaneel Das v. State of West Bengal & Ors (Calcutta High Court)**

"A person is not obliged to hand over his driving licence on demand to a Police Officer who is not in his uniform, in view of Section 130 of the Motor Vehicles Act, 1988", held by Calcutta High Court in one of its recent judgments.
The Court stated:

"The duty to produce a licence and certificate of registration only arises under Section 130 of the 1988 Act, Sub-section (1) of which provides that the driver of a motor vehicle in any public place shall on demand by any police officer in uniform produce his licence for examination."

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Criminal Law Review 48-58

Legal Provisions Dealing with Domestic Violence

ABHINAV TYAGI*

Introduction

Domestic Violence has since 1983 been recognised as a crime and also constitutes a considerable part of the workload of police, prosecutors and the court. Few would claim however that the criminal law alone can solve the problem of domestic Violence. In this article, we go through various provisions available to the victims of domestic violence and understand the strength and weaknesses of the same.

The Protection of Women from Domestic Violence Act, 2005 defines domestic violence as any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it,

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

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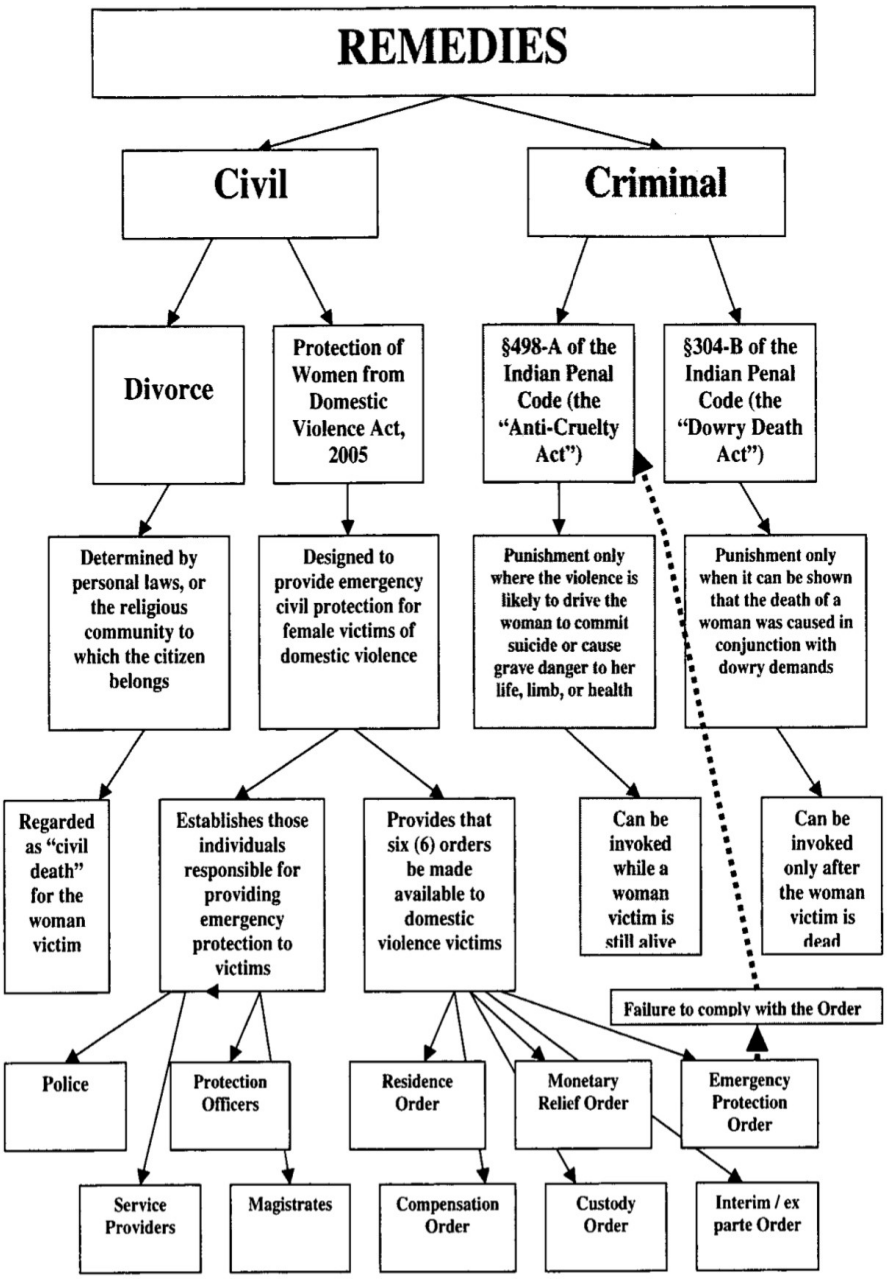
(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or
(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or
(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person

Legal remedies against domestic violence

Legal remedies against victims of domestic violence in India can be divided into civil and criminal remedies. Under the civil remedies, lie the remedy of divide and the remedies provided under The Protection of Women from Domestic Violence Act, 2005 and the remedy of divorce. Under the criminal remedies, the victim has the remedies under Section 498A and Section 204B of IPC. In this article we would go through the available remedies in detail and try to understand the strengths and weaknesses of the same. If we look at the timeline of these remedies' criminalization of domestic violence in India was brought in 1980s with enactment of Sec 498A in the IPC in 1983, Sec304 B in 1986 and corresponding provisions in the Indian evidence Act. Before that the cases of domestic violence were treated under general sections of IPC.


REMEDIES
Civil
Criminal
Divorce
Protection of Women from Domestic Violence Act, 2005
§498-A of the Indian Penal Code (the "Anti-Cruelty Act")
§304-B of the Indian Penal Code (the "Dowry Death Act")
Determined by personal laws, or the religious community to which the citizen belongs
Designed to provide emergency civil protection for female victims of domestic violence
Punishment only where the violence is likely to drive the woman to commit suicide or cause grave danger to her life, limb, or health
Punishment only when it can be shown that the death of a woman was caused in conjunction with dowry demands
Regarded as "civil death" for the woman victim
Establishes those individuals responsible for providing emergency protection to victims
Provides that six (6) orders be made available to domestic violence victims
Can be invoked while a woman victim is still alive
Can be invoked only after the woman victim is dead
Failure to comply with the Order
Police
Protection Officers
Residence Order
Monetary Relief Order
Emergency Protection Order
Service Providers
Magistrates
Compensation Order
Custody Order
Interim / ex parte Order

Source: The Protection of Women form Domestic Violence Act: Solution or Mere Paper Tiger? Volume 4, Issue 2 (2007) Spring/Summer 2007, Loyola University Chicago International Law Review

Section 498A of IPC

Section 498A of IPC is titled "Husband or relative of husband of a woman subjecting her to cruelty" states that-Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation: - For the purpose of this section, "Cruelty" means -

(a) Any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

Positively, this section does not use the term dowry (it only makes an indirect reference to 'unlawful demand for property') to define cruelty, and includes mental cruelty. Hence, it is broad enough to be used in situations of domestic violence where the cause of violence may or may not be dowry.

Issues

1. **Protection Only for Married women**: Sec 498A applies only to violence faced by married women at the hands of their

husbands or husband's relatives. The definition therefore neglects and delegitimises the everyday violence faced by married women at the hands of other relatives and by unmarried women and children in their homes, although it is a known fact that women face violence at the hands of other male relatives as well - their fathers, brothers, uncles, boyfriends, live-in partners or other household members.

2. **Vague Definition of cruelty**: Definition of cruelty given under the Section 498A is vague and limited and does not include all forms of violence experienced by women. Women's experience show that they face violence in the form of physical, mental, verbal, psychological, sexual and economic violence. Only physical and mental violence are covered under Section 498A. Sexual violence particularly needs to be recognised as a form of cruelty not only because of its high prevalence within marriage but also because the definition of rape within Sec 376 IPC specifically excludes marital rape as an offence.
3. **Difficulty of Proving Cruelty 'Beyond Reasonable Doubt:** Sec498A of the IPC necessitates that the "cruelty" of the husband and his relatives be proved "beyond reasonable doubt" - a requirement of criminal law. This requirement of being able to prove physical or mental cruelty beyond reasonable doubt, when such cruelty takes place within the confines of the home is extremely difficult and almost impossible.

Section 304B of IPC: -

Section 304B focuses on dowry deaths. According to this section, “where the death of the woman is caused by any burns or bodily injury, or occurs otherwise than under normal circumstances within seven years of her marriage and if it is shown that soon before her death she was subjected to cruelty or harassment by her

husband or any other relatives of her husband for or in connection with any demand for dowry, such death shall be called 'dowry death' and such husband or relatives shall be deemed to have caused her death."

The offence is punishable with a minimum of seven years and a maximum of life-imprisonment. Once dowry harassment is proved, the presumption of guilt lies on the accused through the enactment of section 113B in the Indian Evidence Act.

Issues: -

This Section, unlike Section 498A, can be used only for cases related to dowry. Since no record is maintained and no complaints made at the time of meeting dowry demands while the girl is still alive, it is extremely difficult to prove dowry death under this section.

This section also puts an arbitrary limit of 7 years till which death of a women may be treated as dowry death. Death occurring beyond 7 years of marriage are not covered under this section.

The phrase 'soon before her death' one can infer that it does not take into account the violence committed earlier and has been used by courts to acquit accused just on the basis of the fact that harassment soon before the death could not be proved.

The Protection of Women from Domestic Violence Act: -

The Act is a civil law that runs parallel to the various criminal law provisions provided under IPC and other acts. Therefore, a woman can file a criminal complaint in addition to seeking emergency relief under the Act. In providing a civil remedy, the Act is not designed to punish the abuser, and no arrests can be made based on a complaint filed under the Act. Arrests under the Act can be made only if the abuser violates a Protection Order

issued by the court. The reasoning behind the civil nature of the act is that the drafting members had the view that the remedy should be civil rather than criminal to ensure that women who are not ready to leave their spouses are still able to seek protection from domestic violence.

Definitions under the Domestic Violence Act: -

The Act provides an expansive definition of domestic violence. Not only does the Act proscribe acts of abuse, it also proscribes the threat of any physical, sexual, verbal, emotional, or economic abuse. The Act provides protection for women who are in a "domestic relationship," which includes any "two persons who live or have, at any point in time, lived together in a shared household. It embraces relationships based on consanguinity, marriage, adoption, and cohabitation. Therefore, the Act provides protection for all women who have a relationship with the abuser, including sisters, widows, mothers, in-laws, and unmarried women living with the abuser.

A key provision of the Act is the creation of a woman's right to reside in the "shared household" or to seek support for alternative housing arrangements. A shared household is a household where a woman lives or has lived in a domestic relationship, whether or not she has any ownership rights in the property. However, unfortunately in *S.R. Batra V. Taruna Batra* the Supreme Court has interpreted shared household narrowly. The Court held that section 17(1) of the Act entitles the wife to claim a right to reside in the shared household only when the house is joint family property.

Protection Officers and Service Providers: -

The Act also establishes a network of protection officers and service providers. The Act requires the states to appoint protection officers, whose sole focus is enforcement of the Act. A protection

officer's responsibilities include assisting women in filing domestic incident reports with the magistrate, filing applications for Protection Orders and other court orders with the magistrate, ensuring that women are provided legal aid, a safe shelter home, medical attention, and enforcing Orders passed by the court.

The Act also calls for service providers, non-governmental organizations (NGOs), or other voluntary organizations to assist women in filing complaints, filing applications for court Orders, and providing other necessary support to victims of domestic violence.

Protections and Remedies Under the act:-

The Act provides for six remedial protections:

1. **Protection Order**: - A Protection Order prohibits the alleged abuser from committing any act of violence against the victim, aiding or abetting the commission of violence against the victim, entering the victim's place of employment or school, attempting to communication in any form with the victim, alienating any financial assets to the detriment of the victim, and/or harming any dependent or relative of the victim.
2. **Residence Order**: - which prohibits the victim from being dispossessed of the shared household, directs the alleged abuser to remove himself from the shared household, prohibits the abuser or any of his relatives from entering any portion of the shared household in which the victim lives, restricts the abuser from renouncing his rights in the shared household, or orders the abuser to provide the same level of alternate accommodation for the victim.
3. **Monetary relief**: - This includes medical expenses, lost earnings, loss of property, and maintenance for the woman and her children.

4. **Compensation Order**: -These orders permit the woman to recover compensation and damages for her physical injuries and emotional distress. These damages are intended to be awarded in addition to monetary relief, which only covers actual expenses related to the violence.
5. **Custody Order**: -These orders ensure that the abuser does not take children away from the victim.
6. **Interim or Ex Parte order**: - A magistrate may also pass any interim or Ex Part order under the act if he deems necessary to thwart immediate threats to the life or limb of the woman.

