

Road to Rule of Law Strict Laws or Better Implementation

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The Rule of law symbolises the quest for civilised democratic society.¹ It is said that there is a direct relationship between democracy and the rule of law.² When Rule of law is not existing in a society, it “produces more violence, less security, and diminished economic capacity.”³ Rule of law is the foundation of good governance. To ensure the Rule of Law, various laws are enacted to maintain law and order in the state.

After the Nirbhaya incident, the laws covering the offences against women were made stricter. Criminal Law (Amendment) Act, 2013⁴ broadened the definition of rape to cover more than just vaginal penetration. Stalking, voyeurism, acid attacks were also made punishable under the Act. The punishments were made more stringent. The age of consent was increased to 18 years, below which all penetrative sexual acts will now constitute statutory rape which means that even if the consent is obtained from the girl but her age is below 18 years then the consent won't have any effect whatsoever. Hon'ble Supreme Court has held that just because any female has had intercourse quite a few times previously, it does not in any way affect her right to consent for that particular incident of when the rape is alleged.⁵ By a recent amendment, death penalty has also been introduced for the offence.⁶

Fredd Riggs' Formalism

Fred Riggs in his Prismatic Model of Society has used the term “prismatic society” to denote a “transitional society”.⁷ This model basically represents that a fused society after going through prismatic stage becomes a refracted society. Here, refracted society is the developed society while the prismatic society is the developing

¹ Soli J. Sorabjee, *The Rule of Law: A Moral Imperative for The Civilised World*, (2014) 6 SCC J-27, 28.

² HR Khanna, *Rule of Law*, (1977) 4 SCC J-7, 8.

³ JAMES A. GOLDSTON, *New Rules for the Rule of Law*, in *THE INTERNATIONAL RULE OF LAW MOVEMENT: A CRISIS OF LEGITIMACY AND THE WAY FORWARD* 3 (David Marshall ed., 2014).

⁴ The Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013.

⁵ State of UP v. Pappu, 2005 Cr LJ 331.

⁶ The Criminal Law (Amendment) Act, 2018, No. 22, Acts of Parliament, 2018.

⁷ Fred Riggs, *Prismatic Society and Financial Administration*, 5 ADMINIS. SCIENCE Q. 2 (1960), <https://www.jstor.org/stable/2390823> [hereinafter “Riggs”].

society. The developing society is the transitional society.⁸ One of the characteristics of the transitional society is the “formalism”.⁹ A system is *formalistic* when its formal structure fails to correspond to the effective behaviour of the society.¹⁰ Formalism will be more in the society where a greater difference lies between formal and actual.¹¹ India being a developing nation will fall under the category of prismatic society. And, indeed enough the formalism lies in the Indian system. India has on paper a very good legal framework. However, when it comes to practise, a sheer lack and void-ness can be seen with regards to the enforceability.

The Real Picture

The NCRB data present a very concerned picture of the crime rates in India. During 2017, registration of cases under IPC have increased by 2.9% and SLL (special and local laws) crimes by 4.8% over 2016.¹² Crimes against women have seen an increase of 5.80% in 2017 from that in 2016.¹³ In the cases of rapes around 42,789 accused were charge-sheeted in 2017 alone.¹⁴

The figure has been staggering. It is essential to take note that these are those numbers which were reported, however, many of these incidents are not brought before the authorities because the perpetrators in many of these cases are either family members or some “person with power”.

The question pertinent to raise is what is more required strict laws or better implementation. We have a good framework of laws but the rising crimes makes it evident that there is some deficiency in the implementation. It starts right from the reporting stage where reluctance appears on behalf of the victims to report the incidents of rapes or sexual assaults.

1. Unfair investigation- In several cases, the perpetrator has the links with the political parties or someone who is “person with powers”. This political collusion effects the investigation by the police. The investigation is carried out in unfair and influenced manner which aids the accused and proves to be against the victim.