In order for a woman to obtain an Order from the court, she must first file a formal complaint in the form of a domestic incidence report with the police, a protection officer, a service provider, or directly with the magistrate. Thereafter, a woman may file an application for an order of relief directly with the magistrate. Alternatively, a protection officer or any other person may file the application on her behalf. The Act requires that all proceedings brought under the Act be disposed of within sixty days of the first hearing, which must occur within three days following the application. Once the magistrate enters an Order, failure to comply with the Order will result in criminal punishment with imprisonment for a maximum of one year or a maximum fine of 20,000 rupees.

Limitations of the Act: -

The most significant limitation is the civil character of the Act. As a civil statute, the Act does not allow criminal punishment for men who engage in domestic violence. Therefore, even with the enactment of the Act, women are left with only the Anti-Cruelty Statute and the Dowry Death Statute under which they can request criminal charges for domestic violence. As outlined above, these

acts are not broad enough to provide criminal recourse for most victims of domestic violence.

Another shortcoming of the act is that the Act does not provide victims of domestic violence with permanent relief. The Act provides only an interim solution, by providing for Protection Orders and other temporary orders that are designed to give women time to evaluate their options.

The Act is also limited because it grants women only one right i.e., the right to reside in a shared household. While the orders of protection that can be granted under the Act prohibit the respondent from committing any act of domestic violence and require the perpetrator to have no contact with the victim, these orders are only temporary and thus are not rights per se.

Conclusion

The Protection of Women from Domestic Violence Act grants Indian women more rights and protections than those ever been granted to them in the past. Unlike previous domestic violence laws, which provided protection only in cases of dowry death and extreme cruelty, the Act defines domestic violence broadly to include everything from physical violence to emotional injuries to economic threats. Furthermore, the Act provides civil remedies to fill the gap between the restrictive criminal laws and the extreme civil remedy of divorce. Most importantly, for purposes of the women's rights movement in India, the Act grants a specific right to women, the right to reside in the shared household.

In order to improve the way victims of domestic violence cases are handled and for proper interpretation and implementation of laws, several aspects must be addressed. We need further research that explores and seeks to understand women's views and

perceptions on what constitutes violence, what forms of justice are adequate, and how they can be redressed. There is also the need to have a comprehensive law on domestic violence that incorporates both civil and criminal remedies to tackle the issue.

Along with amendments of law, a simultaneous process of sensitizing the legal system is necessary. Gender sensitivity should be included in the training of the police, the judiciary, medical officials, policy makers, and other service providers to improve their skills in handling cases.

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National Police Academy
Criminal Law Review 59-74

Cyber Crime Investigation Related Action Points and Case Laws

ABHISHEK GUPTA*

IT ACT does not have the words like digital evidence or electronic evidence. It deals with only electronic records and electronic form of evidence. Electronic records in the form of hard disk, compact disk, CCTV footage etc. are documentary evidences.

DHARAMBIR vs. CBI*: All the rules that are applicable to documentary evidences are equally applicable to electronic records also. So, the* ***document needs to be produced in the court*** *either in original or as a copy of the original, and the* ***author of the evidence shall prove the evidence.*** *No oral evidence shall be taken of a document that is lost or produced before the court.*

Why special law for electronic records?

The data is generated by the computers, the things are authored by computers, thus nobody would be able to adduce evidence about the contents of such documents. Also, multiple computers are involved in the creation of such documents. (Ex: in case of bank statements).

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RELEVANT SECTIONS IN IEA: -

Section 65: The contents of electronic records may be proved in accordance with the provisions of section 65B.

Section 65B: (***Anvar vs. Basheer 2014**,) the SC has clarified that without 65B certificate an electronic record which is a secondary form of evidence cannot be admitted in a court.)* With 65B certificate if we are not producing the original electronic record in its original form, such kind of secondary evidence is admissible if the conditions of section 65B are fulfilled.

FOUR CONDITIONS:

1) Computer would have been regularly used to store and process the information and it should have been used by the person who is having lawful control over that computer
2) The information so contained is regularly fed into the computer in the ordinary course of activities
3) Computer was operating properly. If it is not operating for some period, during the time that computer is down, it did not affect the record which we are producing before the court.
4) We need not produce the entire document. We can even produce part of it, and the court would accept. (For ex: in CDR analysis report we are not providing the full report but only 13 columns).

The **Section 65B (3)** states that in case of information being provided by a combination of computers, in that scenario the combination of computers will be deemed as if the information is generated by a single computer (ex: in a bank two PCs were used successively to operate a system and prepare a report. Both these PCs will be treated as once; a bank statement is generated for a person with thousands of computers and servers spread across the

world, this statement will be deemed to be generated by a single person; an individual Mr. X is having an account in SBI Hyderabad, he then shifts the account to Delhi, data is maintained by servers in Bombay, who can give statement? As per this section statement can be given by any of the three managers.)

Compliance of conditions in section 65B is ensured by provisions in section 65B (4). It states that there should be **a certificate** which shows all the provisions of section 65B are compiled with and this is the **procedure** by which an IO made a copy of the evidence. So, a certificate with these details has to be given by **competent person along with a copy of the electronic record.**

Who can give section 65B certificate?

1) **The nodal officer** who is occupying responsible official position in relation to the operation (Note: - he is not owning the server nor the data but still he can give the certificate.)
2) One who is looking into the **management of relevant activities**. (Note: - he is not owning the computer nor does he sit on the computer but still he can give the certificate.)

As per section 65B (5), **a police officer can give a 65B certificate**. Ex: a victim comes to Police Station saying he is receiving some threatening mails. The IO can take a copy of the mail following proper acquisition process and state the same along with the tools used for making a copy of the mail in 65B certificate.

During Trial, the defense lawyers are inclined to ask underlined questions to the individual who has given 65B certificate: -

- Do you know that all computers were working properly?
- Do you know the make model of computer?
- How can you say there is no virus?

All these above questions by defense lawyer are irrelevant. **The certifying competent authority just needs to say that to the best of his knowledge the systems are working properly.**

Paras Jain vs State of Rajasthan, 2015 and Kundan Singh vs State, 2015: -You can file a 65B certificate later also. During the trial process the person who gave the 65B certificate and is being called for as a witness, he can give 65B certificate at that point also. He can even produce that certificate at a later stage and go on appeal to higher court.

But **we cannot file a post-dated 65B certificate.** 65B certificate to be admissible shall be made on the same day when the copy of electronic evidence is made.

Section 88A of IEA:*"The Court may presume that an electronic message, forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission."* It means that the court may presume that the mail which was typed and sent is the same as the mail which is received on the other side. It is sufficient if we are presenting the mail from either the sender or the receiver. We don't need to approach **Mail Service Providers** like Google, Yahoo etc. either for a certified copy of mail or for 65B certificate for the copy of the mail. In all cases involving mail, the IO can actually take a copy of the mail along with mail header (which is the meta data of the mail) and he can present before the court.

In case of companies or organizations having their own mail servers like SVPNPA, in these cases **we need to get a copy of mail from the in charge of that mail server in that organization along with 65B certificate.**

In case of SMS: A person receives a message that he wants to produce before a court. He can submit the mobile containing that message in the court. This will be primary evidence. Here there is no need of 65B certificate. But if he is producing a copy of the message then he has to give a 65B certificate also. However, in case a copy of the message is given then the IO has to preserve the message in its original form. Tomorrow someone can dispute that it is a tampered message and hence the preserved form of evidence will save the day. Note: **we cannot save the message in the computer but we need to save the message in the mobile i.e. original form.**

In case of bank statement or other bank related electronic records: a certificate as per Section 2A of the Banker's Book of Evidence Act needs to be presented along with the evidence. Here provisions of 65B certificate are not applicable.

In case of CCTV footage: best form of evidence will be to carry the DVR itself i.e., a primary evidence. No need of 65B certificate.

However, in cases where DVRs are managed centrally and where feeds from hundreds of cameras are being recorded continuously. Make a copy of relevant portions of CCTV in the presence of witnesses and with the help of forensic experts along with 65B certificate.

(Note: - CCTV footages needs to be given along with the specific player to play those files.)

In case of data taken from accused's PC or laptop: the IO needs to collect the copy of data and issue himself the 65B certificate. Here we cannot ask the accused to give 65B certificate as it will be an incriminating evidence against him.

In case of presenting photographs (ex: for a murder scene): Here we need to provide 65B certificate along with the photographs.

It Act 2000 As Amended In 2008 And Relevent Rules Issued Under The Act From Time To Time.

Jurisdiction:

Territorial jurisdiction: the act extends to whole of India.

Sec 1 (4): -Nothing in this act shall apply to documents or transactions specified in first schedule (negotiable instrument, power of attorney, trust, will, contract for sale of immovable property etc.)

Extra territorial jurisdiction: - it applies to any contravention committed by any person outside India provided it comprises a computer, computer system or a computer network that is located in India

Sec 45 (1A): - the **adjudicating officer appointed shall decide claims up to 5 crores**. Appeal lies to Cyber Appellate Tribunal and finally High Court.

Sec 46: - provides for appointment and powers of Adjudicating authority**. IT secretary is appointed as adjudicating authority.**

For claims above 5 crores: - the concerned Civil Court shall attend to the case. Appeal lies to District Court and so on.

For Criminal Cases: - the jurisdiction lies with JMFC then Sessions court and so on.

Sec 4: Legal Recognition of electronic records:

There are two conditions: -
1) made available in electronic form

2) accessible so as to be useful for subsequent reference

Sec 3: authentication of electronic records by using digital signature. Here private key will be used for affixing the signature and the public key of the authenticator will be used to verify. Both the private and public key are unique to authenticator and serve as a functioning key pair.

Looking at the prospect of new technologies coming for authentication of electronic records in future the IT Act specifies "electronic signature" (that includes digital signature) that includes all techniques specified in second schedule. Now the second schedule is amended and AADHAAR based authentication and other e-KYC services are allowed for authentication.

Civil Cases Under it Act

Penalties: -

Section 43: Penalty and compensation for 10 types of damages relating to computer, computer system, etc.

Section 43A: a firm handling personal information negligently fails to take reasonable security measures shall be liable for damages.

(In case of offenses u/s 43 and 43A, FIR shall not be registered and the complainants shall be guided to approach the adjudicating officer or civil court. However, if the accused has done the above acts "dishonestly" or "fraudulently" then he will be punished under section 66 as a criminal offense).

Relevant Sections for Civil Action that is Action Against Cyber Contraventions: -

Section 43(b): for data theft etc.

Section 43(c): for virus etc.

Section 43(d): for damaging the system

Section 43(e): for disruption either physically or electronically

Section 43(f): denial of service attack, DDoS attack, bringing down the server by hacking/virus

Section 43(g): for assisting unauthorized access to a computer/system/network etc.

Section 43(h): for online frauds like charging for a transaction to a person other than the one making it by fraud

Section 43(i): deleting/altering any information on a computer or diminishing value of same (ex: introducing an application to slow down the functioning of other application)

Section 43(j): stealing/concealing/destroying/altering any computer source code with an intention to cause damage

(NOTE: Section 65 also deals with computer source code that has been tempered but the same is to be kept or maintained by law.)

Relevant Sections for Criminal Action That is Action Against Cyber Offences: -

Section 65: conceals/alters/destroy computer source information required to be maintained by law. *(Computer source code means listing of commands, design, layout etc. of a program)*
Section 66: acts mentioned under section 43 committed with dishonest or fraudulent intention.

Section 66A: Punishment for sending offensive messages through communication service. It was useful for tackling cyber bullying, cyber stalking, spamming, phishing, stolen identities, sending emails from falsely named addresses etc. Now we can use IPC section from 500 onwards for same. **(Now repealed after *Shreya Singal vs. Union of India*)**.

Section 66B: Punishment for dishonestly receiving stolen computer resource or communication device. *(Computer resource includes email, audio/video files etc. Here knowledge has to be proved for constituting the offense).*

Section 66C: Punishment for identity theft *(fraudulently or dishonestly make use of the electronic signature, password or any other unique identification feature of any other person).* By this section we can punish **financial frauds, lottery scams etc.**

Section 66D: Punishment for **cheating by personation** by using computer resource.

Section 66E: intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances **violating the privacy of that person. This punishes video voyeurism acts like hidden cameras in hotel rooms, changing rooms, public washrooms etc.**

Section 66F: cyber terrorism by denying access to computer resource or by penetrating into computer source without access or by injecting some computer contaminant thereby threatening life or property; or disruption of essential supplies; or **threatening critical information infrastructure as given u/s 70.**Also, any person who obtains access to **restricted information** threatening sovereignty, security etc. of nation. **Punishment here is imprisonment of life.**

(*Terrorism committed by use of cyber space is not cyber terrorism. Only when the said act constitutes ingredients mentioned in section 66F would constitute Cyber Terrorism.)*

Section 67: Punishment for publishing or transmitting **obscene material** in electronic form so that **its effect** is such as to corrupt persons who are likely to read, see or hear the matter.

(This is not a blanket section for punishing all kinds of obscene material sharing. EX: group of psychologists discussing sexual perversions may not be punishable under this section but if same material is circulated widely in public, then this section can be attracted.)

(a matter is considered obscene only if it appeals to the prurient interests in sexual matters i.e., excessive, degrading and morbid)

Section 67A: Punishment for publishing or transmitting of material containing **sexually explicit act i.e. pornography** etc. in electronic form. This is cognizable, non bailable and non-compoundable.

Section 67B: Punishment for publishing or transmitting of material **depicting children** in sexually explicit act, etc., in electronic form. This section also punishes browsing/ downloading /creating etc. electronic material depicting children in indecent manner. This section **includes online child abuse and its facilitation.**

(NOTE: SECTION 67, 67A AND 67B EXEMPTS ONLINE MATERIAL THAT IS FOR "PUBLIC GOOD" OR KEPT IN A BONAFIDE MANNER FOR HERITAGE PURPOSE.)

Other Important Sections: -

Section 69: - Central/State govt. can direct IN WRITING any agency to intercept/monitor/decrypt any information for sovereignty and integrity, preventing any cognizable offense or for investigation or for public order. Here intermediary/in-charge of computer resource shall assist; otherwise, he will be prosecuted. (*This power is extended to Secretary, Home Affairs to GOI and respective states who will be a competent authority. In emergency, authorized Joint Secretary or above rank officer can provide*

approval. In remote areas or for operational reasons the Head of the security agency or the authorized officer of rank IG or above can allow for same but shall inform in writing the reasons for same within three working days and shall obtain an approval in 7 working days. If approval is not given then said interception /monitoring/decryption shall be ceased.)

The **powers mentioned in the section 69 is not for blocking content** but only for interception/monitoring/decryption.

Section 69A: - Central govt. can direct IN WRITING any agency or intermediary to block any information through any computer resource for sovereignty and integrity, defense of India, preventing any cognizable offense or for public order. Here intermediary/in-charge of computer resource shall assist, otherwise, he will be prosecuted. (*The authority for blocking lies with Secretary, MIETY. It can be done on the basis of request of various agencies or court order. The* ***reasons shall be given in writing*** *for blocking.)*

Section 69B: -The intermediary or any person in-charge of the computer resource shall provide technical assistance to authorized agency for monitoring/collecting traffic data for cyber security or preventing spread of computer contaminant. *(Traffic data is data collected about an individual's use of an electronic network, often concerning routing, timing, and duration.).*Intermediary will be prosecuted for any failure here.

Section 70B: Indian Computer Emergency Response Team (CERT) to serve as national agency for emergency measures for handling cyber security incidents, issue guidelines, call for information etc.

Section 79A: - Central Govt. can notify any agency to be an Examiner of Electronic Evidence for the purpose of giving expert

evidence in the court about the electronic form of evidence. Only four agencies notified so far:

1. CFSL, Hyderabad
2. Directorate of Forensic Science, Gandhinagar
3. Computer Forensic and Data Mining laboratory of SFIO, New Delhi
4. FSL, NCT Rohini

Section 78: -police officer not below the rank of Inspector shall investigate any offence under this Act.

Section 67C: -Preservation of information by intermediaries for such duration and in such manner as the Central Government may prescribe. Failure is punishable by 3 years or above.

Section 80: -Any police officer not below the rank of Inspector may enter any public place and search and arrest without warrant any person suspected of having committed any offence under this Act. If arrest by any other officer, then produce before a magistrate having jurisdiction in the case or before the officer-in-charge of a police station.

Section 85: -if an offense is committed by a Company, then all the officers of the company shall be liable unless they prove due diligence.

Section 84B: -abetment invites same punishment.

Section 84C: -attempt invites half of maximum punishment.

Intermediary: -

Section 79: an intermediary shall not be liable for any third-party content hosted by it provided the intermediary has acted with due diligence and expeditiously removed the said content on receipt of direction. (*Here the intermediary shall not be involved in*

the selection of recipient or modification of the content. It should have acted in completely passive manner.)

The intermediary shall include any person who on behalf of another person receives, stores or transmits electronic records or provides any service with respect to electronic records including TSP (Telecom Service Provider), NSP (Network Service Provider), ISP (Internet Service Provider), WHSP (Web-hosting Service Provider), Search Engines, online payment sites, online auction sites, online market places and cyber cafes.

Some obligations of Intermediaries: -

1. *They shall not host any content in violation of IT act.*
2. *Suo-moto or on complaint by any person by any means they shall remove objectionable content within 36 hours*
3. *As per section 43A they shall follow reasonable security practices, appoint one grievance redressal officer with contact details on website and report cyber security related incidents.*
4. *As per section 67C, intermediaries need to store designated data for designated time frame in designated form. Rules are not formed for this.*

Important Judgements: -

1. **IDBI Bank Vs Shri Sudhir S Dhupia:** Respondent got an email alleged to have been sent in the name of Appellant Bank in which he was asked to provide the confidential and Personal information including the net banking ID and password besides other information. The Court observed that some phishing frauds may be beyond the control of concerned banks. But, the domain name in the alleged e-mail which led the respondent to divulge all his details was idbi.co.in which is one of the registered domain names

of the appellant Bank. This could be security lapse or done through connivance. It was further observed that while the appellant failed to provide reasonable security to avert such communication bearing its domain name, it merely passed on the onus to the respondent for being negligent. The Court in agreement with the Adjudicating Officer found the appellant guilty and liable for the violation of Section 43 read with Section 85. In addition to this, the appellant was also found to be guilty of the violation of Section 43-A since it was found that the appellant was negligent in implementing a robust security system.

2. **Sanjay Kumar Vs State of Haryana:** it was revealed that the accused, who was having savings bankaccountin his personal name in a bank, manipulated the entries by forging and fabricating certain entries from one account to another, in the computer system of said bank by handling the software and intentionally withdrew the amount from the bank. Accused has tampered with the computer source document and he has also altered in the information which resided in the computer resource and by doing so he committed the offences under Sections 65 and 66 of the Information & Technology Act, 2000. At the same time, it is pertinent to mention that although accused was having secured assess to electrical record of the bank and he forged the entries and cheated to cause wrongful gain to himself but there is no such breach of confidentiality by disclosing the information to any other person and as such he is acquitted of offence under Section 72 of the Information & Technology Act, 2000."
3. **Gaurav Kaushik Vs CBI(2016 SCC Online Del 3405):** This Court finds that the allegations leveled against the petitioner are serious in nature to the effect that he removed

the entries made in the e-tendering system of the MCD and facilitated the contractors without getting completion certificate and enabled them in getting new work without completing the existing works. In the considered view of this Court, to ascertain the role of each person involved, custodial interrogation of the petitioner is required. It has been demonstrated on the record that accused was actively involved in the crime alleged against him. There are so many persons involved in the present case including private persons and MCD officials and if the petitioner is granted anticipatory bail, it may prejudice the investigation conducted by the CBI. Thus anticipatory bail application dismissed.

4. **Ajay Murlidhar Batheja Vs State of Maharashtra & Ors**: Perusal of the facts of the present case could reveal that the ingredients of the Act which has been alleged to be an offence under Section 420 read with 34 of Indian Penal Code are also covered by Section 66 of the Information Technology Act, 2000. If the ingredients of both the offence are same, in such circumstances a person cannot be prosecuted for the same act by invoking the provisions contained in two different statutes. We are therefore not inclined to quash the said FIR as far as the offences under the Information Technology Act are concerned, however we hold that the invocation and application of the provisions of the Indian Penal Code and specifically Section 420, is not sustainable in light of the judgment *Sharat Babu Digumarti v/s. Government (NCT of Delhi).*Thus the court set aside the FIR bearing CR No.01 of 2018 registered with Cyber Police Station, Mumbai only to the limited extent where it invokes and applies Section 420 read with 34 of Indian Penal Code.

5. **P Goplakrishan @ Dileep Vs State of Kerala Crl. Appeal N0-1794 of 2019 (Dated -29-11-2019): -** If the accused or his lawyer himself intends to inspect the contents of the memory card/pen drive in question, he can request the Magistrate to provide him inspection in Court, if necessary, even for more than once along with his lawyer and I.T. expert to enable him to effectively defend himself during the trial. If such an application is filed, the Magistrate must consider the same appropriately and exercise judicious discretion with objectivity while ensuring that it is not an attempt by the accused to protract the trial. While allowing the accused and his lawyer or authorized I.T. expert, all care must be taken that they do not carry any devices much less electronic devices, including mobile phone which may have the capability of copying or transferring the electronic record thereof or mutating the contents of the memory card/pendrive in any manner.

   In conclusion, the court held that the contents of the memory card/pen drive being electronic record must be regarded as a document. If the prosecution is relying on the same, ordinarily, the accused must be given a cloned copy thereof to enable him/her to present an effective defense during the trial.

   However, in cases involving issues such as of privacy of the complainant/witness or his/her identity, the Court may be justified in providing only inspection thereof to the accused and his/her lawyer or expert for presenting effective defense during the trial. The court may issue suitable directions to balance the interests of both sides.

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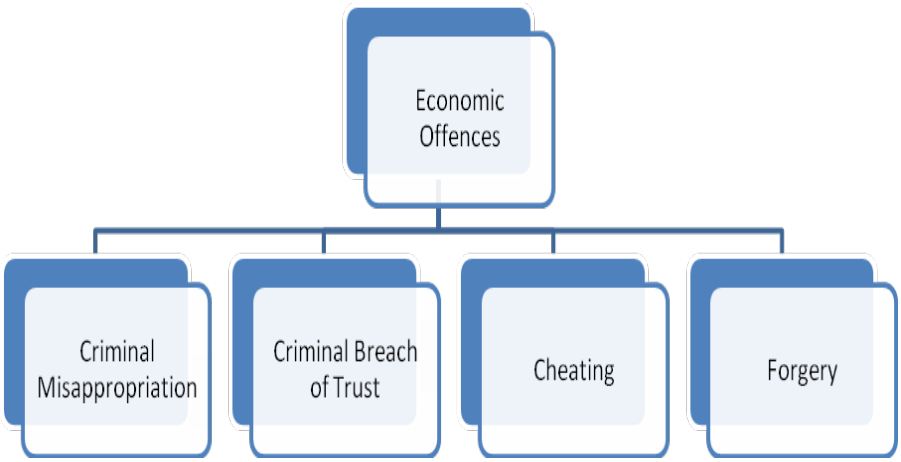
Criminal Law Review 75-85

Investigation of Economic Offences

PUSHKAR SHARMA* & ATUL BANSAL**

The economic offence means any offence or crime which deals with fraud (chit funds), forgery (cheques; stolen or original), cheating, or deceiving (financial institutes) or counterfeiting of money or money equivalents. The economic offence is also known as a Financial Offence. Sections 406,408,409,420,465,467,468,471 and 120 B of IPC are generally invoked by investigating officers of while investigating Economic Offences.



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** *IPS (Probationer) 72 RR, Gujarat Cadre*

1. **Criminal Misappropriation**

Ingredients

- Section 403 IPC: - Dishonest misappropriation of property-Whoever dishonestly mis-appropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

2. **Criminal Breach of Trust**

Section 405 IPC defines the offence of Criminal Breach of Trust. As per definition,
this offence is made out if:-

- the accused person has been entrusted with a property in any manner, and
- he dishonestly uses or disposes of such property in violation of any law or contract, express or implied.
- Thus, the investigation must clearly bring out evidence of:
- entrustment of property, and
- its dishonest disposal in violation of laid down law, rules or policies/guidelines etc.,
- for the offence of criminal breach of trust to be made out.

3. **Cheating**

Section 415 IPC defines the offence of Cheating as: -

- an act of fraudulently or dishonestly inducing the victim to deliver any property to any person (which he would not have delivered otherwise), or

- Intentionally inducing the victim to do or omit to do something which he would not have done otherwise, and which act or omission causes or likely to cause damage or harm to the victim in body, mind, reputation or property.
  Explanation:- Dishonestly concealing facts amounts to deception.

Cheating u/s 420 IPC

- This section defines the offence of cheating AND dishonestly inducing delivery of property. In other words, cheating alone does not constitute the offence of 420 IPC.
- The acts of omission and commission on the part of the accused should also dishonestly induce the victim to part with some property or make, alter or destroy any valuable security. This offence is punishable with imprisonment of up to seven years.