⁸ Marume et al., *Comparative Public Administration*, 5 INT’L J. OF SCIENCE AND RESEARCH 1025, 1029 (2016), <https://www.ijsr.net/archive/v5i1/NOV152468.pdf>

⁹ Muneer Ahmed, *Ecology of Administration: A Resume of Riggs’ Model*, 8 PUNJAB UNIV. ECON. 23, 28 (1970), <https://www.jstor.org/stable/25825386>

¹⁰ Riggs, *supra* note __, at 18.

¹¹ Riggs, *supra* note __.

¹² MINISTRY OF HOME AFFAIRS, NATIONAL CRIME RECORDS BUREAU, CRIME IN INDIA – 2017 SNAPSHOTS (STATES/UTS) xiii (2017), <http://ncrb.gov.in/StatPublications/CII/CII2017/pdfs/CII2017-Full.pdf>

¹³ MINISTRY OF HOME AFFAIRS, NATIONAL CRIME RECORDS BUREAU, CRIME IN INDIA – 2017 CRIME AGAINST WOMEN (IPC + SLL) - 2015-2017 195 (2017), <http://ncrb.gov.in/StatPublications/CII/CII2017/pdfs/CII2017-Full.pdf>

¹⁴ MINISTRY OF HOME AFFAIRS, NATIONAL CRIME RECORDS BUREAU, CRIME IN INDIA – 2017 DISPOSAL OF PERSONS ARRESTED UNDER IPC CRIMES (CRIME HEAD-WISE) (STATE/UT-WISE) – 2017, 1192 (2017), <http://ncrb.gov.in/StatPublications/CII/CII2017/pdfs/CII2017-Full.pdf>

2. Low conviction rate- Since the investigation is conducted in improper manner, the evidences are not gathered accurately and appropriately. This impacts the trial adversely and makes the prosecution ineffective. This is one of the major reasons for low conviction rates. The conviction rate in rape cases was merely 32.3%.¹⁵ Only about 7,268 accused were convicted in 2017.¹⁶
3. Less deterrence- When the conviction is low, it fails to provide the requisite deterrence which is expected from a penal law. If any legislation has been unsuccessful in meeting its objective, the whole exercise is rendered futile.

The effectiveness of the law in addressing the ground problems is tested by how effective its implementation is. Even the greatest law is rendered ineffective because of its poor implementation.

In justice delivery system there is a dichotomy, *justice delayed is justice denied* and *justice in haste is justice in waste*. Madhava Menon Committee on Criminal Justice System had noted that two major problems which confronts this system are the pendency and delayed disposal of cases, and low convictions.¹⁷ One of the biggest afflictions of the justice system is the snail's pace at which it proceeds. There are around 22.6 million criminal cases pending before the lower judiciary.¹⁸ Around 42,000 of those are more than 30 years old.¹⁹ When the criminal justice system fails to deliver the justice in timely reasonable manner, citizens are left discontent. This has a serious repercussion as it may end in public taking law in their hands or the police, being moved by the public sentiments, trying to do instantaneous justice. It has been seen that public outrage over heinous crimes has led to expediated trials, but when this turns into mob vigilantism, rule of law is tarnished. The Preamble to our Constitution gives prime importance to Justice. When the accused also are not being subjected to a proper trial, justice can't be said to be done.

Indian Judiciary

Legal system of a country is a part of its social system and reflects the social, political, economic and cultural characteristics of that society. It is, therefore, difficult to understand the legal system outside the cultural milieu in which it operates.²⁰

¹⁵ MINISTRY OF HOME AFFAIRS, NATIONAL CRIME RECORDS BUREAU, CRIME IN INDIA – 2017 SNAPSHOTS (STATES/UTS) xvi (2017), <http://ncrb.gov.in/StatPublications/CII/CII2017/pdfs/CII2017-Full.pdf>