Ingredients: -
Whoever cheats a person and thereby dishonestly induces him or her to:–

- deliver any property to any person, or
- make, alter or destroy any valuable security, or anything which is capable of being converted into valuable security, commits the offence of 420 IPC.

4. Forgery

The term forgery is defined in Section 463 IPC.
Ingredients:

- Whoever makes a false document,
- with intention to cause damage or injury to the public or any person, or

- to support any claim or title, or
- to cause any person to part with property, or
- to enter into any contract, or
- with intent to commit fraud,
- commits the offence of forgery.

Procedure For Dealing with Complaints of Economic Offences:

- Registration of FIR
- Plan of investigation
- Collection of relevant records/documents
- Search and seizure
- Scrutiny of documents
- Collection of oral evidence
- Examination of witnesses
- Examination of accused person(s)
- Expert opinion
- Prosecution sanction
- Appreciation of evidence and preparation of Final Report u/s 173 CrPC

Registration of FIR

- Always invoke correct sections of law in the FIRs.
- If a public servant is named in the FIR and the allegation in regard thereto is found prima facie credible then Prevention of Corruption Act should be invoked.
- Whenever PC Act is invoked in the FIR, investigation is to be conducted by an officer of the rank of Dy. SP or above.

Plan of investigation

Following steps are common in every case:

- Understand allegation(s) as contained in the FIR
- Identify the main allegation(s) for investigation
- Identify witnesses to be examined
- Know the documents to be seized
- Know technical/expert assistance required
- Conduct searches etc.

Collection of documents

- Prepare check list of all authorities including banks from whom documents are to be seized and send requisition for those documents u/s 91 CrPC at the earliest.
- The IO should not resort to indiscriminate collection/seizure of documents.
- Conduct preliminary scrutiny of documents initially at the time of seizure itself.
- Always obtain documents against proper receipt/seizure memo. Documents obtained from private persons should always be witnessed by independent witnesses through a seizure memo
- Always examine relevant witnesses to prove contents of a document.
- In case of bank ledger, certificate under Banker's Books Evidence Act 1893 must be obtained.

Search and Seizure

- Ensure presence of at least two independent witnesses for each search.
- Ideally searches should be conducted on the strength of Search Warrants under Section 93 CrPC obtained from the competent court.

- However, practically almost all searches are made u/s 165 CrPC. If this is the case, please ensure that grounds for doing so have been recorded in the case diary.
- Where the I.O. requires any officer subordinate to him to conduct search, he has to record the reasons in writing for doing so.
- Ensure that the search party has offered their personal search.
- During the search, ensure that all witnesses remain present and witness entire proceedings.
- Detailed seizure list specifying the place where each item was found has been prepared.
- After the search, make sure that copy of the seizure memo is given to the house owner or his representative and receipt obtained.
- In order to "freeze" bank account of a suspect, send notice to the concerned Bank Manager.

Scrutiny of Documents

Scrutiny of documents helps in ascertaining:

- Whether the laid down procedures and practices were followed by the accused person(s).
- Whether the acts of omission and commission resulted in loss to the department and subsequent gain to the accused persons.
- Whether the omission and commission were due to negligence or due to dishonesty on his part or on account of criminal conspiracy with others.
- Findings of the department concerned in case any departmental enquiry was conducted.

- Whether there has been any tampering with the documents. If so, by whom?
- The quantum of wrongful gain/wrongful loss caused.
- The author of writings/signatures appearing on various documents.

Collection of Oral Evidence

- Statements of witnesses be recorded in their vernacular language as far as possible.
- Concerned officials of the department be examined to prove the rules, procedures, policies and practices prevalent during the relevant time.
- Concerned officials of the department be examined who initiated the processing of contract/purchase or dealt with the concerned matter.
- Relevant writings, signatures and initials should be identified and proved by the witnesses who are conversant with the writings, signatures and initials.
- 160 CrPC empowers an investigating officer to summon a person acquainted with the facts and circumstances of a case provided such person is within the limit of his own or the adjoining police station.
- If investigating officer is changed during the course of investigation, the new IO need not write the 161 CrPC statements again. It would suffice if he speaks with the witnesses and verifies the statements made by them before the earlier investigating officer(s).
- A person can be cited as a witness even if his 161 statement has not been recorded.

Examination of accused persons

- Make entry in the General Diary if the accused is arrested.

- Follow instructions given by the apex court in D.K. Basu case in case of arrest.
- Carry up-to-date case diaries to the Court, when producing the accused for remand.
- If an accused person is granted anticipatory bail, it is not mandatory to arrest him. The terms and conditions of the bail order itself are clear on his aspect, as per which the person is to be released on furnishing bond etc. only in the event of his arrest. Therefore, arrest should be made only if the accused is actually required to be arrested, and not just because he/she has been granted interim bail.
- Prepare questionnaire before the examination of an accused person.
- If accused discloses material objects connected with a crime while in custody, record his/her disclosure statement in the presence of witnesses and prepare discovery memo, as per provisions of Section 27 of Evidence Act.
- Record the statements in the language of the accused.

Expert Opinion

In most cases of economic offences, opinion of the handwriting expert is required. For this purpose:

- Obtain admitted documents.
- Obtain specimen writings, signatures, initials etc as required
- Mark the admitted and specimen documents with blue pencil
- Mark the questioned documents with red pencil
- Prepare questionnaire
- Send questioned documents, admitted documents and specimen documents to expert along with questionnaire.

- Reports of advanced forensic techniques namely Polygraph, Brain Mapping and Narco analysis are not admissible evidence. They may only be used to generate leads during investigation.

Prosecution Sanction

- Ascertain whether sanction for prosecution is required u/s 19 of PC Act, 1988.
- Ensure that the authority granting prosecution sanction had access to the case documents (161 statements of witnesses and other relied upon documents) at the time of deciding the grant of sanction.
- While obtaining sanction, competence of the authority granting the sanction must be verified.
- Ascertain whether sanction for prosecution is required u/s 197 CrPC.
- IO to prepare draft Sanction Order in consultation with Law Officer.

Charge Sheet

Checklist for preparation of charge sheet is

- Whether in prescribed format?
- Whether the names of accused approved for prosecution are mentioned incolumnNo.1?
- Whether the custody position of the accused has been specifically mentioned i.e. arrested/not arrested/on bail/in jail etc?
- Whether list of witnesses is enclosed?
- Whether list of documents is enclosed?
- Whether list of material objects is enclosed?

- Whether facts alleged contained in the charge-sheet are supported by evidence gathered during investigation?
- Whether all exhibits kept in the Malkhana have been physically checked to see that these are properly sealed and are in original condition?
- Whether, if an accused is on bail, the date of the order as well as the name of the court and if in jail, the name of the jail and reference of the court order vide which sent to jail etc have been mentioned?
- Where further investigation u/s 173(8) CrPC is continued, whether a mention about the same has been made in the charge-sheet?

Important Case Laws

- ***Mohd. HadiRaja Vs. State of Bihar AIR 1998 Supreme Court 1945: -*** Sanction for prosecution under section 197 CrPC is not required if a public servant is employed in any Corporation or Undertaking established by the Government.
- ***Ravichandran Vs.Mariyammal (1992) Cr LJ 1675 (Mad):*** **-**The court of law in this judgment held that making false representation and deceiving any woman and having mutual intercourse is an act amounting to the offence of cheating and punishable under section 417 of the IPCs.
- ***Hari Prasad ChamariaVs.Bhisun Kumar Surekha:*** **-**It is necessary to prove that dishonest intention was present from the very beginning.If there is mere non-fulfilment of promises it does not amount to cheating.
- ***Rajesh Bajaj Vs. State NCT of Delhi AIR 1999 SC 1216*****: -** with regard to the fact of inducement, the apex court made it clear that the intention of the accused must be looked into

rather than the nature of the transaction to decide the offence of cheating.

- ***Nageshwar Prasad Singh Vs. Narayan Singh: -***There are cases which might be of civil nature but the prosecutors file for criminal liability too. In this case, the accused and the complainant entered into a contract. A part of the consideration was paid by the accused and the rest of the consideration was not paid as agreed.

  The complainant filed a civil suit for specific performance of the contract, also filed a case of an offence of cheating against the accused. The apex court held that when the case was clear that there lies no dishonest intention to not fulfil the promise made due to the fact that a part of the consideration was already paid. This shows that this is a case of mere breach of contract but not cheating.

- ***Shankarlal Vishwakarma Vs. State of Madhya Pradesh: -***
  The difference between cheating and criminal breach of trust was expounded. In the offence of criminal breach of trust, although the accused misappropriated the property, one receives by entrustment of the victim.

  In cheating, there is no such entrustment nor there is any duty to remain trustworthy. There is deception committed by the accused upon the victim to induce the delivery of any property, which was misappropriated by the accused.

  Further the difference between the offence of criminal misappropriation and cheating lies in the fact that in the offence of cheating, the accused from the beginning, with the dishonest intention, induces the victim to take the possession of any property. But in the criminal misappropriation after possession of the property, there is dishonest intention to misappropriate it.

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Criminal Law Review 86 - 106

Drug Situation in India and the Shortcomings of NDPS Act, 1985

ACHIN GARG* & JYESHTHA MAITREI**

The Genesis and development of the Indian drug trafficking scenario are closely connected with the strategic and geographical location of India which has massive inflow of Heroin and Hashish from across the Indo-Pak border originating from 'Golden Crescent' comprising of Iran, Afghanistan and Pakistan which is one of the major illicit drug supplying areas of the world. On the north eastern side of the country is the 'gold triangle' comprising of Burma, Laos and Thailand which is again one of the largest sources of illicit opium in the world. Nepal also is a traditional source of Cannabis both herbal and resinous. Cannabis is also of wide growth in some states of India.

After Alcohol; Cannabis and opioids are the next commonly used substances in India. About 2.8% of the population (3.1 crore individuals), reports having used some form of cannabis product within the previous year. About 2.1% of the country's population (2.26 crore individuals) use opioids which includes Opium (or its variants like poppy husk known as doda/phukki), Heroin (or its

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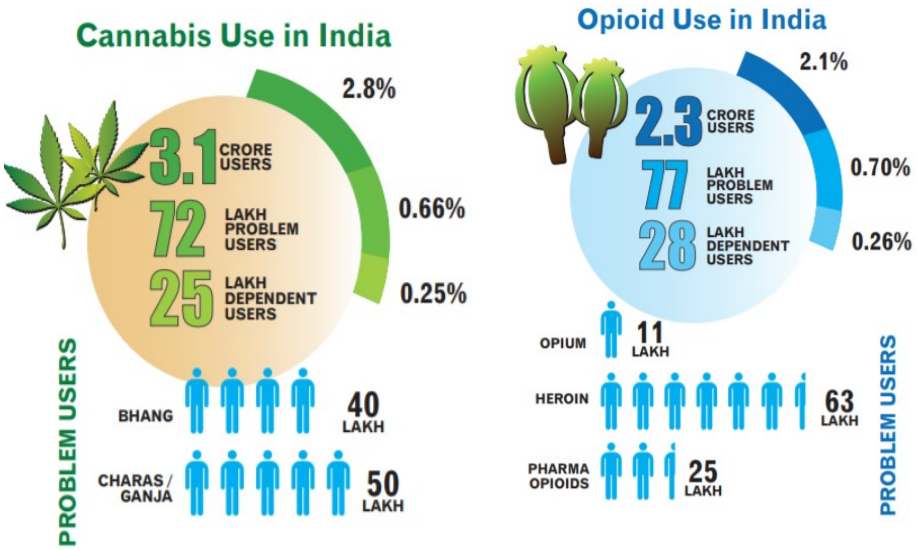
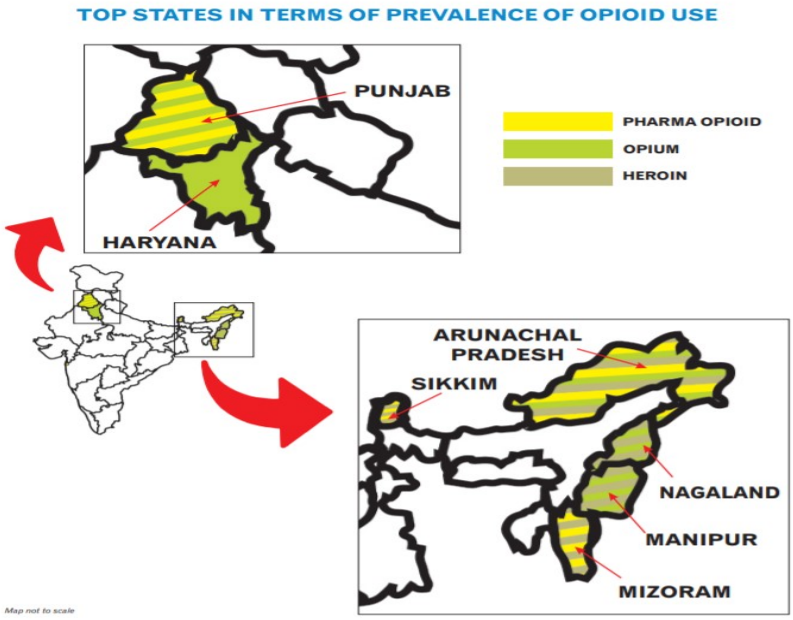
impure form - smack or brown sugar) and a variety of pharmaceutical opioids.





NDPS Act, 1985

The purpose of the Act as mentioned in the preamble of the Act:

"An Act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Conventions on Narcotic Drugs and Psychotropic Substances and for matters connected therewith."

In India, until 1985, Cannabis and its derivatives (Bhang, Charas and Ganja) were legally sold and were commonly used for recreational purposes. India opposed the Single Convention on Narcotic Drugs (1961) which was proposed by United States under law against all drugs. Thus, the convention came to a favourable decision giving India a 'Grace period" of 25 years to make Cannabis available for scientific and medical purpose and not for any other reason. Since it was a politically sensitive issue and India became obligated to the international delegations, this compelled Indian government to eliminate ethnically deep-seated use of Cannabis. Consequently, on 14 November 1985, NDPS Act was enacted, banning all narcotic drugs in India without much resistance.

NDPS Act mainly prohibits cultivation, manufacture, possession, sale, transport etc. of these drugs and substances except for medical and scientific purposes as provided in the act. Drugs covered under this act include Cannabis, Coca, Opium or any other narcotic substance. Main aims for enforcing this law were to control the manufacturing and distribution of drugs, to keep a check

on quality of drugs, to mandate display of ingredients in drugs and to prevent substance abuse in society.

Table 1: Common drugs in NDPS Act.

Drugs	SmallQuantity	Punishment	Commercial Quantity	Punishment	Intermediate(In between smaller & commercial quantity)
Heroin	5g	Maximum of 1 year rigorous imprisonment or a fine up to Rs 10,000 or Both.	250g	Rigorous imprisonment from 10 years (min) to 20 years (max) and a fine from Rs 1 lakh to 2 lakhs.	Rigorous imprisonment that may extend to 10 years & fine that may extend to Rs 1 lakh.
Opium	25g		2.5kg		
Morphine	5g		250g		
Ganja (cannabis)	1kg		20kg		
Charas(cannabis resin)	100g		1kg		
Coca leaf	100g		2kg		
Cocaine	2g		100g		
Amphet-Amine	2g		50g		
LSD	2mg		100mg		

Loopholes in NDPS Act, 1985

Apart from the sections defined which might need some reforms it is a necessity that this act should be reviewed time to time, since, every now and then a new drug or its derivative comes in existence as an addictive substance. For example, a new type of substance with basic similarities with amphetamine was seized in quite a large quantity in Maharashtra, India, about 2,640 bottles of Rescox cough syrup valuing for Rs.3lakh were seized. In such new kind of drugs and derivatives it becomes difficult to justify it under NDPS Act. Inclusion of new precursors, drugs and their derivatives with narcotic and psychotropic effect in act is required for increasing the effectiveness of the law.

On an average 76 percent were prosecuted and 28 percent were convicted in cases related to drugs according to a study conducted in Tihar jail. Indicating the ratio of conviction being too low against the drug cases reported. NDPS amendments, 2014 came in force on 1 May 2014. Under section 71 of NDPS act which explains the management of drug dependents cases and the rules for treatment facilities was incorporated. At the same time, the amendments

increased penalties for low-level offences and continued to criminalize the consumption of drugs. Producers of morphine just need a single license from respective State Drugs Controller unlike the earlier procedure which had prolonged steps and multiple licenses of different validation period. The amendment will ensure a uniform regulation for the whole country, eliminating state wise conflicts. Essential Narcotic Drugs which are used in medicinal preparations also including; Morphine, Fentanyl and Methadone, have been relaxed for easy accessibility among treatments provided.

The death sentence for repeated conviction for trafficking large quantities of drugs has been diluted with giving courts to discretely sentence for 30 years. On the other hand, punishment has been increased for "small quantity" offences from a maximum of 6 months to 1 year imprisonment after this amendment. Considerations for Future Effective implementation of NDPS act for regulating the drugs and its usage in the society needs to be kept under view. Ensuring the quality of drugs used for medical purposes is an important aspect which should be taken into consideration.

Data of drug addicts should be well maintained and regulated incorporating various organizations working in this area. Improvising co-ordination among states for investigation in cases related to drugs. Differentiating synthetic drugs from natural drugs can be helpful for clear lines of investigation. Transparency of the policy can be a great advent for effectively solving crimes related to drugs. Understanding the drug patterns is an essential requirement for eliminating the problem of illegal drugs from our country. Bringing awareness and educating can help in eradicate the problem of drug addiction in our country. Rehabilitation centers should co-ordinate with the central and state governments for

preventing the substance abuse of drugs and its practice in coming generations from the harms of substance abuse.

However, even after thirty-six years of enactment, the Act the war on drugs has failed due to the following reasons:

Shortcomings of the Act:

(i) Delays in trial- "Justice delayed is Justice denied." Special courts have been created under this Act to help deal with the cases. However, in many states, such courts are given the additional responsibility of dealing with other cases as well causing undue delays in the disposal of drug related cases. Further, it is quite difficult to find witnesses, often due to threats from the accused including possible bribes to turn hostile. A number of times long time-gaps between the occurrence of the crime and the trial cast doubts on the accuracy of the evidence leading to acquittal on grounds of insufficient evidence.

(ii) Stringent bail laws: Studies have found out that most of the drug users are from socially and economically backward classes. The elaborate provisions concerning bail coupled with an inherent lack of knowledge, ignorance and poverty often results in the poor vanquishing in prison. Courts cannot provide bail to those accused of offences under Sections 19, 24 or 27A of the NDPS Act and for offences involving commercial quantities (Section 2). Generally, all are innocent till proved guilty. But this law says that you are guilty unless proven innocent! The Act presupposes the guilt of the accused, reversing the onus of proving one's innocence, which is not the norm as per Indian jurisprudence. Section 35 presumes that an accused under this Act had the intent, motive and knowledge of and for his actions while Section 54 goes a step further to add that unless the contrary is proved it shall be presumed that the accused was in possession of the illicit articles seized from him. The initial

attitude was that drug abuse was a menace to society and needed to be checked. This factor overshadowed the norms set down for the enforcement officials for safeguarding the rights of the accused. Thus, there were several convictions for terms of 10 years' imprisonment and fines for possession of even very small quantities.

(iii) Poor understanding of the addiction problem. Addiction is a chronic, often relapsing brain disease that causes compulsive drug seeking and use despite harmful consequences to the individual who is addicted and to those around them. By consuming drugs, a person's brain becomes "rewired" to tolerate high amounts of dopamine neurotransmitters, but once those high amounts of dopamine cease to exist, the person experiences withdrawal symptoms. However, there are ways drug addicts can control their drug intake by using classical conditioning techniques, which allows them to associate drugs with negative attributes. The Act does not understand the concept of addiction, particularly in its provision of once in a lifetime reprieve to addicts with mandatory treatment. It, however, does attempt to provide some reprieve to the addicts. This is mentioned under Section 64A of the Act. Addicts typically relapse several times before stabilizing. This one-time reprieve shows a complete ignorance of the phenomenon of addiction on the part of policy-makers.

Though the Ministry of Social Justice and Empowerment has funded over 375 NGOs to run treatment centres, none of them are notified centres; instead they are only recognised as centres where patients can seek voluntary treatment. Of these, only three centres run under the Ministry of Health and Family Welfare are notified. The Act lays down the conditions and manner in which narcotic drugs and psychotropic substances shall be supplied for medical necessity to addicts registered at the centres (section 71 and 78).

But till date, no mechanism has been created at the district or state levels for this purpose. Further, the central registry of addicts was frozen in the late 1950s. This has had serious consequences on the type of addiction in the country.

Traditionally, India had a large number of opium consumers and an even larger number of people using cannabis in one form or another. Earlier, there were numerous retail outlets all over the country. But, with the advent of law, these natural products have become scarce even as heroin and several pharmaceutical drugs are available in plenty. Many users of traditional drugs have shifted to these extremely harmful drugs. Opium is bulky in comparison to heroin – one kilo of heroin is extracted from 10 kilos of opium. However, it is easier to transport, hide and sell heroin than the raw drugs. Since, heroin gives higher profits, it enables the peddler to bribe the authorities. In such a scenario, if one has to go to jail for 10 years for both opium and heroin, why sell opium?

This law has brought drug users in contact with criminal gangs who alone can buy political and police protection. Under section 27, illegal possession of certain drugs in small quantities intended for personal consumption only carries a punishment of upto one year or a fine or both. The amount of the specified drugs is listed by the central government and in case of drugs not listed, the punishment is upto 6 months or a fine or both. In the case of heroin, the small quantity specified is a quarter gram. Imagine sending a young man to 10 years' rigorous imprisonment for possession of a quarter gram of heroin! However, any addict convicted under this section may once in a lifetime be released for medical treatment subject to certain conditions, to any hospital or organisation maintained or recognised by the centre. The real loser, though, is the society, particularly the poor and marginalised. Just to prove the usefulness of the Act, the enforcement agencies are forced to file

several cases. Given the provisions of the Act and the manner in which they are used, many of the accused end up in jails, even as under trials. It is, therefore, crucial that we review our basic premises and reform this Act.

According to an amendment in 1989, in section 31A mentions death penalty for repeated offences if the quantity of drug seized is more than the certain limits. Many times it is debated that the NDPS Act does not distinctively differentiates between a casual drug user, a hard addict, a petty peddler and a seasoned drug trafficker.

(iv) Harsh Punishments: As per the Act, a convicted person shall be punished with rigorous imprisonment for a term of not less than 10 years which may extend to 20 years and a minimum fine of Rs one lakh which may extend to Rs 2 lakh or more (sections 15-25 and sections 27A-29). Offences relating to cannabis are punishable with a minimum sentence of five years and a fine which may extend to Rs 50,000 (section 20). Far greater punishment has been imposed for a repeat offence. The amendment in 1989, section 31A laid down the death penalty for second offences with regard to certain drugs if the quantity involved exceeded specified limits. As mentioned before, under Section 27, a person can be imprisoned for a period of 10 years for possessing even very small quantity of an illegal drug. Such provisions again make the Act very unpractical. As mentioned before, most of the substance abusers are from a rural or a poor background. These people will not able to pay the fines and due to the unavailability of legal aid, they are denied justice. The Act does not adequately discriminate between the addict, petty peddler and drug trafficker. There is a complete lack of distinction between various offences. Under the Act, any illegal activity related to drugs has been termed as trafficking and the punishment made absolute. Circumstances of the offence, intent of

the accused, discretion of the judges, all of which form the basis of deciding the guilt or innocence of an accused, have been done away with by a single stroke. The judge has to punish the convicted with a minimum 6 sentence of five years (in the case of ganja) and 10 years' rigorous imprisonment in other cases. The punishment cannot be commuted, reduced or transferred.

Action needed to be taken:

- Special Courts for the purpose of dealing with offences under the Act should be established in every major city. At the very least, an exclusive bench should be set up to deal with such cases. Further, the law enforcement agencies should be well versed with the sections of this Act. The fact that only a few under-trials are convicted under this Act highlights this major flaw.
- There should be a substantial reallocation of resources and particularly an increase in the provision of services for adolescents, women, people from minority ethnic communities and people with mental health problems.
- Treatment in prisons should also be considered but it should only be a secondary option. Most of the under-trials or convicts put behind bars for a prolonged period may resort to higher consummation of drugs. Where prisons are meant for reformation, such people will come out with a higher degree of addiction. Therefore, Prison authorities should cooperate closely with law enforcement agencies to keep drugs out of the prison system. Prison personnel should be discouraged from tolerating the presence of drugs in penal institutions.
- To be effective, demand reduction programmes should be targeted at all young people, particularly those at risk, and the content of the programmes should respond directly to

the interests and concerns of those young people. Preventive education programmes showing the dangers of drug abuse are particularly important. Increasing opportunities for gainful employment and activities which provide recreation and opportunities to develop a variety of skills are important in helping young people to resist drugs. Youth organizations can play a key role in designing and implementing education programmes and individual counselling to encourage the integration of youth into the community, to develop healthy lifestyles and to raise awareness of the damaging impact of drugs. The programmes could include training of youth leaders in communication and counselling skills.