¹⁶ MINISTRY OF HOME AFFAIRS, NATIONAL CRIME RECORDS BUREAU, CRIME IN INDIA – 2017 DISPOSAL OF PERSONS ARRESTED UNDER IPC CRIMES (CRIME HEAD-WISE) (STATE/UT-WISE) – 2017, 1193 (2017), <http://ncrb.gov.in/StatPublications/CII/CII2017/pdfs/CII2017-Full.pdf>

¹⁷ GP Joshi, *Crime and Instant Punishment*, THE INDIAN EXPRESS (Dec. 21, 2019), <https://indianexpress.com/article/opinion/columns/crime-and-instant-punishment-6177499/>

¹⁸ NATIONAL JUDICIAL DATA GRID (DISTRICT AND TALUKA COURTS OF INDIA), <https://njdg.ecourts.gov.in/njdgnew/?p=main/index> (Last accessed: December 21, 2019).

¹⁹ *Id.*

²⁰ K.C. Jena, "Legal Education in 21st Century: Problems and Prospects", AILTC (All India Law Teachers Congress, Faculty of Law, University of Delhi) 51 (1999).

India has a robust judiciary which is the guardian of the Constitution. The fundamental rights of the citizens are considered to remain fundamental and in our constitutional scheme, this duty falls upon the judiciary. The complexity arises by virtue of the fact that rights, even those considered to be fundamental, are rarely absolute.²¹ This is diluted sometimes by state's actions and sometimes by state's inaction. While the state's inaction pertains to ineffective implementation, state's actions is related with the law *per se*. Ultimately it falls upon the judiciary to effectuate such standards of rights' absoluteness to carefully balance between public or private interests. The courts must draw a line with respect to restricting individual's rights in the interest of a greater public good- a utilitarian analysis. With regard to equality analysis, the standard traditionally utilized by the Indian courts is one of reasonableness- requiring reasonable classification with an intelligible differentia possessing a rational nexus to the object of the Act.²²

The Strict Scrutiny

The term 'strict scrutiny' can be found in several judgments of the Supreme Court.²³ With the intention of attaining greater protection to individual rights, the courts have been called upon to adopt standards which involves more rigorous evaluation of the legislation and thus strict scrutiny should be one such standard. If we look into the recent developments, the concept of strict scrutiny has been subject of significant controversy with the apex Court of the country articulating several differing views on the matter and the question recently came up before the Delhi HC in Naz Foundation Case²⁴ where the court even bounded by the precedent, seemingly offered its own interpretation, introducing further ambiguity of door for discussion. Accordingly, the aftermath of the Naz Foundation case witnessed a plethora of literature ranging from the social consequences of the verdict to the moral concerns raised by it.²⁵ Judges have talked regarding poor implementation of laws outside courtrooms also. Justice Gopal Krishna Vyas of Rajasthan High Court made comment during a conference that "the law of India is beautiful but for the lack of implementation of the legal provisions, problems arise."²⁶ To maintain law and order is the basic tenet of the society having the foundation of rule of law. Stricter laws may succeed in providing deterrence only when they are implemented effectively.

²¹ Tarunbh Khaitan, Beyond Reasonableness- A Rigorous Standard of Review for Article 15 Infringement, 50(2) J. Ind. L. Inst. 177 (2008).

²² John Vallamattom v. Union of India, AIR 2003 SC 2902; *see also* State of Kerala v. N.M. Thomas, AIR 1976 SC 490.

²³ Saurabh Chaudri v. Union of India, (2003) 11 SCC 146.

²⁴ Naz Foundation v. Govt. of Delhi, 160 (2009) DLT 277.

²⁵ Siddhartha Narrain, Crystallising Queer Politics- The Naz Foundation Case and its implication for India's Transgender Community, 2(3) NUJS L.R. 455(2009).

²⁶ *Non implementation of laws properly leads to problems*, THE TIMES OF INDIA (April 1, 2012), <https://timesofindia.indiatimes.com/city/jaipur/Non-implementation-of-laws-properly-leads-to-problems/articleshow/12488053.cms>