- Prison sentences for possession only offences are not proportionate with the harm done by the offence, and they impose substantial harm of their own. If the objective is to reduce individual and social harm, as we believe it must be, there are better responses available whatever the drug involved. It is said that drug-related problems are more effectively addressed in the community than in a custodial setting.
- But, abolishing custodial penalties would rule out some community sanctions that are available to the courts only as alternatives to imprisonment. In most serious cases of problem drug use this will not matter because the offender charged with possession is likely to be charged with other offences at the same time. There may, however, be cases of problem drug users in possession of certain dangerous drugs but not charged with any other offence where the courts need to consider the full range of community orders. Because of the pre-eminent harm of these drugs, it should be accepted that a custodial sanction may be needed in such

cases. It would act both as an incentive to treatment and in order to enable the courts to consider the use of a wider range of such orders, including community service orders, than would otherwise be possible.

- A high rate of drug incarceration as a strategy to control drug use has at best a marginal impact and does not lead to a significant undermining of the drug market. Indeed, experience from around the world reveals the cost effectiveness of appropriate treatment and harm reduction programmes and interventions. There is a need to urge the Indian authorities to strengthen efforts to understand patterns and trends of drug use within the country, especially in rural areas falling along the drug trading routes and those close to cultivating areas. Develop methods for supporting socio-cultural controls on drug use.

Health Aspect of the Substance Abusers

To improve health, social and economic outcomes by preventing the uptake of harmful drug use and reducing the harmful effects of licit and illicit drugs. The Australian government's harm-minimisation strategy focuses on both licit and illicit drugs and includes preventing anticipated harm and reducing actual harm. Harm minimisation is consistent with a comprehensive approach to drug-related harm, involving a balance between demand reduction, supply reduction and harm reduction strategies. It includes:

1. Supply reduction strategies to disrupt the production and supply of illicit drugs, and the control and regulation of licit substances;
2. Demand reduction strategies to prevent the uptake of harmful drug use, including abstinence orientated strategies and treatment to reduce drug use, and

3. Harm reduction strategies to reduce drug-related harm to individuals and communities. Individual jurisdictions and non-government organisations will continue to develop plans and strategies that reflect the key elements of the National Drug Strategy, and will report annually on implementation of programs, activities and initiatives along with the promotion of partnerships between health, law enforcement and education agencies.

Conclusion

Though the intended purpose of the NDPS Act is evident, its success can be questioned with some commentators even going to the extent of terming it as 'draconian'. What is often observed regarding the NDPS Act is that the small fish get caught while the big fish escape and evade the law owing to their clout. There have been reports of how people who were merely sitting in the vicinity of drug users were caught and charged under this Act by the police. The Act also fails to provide an adequate distinction between minor and serious offenders as also the basis for the punishments laid out. In finality, these issues bring to light the existing loopholes in the NDPS Act which need addressing if its purpose, as mentioned in the preamble of the Act, is ever to be achieved.

Offences under NDPS Act.
Steps in investigation

1.Receipt of information from any source or personal knowledge. (Enclosed place, conveyance or building as per Section 42):

- Must be recorded in writing in the station diary or general diary before conducting raid between sunrise and sunset.
- If raid is planned to be conducted between sunset and sunrise and search warrant cannot be obtained without

affording for the concealment of the evidence, this must be recorded in the station diary

- A copy of the station diary should be seized and form part of the case record as a proof of compliance to S-42(1)
- A copy of the same should be sent to the immediate official superior as compliance to S-42 (2) (Within 72 hours in the amended act)
- Non-compliance of requirements under Section 42 would become suspect and one causing prejudice to the accused, but would not vitiate the trial ***(Baldev Singh vs. State of Punjab 1999 6 SCC 172); (Abdul Mansuri vs. State of Gujarat AIR 2000 SC 821)***
- In case of search of person and premises the provisions of CrPC (S-47, S-100, S-165) are to be followed. However, in case of personal search the requirements of S-50 of the Act are mandatory (Except in circumstances under Cl. 5 of S-50 of amended act).
- S-42 not applicable to Nakabandi ***(Hardeep vs Punjab,2001,CRL 1593)***
- The requirements of S-42 are not applicable to search in public places as search is conducted under Section 43.
- If information is received on the move and calls for immediate action, recording of information can be postponed***(Karnail Singh vs. State of Haryana 2009)***

2. Search of premises:

- Independent witnesses.
- Personal search of the officers of the raiding party and that of the witnesses before search operation.
- (Mention in the case diary or in the FIR)

3.Steps in investigation: S-50 Personal search of the accused,

- S-50 mandates that the accused should be given an option either to be searched by an executive magistrate or a gazetted officer.(Consent Memo shall be taken from accused)
- The constitution bench of the Supreme Court in ***Baldev Singh vs. State of Punjab 1999 - 6 SCC 172*** in order to sort out divergent views among different benches pronounced failure to inform the suspect of this right would cause prejudice to the suspect. Failure to conduct search in compliance to S-50 would render the recovery illicit articles suspect and vitiate the conviction and sentence.
- Search of a bag of a person is not the same thing as the search of the person. Hence, the provisions of S-50 are not applicable. ***(Kalema Thumba vs. State of Maharastra 1999 4 Crime. - 352 SC,State of H.P. vs.Charecton, 2001(1) Crimes 50)***
- Charas was seized, kept in a bag which was hanging on a scooter which the accused was riding. No charas was seized from the person of accused. It was held that in such case applicability of S-50 does not arise. ***(Saraju Das vs State of Gujarat 2000 CrLJ SC 509)***
- Amended Act 2001 alters this stand of the court. Section 50 (5) authorises search by the authorised officer dispensing with the presence of a magistrate/gazetted officer. However, there should be intimation to official superiors within 72 hours justifying the dispensation.

4. Seizure - sampling - sealing (S-55):
   - Weighment, seizure list and sealing to be done at the spot in presence of the accused, witnesses or G.O./E.M.
   - All packages/containers carrying contra band articles should be serially numbered.

- The packages/containers should be sealed at the spot neatly.

5. Arrest (S-52):

- Ground of arrest should be informed to the accused. A mention may be made on the FIR on the score.
- Arrest memo should be prepared at the spot and a copy be given to the accused.

6. Custody of seized articles (S-55):

- As per this section, the OIC of PS shall take charge and keep the seized articles in safe custody.
- To authenticate the requirements of the provision, the OIC should reseal the exhibits and mention the fact in the station diary. A corresponding entry shall be made in the Malkhana register.

7. Detailed report (S-57);

- Detailed report of arrest and seizure should be submitted to the next official superior within 48 hours.

8. Despatch of exhibits to FSL:

- No time limit has been provided in the Act.
- But it should be promptly despatched to the FSL.
- Unaccounted for delay raises serious doubt in the mind of the court. Chain of custody is vital ***(Vasala vs State of Kerala 1994 SC CrR 77)***

9. Drawl of FIR: FIR contains all the aspects till arrest of the accused. Hence the following aspects should find mention in the FIR: -

1. Record of ground of belief with station diary number entry.
2. Copy to the next official superior regarding the ground of belief as per S-42(2).

3. Name of the officers in the search party.
4. Name of the witnesses.
5. Giving out personal search before the witnesses by the search party before house or personal search.
6. Result of house search.
7. Compliance to S-50 in case of personal search. Name of the magistrate or G.O. to be given.
8. Weighment at the spot in presence of witnesses.
9. Drawl of sample, sealing undertaken.
10. Preparation of seizure list in presence of witnesses and copy given to the accused.
11. Arrest and intimation regarding the ground of arrest.
12. All these aspects to be kept in mind while drafting the FIR as in cases under NDPS Act complaint is given by the police officer or any authorised officer.

10. Documents to form part of the case diary: -

- Copy of the station diary in compliance to S-42(1).
- Written option of the accused whether wants to be searched before G.O./Magistrate as per S-50. (Though written option is not mandatory but is highly advisable.)- JustifyS-50(5)
- Copy of the station diary entry authenticating deposit of the seized items before the OIC and resealing by him. (S-55).
- Reference of the Malkhana register as per S-55.
- Copy of the detail report to the senior officer as per S-57.
- Document explaining delay in despatch of the exhibits.

11. Check List: -
    1. If the provisions of S-42 were followed, copy of the entry made in compliance to S-42 must be sent to official superior.
    2. If the I.O./witnesses gave their personal search before conducting the search and entry was made in the CD/FIR.

3. If the provisions of S-50 were followed/if dispensed with, U/s 50(5), grounds thereof.
4. If sealing was done properly and provisions of S-55 were followed and entry was made in CD/FIR.
5. If the provisions of S-52 were followed and entry was made in FIR/CD.
6. If the provisions of S-57 were followed and entry was made in the CD (a copy of the report sent by the I.O. to his superior officer must be attached).
7. Date of arrest of the accused and date of his forwarding to the court.
8. Date of seizure contraband articles and date of dispatch of contraband articles to FSL. In case of delay, the same must be explained on day-to-day basis.
9. Date of receipt of opinion from FSL.

Sample FIR

To,

The I.I.C., Chauliaganj PS.

Sub: FIR U/s 20 (b)(ii)(c) NDPS Act.

Sir,

I, SI Rabin Narayan Bhanja of Mahanadi Vihar Out Post P.S. Chauliaganja Cuttack present this report before you stating herewith that on 19.8.2010 at 5.30 P.M. I received reliable information from sources that huge quantity of contraband articles like "Ganja" had been kept inside a silver colour TATA SUMO vehicle bearing Regd. No. CG-04-1788 and the said vehicle was parked by the side of the road in front of plot No.1260 Shree Vihar Mahanadi Vihar located at a close distance of Reliance Fresh. One Srikant Samal of Jagatsinghpur had brought the Ganja and kept the same in the TATA Sumo vehicle and he would take the same for

the purpose of selling at Jagatsinghpur. So immediate raid was required otherwise the same TATA Sumo would leave the place.

I entered this information in the MohanadiVihar Out Post Station Diary vide SDE No.352 dtd. 19.8.2010. I sent a letter to DCP Cuttack/ACP Zone-I, ITC Chauliaganja P.S. regarding the information collected vide DR No.243 dtd. 19.8.2010 enclosing extract of the SDE 352 through Crime Havildar 1467 Sanatana Mallik vide CC No.481635 dtd. 19.8.2010. I informed the fact to the DCP Cuttack/ACP Zone-I and IIC Chauliaganja P.S. over telephone too. I along with ASI Dhruba Charan Samantray and ASI Suresh Ch.Swain proceeded to the spot by motor cycle to verify the authenticity of the information at 5.45 P.M. in the way to the spot, I took two independent witnesses, namely, Nihar Ranjan Das (26) S/o Nilamani Das of plot No. LA/7 Vigilance colony Mahanadi Vihar Cuttack and Sarat Ch. Barik (27) S/o Khirod Barik of Aparna Nagar P.S. Chauliganja Cuttack who were present at Justice Chhak, Mahanadi Vihar after explaining them about the purpose of raid. I requested them to accompany with us.

On reaching the spot we found one TATA Sumo vehicle bearing Regd. No. Ca-04-1788 was parked by the side of the road in front of plot No.1260 Mahanadi Vihar on the northern end of the road facing towards west and one young person, aged about 29-31 years, wearing yellow colour shirt and black colour full pant was sitting in the driver's seat and was about to start the vehicle. Immediately, the accompanying staff and I surrounded the vehicle and directed the person, who was sitting on the driver's seat to alight from the vehicle. I gave my identity to him and being asked the said person disclosed his identity as Srikant Samal, S/o Akhaya Kumar Sainal of Rangiagardha PO: Jhimini P.S. Paradeep Dist. Jagatsinghpurand now staying at JobraTelasahi P.S., Malgodown Cuttack. I told him that as per information contraband ganja had

been kept inside the said vehicle. He was fumbled. I told him my intention of taking his personal search and search of the vehicle. I intimated him verbally as well as in writing about his right to be searched in presence of either by a Gazetted officer or a Magistrate as per the provision of section 50 NDPS Act. The driver Srikanta Samal opted to be, searched in presence of a Gazetted Officer. I sent a requisition to the ACP Zone-I, Cuttack with request to remain present during search. Sri Nimain Charan Sethi, OPS, ACP Zone-I, Cuttack reached the spot in his vehicle. I intimated this information to the ACP.

Thereafter myself, ASI Dhruba Charan Samantray, ASI Suresh Ch.Swain and two independent witnesses gave their personal search to the suspect Srikant Ch.Samal in presence of ACP Zone-I but nothing incriminating articles were found. During search of TATA Sumo vehicle I found two plastic Bags on the rear seats and one DL of Srikant Samal vide DL No. OR-05-20080039104. In opening the bags it was found packed with contraband ganja. The recovered Ganja was shown to ACP Zone-I and the witnesses who were satisfied it to be Ganja. Being asked Srikant Samal failed to produce any authority or license in support of his possession of the said contraband ganja. On further question he stated that he had procured the ganja from Angul and was preparing the same for sale in retail at Jagatsinghpur.

I asked ASI Dhruba Charan Samantray to bring a weigh-man along with packing materials and weighing machine. After sometime ASI Dhruba Charan Samantray returned to the spot along with packing materials, weighing machine and weigh-man, namely, Mahesh Sahu S/o LalanSahu of Gandhipali P.S. Chauliaganj, Cuttack. I asked Srikant Samal to take personal search of weigh man as well as checked the weighing instruments. Accordingly, Srikant Samal took personal search of the weigh man

and verified the weighing machine. After weightment of those 2 ganja bags, the quantity of Ganja containing in the white plastic bag was found to be 25 Kgs. which was marked as Ext. A. The other plastic bag was containing 30 Kgs of Ganja which was marked as Ext. B. I put my specimen brass seal embossed in two separate sheets of paper with the signature of ACP Zone-I, the weigh-man, and accused Srikant Samal. I put one sheet of paper in each bag and stitched the plastic bags marked as Ext-A and Ext-B. I seized the two contraband Ganja bags including the TATA Sumo vehicle bearing Reg. No. 0G-04-1788 having Eng. 47Lzz775386 and chassis no. 80Lzz 925458 and DL No. OR-05-20080039104 of Srikant Samal in presence of the witnesses and ACP Zone-I at 8.30 P.M. and prepared the seizure list and made over a copy of seizure list to accused Srikant Samal. I also seized the weighing machine and left the same in zima of Mahesh Sahu. After sealing, I handed over the personal brass seal in zima of Sri Nihar Ranjan Das executing a zimanama with an instruction to produce the same in the court of law during trial and to keep it in safe custody.

As the accused Srikant Samal was found in exclusive and conscious possession of 55 Kgs. of ganja in his vehicle for selling he committed an offence U/s 20(b)(ii)(c) NDPS Act. Therefore, I arrested him at 9.30 P.M. explaining the grounds of arrest after observing all formalities of arrest. I along with the raiding party came to Chauliaganj P.S. with the accused Srikant Samal and the seized two ganja bags marked as 'A' & 'B', TATA Sumo Vehicle, DL of Srikant Samal and produced the same along with the seizure lists and zimanama of my personal brass seal etc. for necessary action.

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Sedition and Free Speech

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"Give me the liberty to Know, to utter, and to argue freely according to conscience, above all liberties." – John Milton, Areopagitica.

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." – UN, Universal Declaration of Human Rights.

Free speech allows the conveyance of an individual's ideas and opinions without fear or threat to his/her life. A liberal Democracy establishes itself on the idea of rule by self (In India through parliamentary representation) and allows its citizens to willfully express their opinions on all issues unhindered. By Definition free speech implies that it is FREE which by extension would mean that it will be extended to every citizen equally. In most multicultural societies, this inevitably leads to a conflict between the state and the individual. As a result, the state imposes certain restrictions to curtail speech that may lead to disorder. Countries all over the

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world have grappled with the idea of how much free speech can be free? It can be thus argued that Freedom by definition comes with regulation.

Liberty and Freedom that forms the bedrock of this nation and is enshrined in the soul of the constitution are promised in the preamble. However, recent cases show that the essence and practice of its expression stand in contradiction. This paper looks at free speech and sedition in the light of three broad debates:

1. Can freedom of speech be absolute?
2. Can the law of sedition be repealed or reviewed?
3. Can free speech and sedition exist together?

Free Speech under the Indian Constitution-

In India, the right to freedom of speech and expression is endowed under article 19 (1) (a) of the Constitution. It guarantees the right to express one's views and opinions at any issue through any medium, eg. by writing, printing, picture, film, or by spoken words. It thus includes the freedom of communication and the right to propagate or publish opinion. However, under article 19(2) the state may make a law imposing reasonable restrictions on the exercise of the right to freedom of speech and expression. Limitations imposed by article 19(2) serve two purposes: one, it clarifies that these freedoms are not absolute and the other they limit the power of the legislature to restrict these freedoms by bringing in the clause of reasonable restriction. Reasonable restriction may be imposed on the grounds of – interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency, or morality or in relation to contempt of court, defamation or incitement to an offence.

Law of Sedition

Sedition is largely understood as an offence against public equanimity and is in some way or the other connected to public disorder. Sedition is a criminal offence under Section 124A IPC which states, "Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the government established by law in India, shall be punished with imprisonment for life, to which a fine may be added; or, with imprisonment which may extend to three years, to which fine may be added; or, with fine."

Can free speech be Absolute?

One of the larger debates revolving around Freedom of speech and expression, globally is regarding whether freedom of speech and expression can be absolute or not. Scholars from Salman Rushdie, Christoper Hitchens, Richard Dawkins to Javed Akhtar, Douglas Murray have argued that it should be absolute for the simple reason that freedom of expression consists of being able to tell people what they precisely do not want to hear. More often than not, (at least historically) those in power had to lose more from criticism (e.g. The Colonial masters in colonies) and hence, had to order laws to prohibit such expression. As Abraham Lincoln once stated, "As I would not be a slave, so I would not be a master." This represents the spirit of liberal democracies that are suspicious of laws that would limit the power in the hands of few and to an extension also represents the intense dislike the members of the drafting commission had regarding sedition in India. However, in *Devidas Ramachandra Tuljapurkar vs. State Of Maharashtra & Ors* on May 14, 2015 the SC expressed that, "Freedom of Speech and Expression has to be given a broad canvas, but it has to have

inherent limitations which are permissible within the constitutional parameters" - bench of Justices Dipak Misra and PC Pant. As a result, the SC refused to quash criminal charges against an author for penning vulgar poem on Mahatma Gandhi.

Can the law of Sedition be repealed or reviewed?

Another big question regarding the law of Sedition, is pertaining to its colonial mindset and the need to repeal or review it.

Colonial Legacy of Sedition

Sedition as a concept comes from Elizabethan England, where if one was found to have criticized the King or was forming a rebellion, it was a crime against the state. Sedition as an offence was first introduced by the Britishers in India because the colonial rulers wished to penalize anyone who intended to rebel against the state. The law was originally framed by Thomas Babington Macaulay. The SC very clearly mentions in its various judgments that Sedition can only be charged against the state, not the government. A. G. Noorani write that,"Bal Gangadhar Tilak, Maulana Azad, Annie Besant, Mahatma Gandhi, Jawaharlal Nehru and many others suffered imprisonment under this barbaric, archaic law."So much so, that Mahatma Gandhi termed Section 124A as the "prince among the political sections of the IPC designed to suppress the liberty of the citizen." He also referred to sedition as - "rape of the word Law" (Ramchandra Guha, 2016). And yet, in the post independent India, this law has been used time and again by both the right and the left wing parties. Two events are most telling of this fact according to Guha: the murder of Gandhi on 30th Jan 1948 and six weeks later, CPI declaring armed war against the Indian state, presenting a new born country with both right wing and left wing extremism. The paramount question in front of

Nehru, Patel and Ambedkar was thus to protect the center and this is how article 19(2) was introduced which became the first amendment to the constitution of India, restricting freedom of Expression (Ramchandra Guha, 2016). In one of the interviews, Abhinav Chandrachud (advocate, Bombay HC) while talking about the need to review Sedition, states that, "the historical context in which this law was introduced no longer exist, which is why the law itself should be repealed."

As it turns out, India is the only country to continue using the same definition of sedition that was introduced by the British India in 1870 despite the inhibitions of the framers of the constitution. Their actions were expressly noted by the SC itself in 1950 in *Brij Bhushan and Romesh Thapar* case. AP Shah, in his MN Roy memorial lecture states that the decisions of SC prompted the First amendment to the Indian Constitution (ironically the first amendment of US prohibits the state to make any law against limiting free speech whereas the first amendment in India imposes those restrictions) wherein article 19(2) was amended and undermining the security of state was replaced with 'in the interest of Public order'. According to the then PM Jawaharlal Nehru in context of Sec 124A, "as far as I am concerned that particular section is highly objectionable and obnoxious and it should have no place both for practical and historical reasons. The sooner we get rid of it the better" (Nehru, 1949, Parliamentary Speech).

Historical Context –

1950s –

1950s witnessed three important decisions regarding the Sedition law. These were, *Tara Singh Gopichand V. The State, Sabir Raza V. The State and Ram Nandan V. The State.* In the first two Cases, the courts upheld that the Section 124A of the IPC had

become void on the enforcement of the constitution. It was in the Ram Nandan Decision, that the Allahabad High Court had to decide the constitutional Validity of Sec 124A. The court held that for the possibility of working of our democratic system, it was essential for criticism of policies and execution of policies and, "if such criticism without having any tendency in it to bring about public order, can be caught within the mischief of Section 124A of the IPC, then that section must be invalidated because it restricts freedom of speech in disregard of whether the interest of public order or the security of the state in involved, and is capable of striking at the very root of the constitution which is Free speech."
1960s-

The *Ram Nandan V. The State* judgement was overruled by the Supreme Court of India in 1962 in *Kedar Nath V. The State of Bihar.* The SC upheld the constitutionality of Section 124A of IPC. The court was of the view that any act within the meaning of sedition under Section 124A which could have the effect of subverting the Government would be a crime as the feeling of disloyalty towards the "Government established by Law" would impart the idea of public disorder by the use of actual violence. The SC, however, clarified that the section has been carefully worded to, "indicate clearly that strong words used to express disapprobation of the measures of Government with a view to their improvement or alteration by lawful means would not come within the section."

60s and beyond

In Another landmark judgement, the SC in 1995 in the *Balwant Singh V. The State of Punjab* case set aside the charge of Sedition in relation to anti-India slogans. The verdict opined that mere casual slogans having no effect on public order in terms of

provocation to violence do not constitute sedition. Justice Shah explains that, Instead of simply looking at the 'tendency' of the words to cause public disorder, the court held that 'Raising of some lonesome slogans, a couple of times… which neither evoked any response nor reaction from anyone in the public" did not amount to sedition.

A third landmark judgement by The Bombay High Court in *Sanskar Marathe V. State of Maharashtra and Ors* noted, where the case was dismissed after the state submitted an undertaking to issue guidelines as a circular to police personnel across the state to ensure that when evaluating whether a speech, words, cartoons etc. would be seditious – "the words, signs or representations must bring the Government (Centre or State) into hatred or contempt or must cause or attempt to cause disaffection, enmity or disloyalty to the Government and the words/signs/representation must be an incitement to violence or must be intended or tend to create public disorder or a reasonable apprehension of public disorder." The HC here notes that the words/signs/representations against politicians or public servants by themselves do not fall in this category unless the words/signs/representations show them as representative of the government. It again, notes (following the earlier suit) that comments expressing disapproval or criticism of the Government with a view to obtaining a change of government by lawful means are not seditious."

The courts have categorically, held a progressive approach towards the reading of the section 124A of IPC. Yet, multiple reports and data show that despite this persistent stipulation, sedition charges are levied against individuals for mere criticism of the government, disillusionment with policies and its advocacy in public and expressing contempt against what is morally or religiously acceptable in our society. Time and again legal scholars,

lawyers, intellectuals, academicians, civil rights activists, human rights advocates have as a result argued that it is time that we get rid of this seditious law which has no place in a free country. In fact, Britain (which gave us this law) itself outlawed this provision in 2009, which came into effect in 2010. New Zealand, Australia, the US all have either discarded the sedition law or have amended it to reflect the idea of freedom of expression in a modern society.

Can free speech and Sedition exist together?

More Recently, two very important judgements have triggered fresh deliberations on free speech particularly pertaining to freedom of Media: the *Vinod Dua V. the UOI case* June 3, 2021 and the restraint against AP police's sedition charges against two TV news channels by the SC. In the former case, the court held that, "a citizen has a right to criticize or comment upon the measures undertaken by the Government and its functionaries, so long as he does not incite people to violence against the Government established by Law or with the intention of creating public disorder" (Indian Kanoon report). In the latter case, On May 31, 2021 the SC agreed to examine the constitutional validity of the sedition Law, filed by Andhra Pradesh Police against TV channels TV5 and ABN while observing that, "We are of the view that the ambit and parameters of the provisions of Sections 124 A, 153A and 505 of the IPC 1860, would require interpretation, particularly in the context of the right of the electronic print media to communicate news, information and the rights, even those that might be critical of the prevailing regime in any part of the nation." It is to be noted that originally the constitution did not separately mention about the freedom of media because Dr. B.R. Ambedkar, the chairman of the drafting commission expressed that the rights of individuals are not separate from the rights of media regarding free speech. It is however pertinent to ask in the light of the current

judgement that apart from the rights of media, the rights of students, activists, human right advocates, public intellectuals are also equally important to be safeguarded.

A second reading of the sedition law apart from free speech of the Press, comes from reading of nationalism and imposition of sedition charges on student activists and public intellectuals. Nationalism can be categorized into two types: Civic Nationalism and Ethnic Nationalism. Civic Nationalism is what allows us to respect the country, value the traditions and appreciate the Nation but a narrow understanding of nationalism would read into ethnic nationalism that only cares about national affirmation to limited ethnic identity. India is a diverse country and conflicts between diverse ethnic groups are bound to erupt. The need of the hour is to respect these diversities and affiliations not suppress them or silence those who hold opposing views especially to the dominant ones. Elevating one view over other and rejecting internal or external criticisms can only lead to further polarization. As, Harry Truman wrote: "Once a government is committed to the principle of silencing the voice of opposition, it has only one way to go, and that is down the path of increasingly repressive measures, until it becomes a source of terror to all its citizens and creates a country where everyone lives in fear." Reading of sedition and anti-nationalism in reference to cases against Kanhaiya Kumar, Umar Khalid, Anirban, Natasha Narwal, Sharjeel Imam, Devangana Kalita, Aisha Sultana needs a more broad and nuanced understanding on the issue.

In the Defense of the State: -It is comprehensible with this reading that there exists a conflict of interest as the government in India is not only the upholder of the constitutional principle of freedom of speech but is also the upholder of law and order and in the latter capacity it often finds itself taking decisions that undermine the

former. It is amply clear that Section 124A of the IPC is constitutional and is necessary requirement to ensure the stability of the state and equip the government with the tools necessary to effectively combat disruptive, terrorist and secessionist activities and preserve the integrity of the nation. The role of the State becomes more complicated with the change in contemporary mode of communication where information is not limited in the hands of a few and wider public participation can lead to polarization with much ease. We have social media where online trolls regularly give threats of rape and murder which has further aided the curtailment of free speech. Therefore, it is extremely important to read the clause of reasonable restriction with caution and responsibility to protect dissent. Free speech is the rule and state restrictions are an exception, and the exceptions cannot overshadow the rules, since it needs to pass the test of reasonableness in order to be identified as an exception. In this light, it is imperative that the state bridges the gap of vagueness that exists between the speech and its proximity to causation of public disorder.

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Understanding the role of Police in Custodial Deaths and Encounter Killings

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Custodial Death is defined as death of a person due to any form of torture or cruel, inhuman or degrading treatment by the police officers, whether it occurs during investigation, interrogation or otherwise. Custodial death can be broadly classified into three types:

- Death in police custody (Lock up)
- Death in judicial custody (Prison/ Jail)
- Death during the transit of under trial prisoners

Death during exchange of fire is called "death in police firing".
In every criminal justice system, the police officers have the right to injure or to cause death of the criminal for the sole purpose of self-defence and maintenance of public peace and order. However, nothing must be done with any malafide or dishonest motive or to settle personal benefit. If use of the force by the police can't be justified and death falls outside the scope of Supreme court's and NHRC guidelines then it shall be a crime

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and police officer shall be guilty of an offence of culpable homicide and murder under IPC and disciplinary proceedings may be initiated by the concerned police department.

Article 21 of Indian Constitution doesn't say anything against custodial torture but its ambit is quite extensive. This right states that no person shall be deprived of his/her life or personal liberty except according to procedure established by the law. This right includes constitutional guarantee against torture, assault, injury, and thus act as a safeguard, therefore it is imperative for police officers to work for the prevention and prohibition of custodial torture to uphold the supremacy of personal liberty of a person.

Procedure after custodial death or death in police firing: -

- **MAGISTERIAL INQUIRY: -**
    - Sections 174 and 176 CrPC defines the role of police and Magistrate into inquiring the cause of suicide and death;
    - When any person dies while in the custody of the police or when the case is of the nature referred to in clause (i) or clause (ii) of Sub-Section (3) of section 174 (suspicious death of married women within 7 years of marriage);
    - The nearest Magistrate (executive) empowered to hold inquests, may hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police officer; and if he does so, he shall have all the powers in conducting it.
    - Sec 176 (1A) CrPC states that where: -
        - *any person dies or disappears, or*

- *rape is alleged to have been committed on any woman, while such person or woman is in the custody of the police or in any other custody authorised by the Magistrate or the Court,*
- *in addition to the inquiry or investigation held by the police, an inquiry shall be held by the Judicial Magistrate or the Metropolitan Magistrate, within whose local jurisdiction the offence has been committed.*

- The Magistrate holding such an inquiry shall record the evidence of witnesses;
- Whenever such Magistrate considers it expedient to make an examination of the dead body then exhumation will be done;
- The Magistrate shall, inform the relatives of the deceased whose names and addresses are known, and shall allow them to remain present during the inquiry;
- The Judicial Magistrate or the Metropolitan Magistrate or Executive Magistrate or police officer holding an inquiry or investigation, shall, within twenty-four hours of the death of a person, forward body nearest Civil Surgeon for PME (post-mortem examination).

- **Supreme court Notice to Centre & States on sec 176(1A) CrPC**

  - The Supreme Court on 24th Jan 2020 issued notice to the Centre and States on a petition by human rights activist Suhas Chakma for

the implementation of Section 176(1A) of the CrPC.

- According to the provision, it is mandatory to conduct judicial inquiry in cases of death, disappearance or alleged rape in police or judicial custody.
- "Death or disappearance of persons not remanded to police custody by court is nothing but murder/killing of the defenceless citizens/persons who have appeared after being summoned by the police or already taken into custody," said the human rights activist quoting NCRB figures.

Dos and Don'ts in preventing and handling Custodial death:

1. **Dos**
    a. Enquiry by Judicial Magistrate or Metropolitan magistrate is mandatory in only those cases of custodial death where there is reasonable suspicion of foul play or well-founded allegations of commission of offence (preferably within three months).
    b. All other cases of Custodial death where death is **natural** as caused by **disease** may be enquired into by an Executive Magistrate.
    c. To prove that death is natural or by a disease, it is important to mention medical record, previous hospital history etc in the Case Diary.
    d. When a complaint is made against police alleging committing of a criminal act recognized as cognizable case of culpable homicide, an **FIR**

must be registered under appropriate sections of the IPC.

e. All cases of deaths in police action in the States shall be preliminary reported to the NHRC by the Senior Superintendent of Police/Superintendent of Police of the District within 48 hours of such death.
f. A **second report** must be sent in all cases to the NHRC **within three months** providing information like post mortem report, findings of the magisterial enquiry or enquiry by senior officers etc.
g. Photography and videography of the scene of crime is must.
h. Never bring a drunken person to a Police Station or outpost. Send him directly to hospital with a request for examination.
i. Ensure CCTVs are functional in prisons and Lock ups of police station.
j. Ensure inspection of lock ups and prisons on regular basis to detect any pernicious material which may be dangerous to the life of the prisoner.
k. Deploy 24x7 sentry before the lock up in a police station.

2. **Don'ts**
    a. Never delay registration of FIR and institution of magisterial probe.
    b. Negligence in following the guidelines of NHRC.
    c. Unjustified delay in post mortem examination.
    d. Non-intervention of senior officers at right time. For example, not suspending the police person who has been alleged to commit a criminal offence.

e. Failure in enquiring the health status of arrested person.
f. Failure in conducting photography and videography of scene of crime.

Procedure in handling of death in police firing: -

In the *PUCL vs State of Maharashtra case (2014), Supreme Court has laid down the following* ***16-point guidelines*** *as the* ***standard procedure*** *to be followed for* ***thorough, effective, and independent*** *investigation in the cases of death during police firing:*

1. **Record Tip-off:** Whenever the police receive any intelligence or tip-off regarding criminal activities pertaining to the commission of a grave criminal offence, it must be recorded either in writing or electronic form. Such recording need not reveal details of the suspect or the location to which the party is headed.
2. **Register FIR:** If in pursuance to a tip-off, the police use firearms and this results in the death of a person, then an FIR initiating proper criminal investigation must be registered and be forwarded to the Court without any delay.
3. **Independent Probe:** Investigation into such death must be done by an independent CID team or a police team of another police station under the supervision of a senior officer. It has to fulfil eight minimum investigation requirements like identify the victim, recover and preserve evidentiary material, identify scene witnesses, etc.
4. **Magisterial Probe:** Mandatory magisterial inquiry into all cases of encounter deaths must be held and a report thereof must be sent to the Judicial Magistrate.

5. **Inform NHRC:** The NHRC or State Human Rights Commission (as the case may be) must be immediately informed of an encounter death.
6. **Medical Aid:** It must be provided to the injured victim/ criminal and a Magistrate or Medical Officer must record his statement along with the Certificate of Fitness.
7. **No Delay:** Ensure forwarding of FIR, Panchnamas, Sketch, and Police Diary entries to the concerned Court without any delay.
8. **Send Report to Court:** After full investigation into the incident, a report must be sent to the competent Court ensuring expeditious trial.
9. **Inform Kin:** In the case of death of accused criminal, their next of kin must be informed at the earliest.
10. **Submit Report:** Bi-annual statements of all encounter killings must be sent to the NHRC by the DGPs by a set date in a set format.
11. **Prompt Action:** Amounting to an offence under the IPC, *disciplinary action must be initiated against the police officer found guilty* of wrongful encounter and for the time being that officer must be suspended.
12. **Compensation:** The compensation scheme as described under Section 357-A of the CrPC must be applied for granting compensation to the dependants of the victim.
13. **Surrendering Weapons:** The concerned police officer(s) must surrender their weapons for forensic and ballistic analysis, subject to the rights mentioned under Article 20 of the Constitution.
14. **Legal Aid to Officer:** Intimation about the incident must be sent to the accused police officer's family, offering services of lawyer/counsellor.

15. **Promotion:** No out-of-turn promotion or instant gallantry awards shall be bestowed on the officers involved in encounter killings soon after the occurrence of such events.
16. **Grievance Redressal:** If the family of the victim finds that the above procedure has not been followed, then it may make a complaint to the Sessions Judge having territorial jurisdiction over the place of incident. The concerned Sessions Judge must look into the merits of the complaint and address the grievances raised therein.

The Supreme Court directed that these requirements/norms must be **strictly observed** in all cases of death and grievous injury in police encounters by treating them as **law declared under Article 141** of the Indian Constitution.

Role of Police in cases of handling and preventing cases of custodial deaths and encounter killings:

1. Establish a good and cordial relation with district collector and district judge for impartial, neutral and speedy inquiry of afore mentioned cases.
2. Do not bring any drunkard to a PS even if he is creating nuisance. Send him to hospital for examination.
3. Let your subordinates enquire about health status of arrested persons to preclude custodial deaths. Medication, checking up your Police Station toilets, no blades, no phenol bottles, no cleaning acid etc should be present there.
4. Remember most of those died in lock up are petty thieves & those who had health problems.
5. In case of alleged lock up death, take photographs and videography of scene of crime.

6. Inform your SP/CP/DIG immediately on occurrence of any of such cases and also inform District collector for initiation of magisterial enquiry.
7. Inform the kith & kin of the deceased duly making GD entry of same.
8. Inform the media and brief them about the facts to establish credibility among public.
9. SP should appoint another Inspector of another Sub division to take up investigation for ensuring fair and impartial investigation.
10. Inform relatives that departmental action is being taken against concerned police officers & compensation process will be taken up.
11. Let your police personnel who are suspected to be examined by Executive magistrate to record their version.
12. Let Executive Magistrate send body for post-mortem examination to hospital to be performed by two doctors one of whom to be of civil surgeon rank. Keep an experienced police officer in mufti to explain due procedure to Executive Magistrate.
13. Send a draft occurrence report to the SP/CP within 24 hours. SP/CP to send brief report in prescribed format to NHRC within 48 hours by mail with copy to SHRC and send a hard copy by post.
14. Take disciplinary action against the erring police personnel.
15. Prepare a grave crime report within a week to the General Administration Department (CS to Govt) with a copy to SP/DIG/ADGP CID & DGP.
16. If found expedient, hand over the case to CID with all necessary documents and records.

17. You may write to District Collector or DLSA for payment of compensation to the deceased family.
18. In case of Judicial Enquiry, request DGP to appoint one of the best Public Prosecutors as Special Public Prosecutor to present the case on behalf of State.
19. Be in touch with your High Court Public Prosecutor to file counters in High Court or in "House motion."
20. Be open minded. Don't go beyond a point to protect your erring subordinates.

References:

1. PUCL vs State of Maharashtra and Others 2014
2. NHRC guidelines, 2010
3. Indrajit Singh vs State of UP 2014
4. Maneka Gandhi vs Union of India 1978