MAHARASHTRA NATIONAL LAW UNIVERSITY MUMBAI

CENTRE FOR RESEARCH IN CRIMINAL JUSTICE

SUGGESTIVE AMENDMENTS IN THE *SHAKTI* CRIMINAL LAWS (MAHARASHTRA AMENDMENT) BILL, 2020.

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I. INTRODUCTION

In December 2020 the Maharashtra Government introduced the *SHAKTI* Criminal Laws (Maharashtra Amendment) Bill, 2020 ('Shakti Bill') to bring about amendments so that the control on heinous and sexual offences against women and children becomes more effective. The Bill proposed to amend the relevant portions of Indian Penal Code, 1860, Code of Criminal Procedure, 1973 and Protection of Children from Sexual Offences Act, 2012 in their application in Maharashtra. This was done with the objective of providing stringent punishment for offences against women and children and speedy investigation and trial of such offences. The Bill was tabled in the monsoon session of the legislature. However, after demand of more time by the opposition, it has been referred to a Joint Select Committee of MLAs and MLCs.

II. METHODOLOGY

The present report is fundamentally based upon a critical analysis of the provisions of '*SHAKTI* Criminal laws (Maharashtra Amendment) Bill, 2020'. There was a detailed study based upon both primary and secondary sources of information. The research team has relied on existing academic and research work on the given legislation, as well as judicial precedents and various Law Commission Reports. The researchers have relied upon the following sources while preparing this report for suggestive amendments-

1.) Indian Penal Code, 1860
2.) Code of Criminal Procedure, 1973
3.) Protection of Children from Sexual Offences Act, 2012
4.) Shakti Bill
5.) Law Commission of India, *Indian Penal Code*, Report no. 42 (June, 1971)
6.) Law Commission of India, *The Code of Criminal Procedure*, *1973*, Report no. 154 (1996)
7.) Law Commission of India, *The Death Penalty*, Report no. 262 (August, 2015)

In addition to this, various case laws have been relied upon to understand the problems that can arise due to the lacunae in the provisions.

III. SUGGESTED AMENDMENTS

1. AMENDMENT TO SECTION 2

Original Section

Section 2(2) of the Shakti Bill provides as follows:
"(2) *after clause (c), the following clause shall be added, namely: -*
(d) deliberately fails to obey the specific directions given by the police officer in the investigation of offences punishable under Section 326A, Section 326B, Section 376, Section 376A, Section 376AB, Section 376B, Section 376C, Section 376D, Section 376DA, Section 376DB or Section 376E, as required under section 100 of the Criminal Procedure Code, 1973,".

Proposed Change

Recommended text of the revised section:
"(2) *after clause (c), the following clause shall be added, namely: -*
(d) deliberately fails to obey the specific directions given by the police officer in the investigation of offences punishable under ***Section 304B****, Section 326A, Section 326B,* ***section 354, section 354A, section 354B, section 354C, section 354D, section 354E,*** *section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E or* ***Section 498A****, as required under section 100 of the Criminal Procedure Code, 1973,".*

It is proposed the inclusion of Section 354, Section 354A, Section 354B, Section 354C, Section 354D and Section 354E in the proposed Section 166A (d). The reason behind the non-inclusion of these sections under the proposed Section 166A (d) seems unclear as even Section 166A (c) preceding the proposed section which provides for punishment on failure of recording information by a public servant under Section 154 of the Criminal Procedure Code, 1973, exclusively lists Section 354 and Section 354B. Furthermore the inclusion of Section 354C (Voyeurism) and Section 354D (Stalking) alongside Section 376A (Punishment for causing death or resulting in persistent vegetative state of victim) under the proposed amendment to Section 228A (*section 5 of Shakti Bill*) showcases the immateriality of the gravity of the offence

or the prescribed punishment for the offense in determining the punishment for disclosure of identity of the victim (Section 228A), failure to share information on request of the Investigating Officer (proposed Section 175A) or disobedience of a direction of a police officer by a public servant. It is further recommended that section 304B (Dowry death) and section 498A (Husband or relative of husband of a woman subjecting her to cruelty) be also added in the clause as the nature of offences and the investigation required for it can be the same as required for the sections mentioned in the proposed clause.

2. AMENDMENT TO SECTION 3

Original Section

Section 3 of the Shakti Bill provides as follows:

"After section 175 of the Penal Code, the following section shall be inserted, namely: -

175A. Notwithstanding anything contained in any law for time being in force, any social media platform or internet or mobile telephony data provider including any intermediary or custodian who fails to share any data including document or electronic record with the Investigation Officer as requested, for the purpose of investigation of offence punishable under section 326A, section 326B, section 354, section 354A, section 354B, section 354C, section 354D, section 354E, section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E, within a period of seven working days from receiving request shall be punished with simple imprisonment for a term which may extend to one month or a fine of five lakh rupees, or with both.".

Proposed Change

Recommended text of the revised section:

"After section 175 of the Penal Code, the following section shall be inserted, namely: -

175A. ***Provided that the safeguards enumerated in Section 37A of the Code of Criminal Procedure are followed****, any social media platform or internet or mobile telephony data provider including any intermediary or custodian who* ***intentionally*** *fails to share any data*

including document or electronic record with the Investigation Officer as requested, for the purpose of investigation of offence punishable under section 326A, section 326B, section 354, section 354A, section 354B, section 354C, section 354D, section 354E, section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E, within a period of seven working days from receiving request shall be punished with simple imprisonment for a term which may extend to one month or a fine of five lakh rupees, or with both.".

It is suggested that the clause should not be a non-obstante clause and the word 'notwithstanding' be removed from the Section. A proviso regarding the proposed Section 37A of CrPC (*as mentioned in Section 12 of the Shakti Bill*) should be added, incorporating the suggestions provided the Centre for Research in Criminal Justice under sub-heading 6 of this report. Thus, the safeguards suggested to be included in Section 37A of CrPC should be laid down as a condition for the applicability of the proposed Section 175A of the Indian Penal Code.

It is further proposed the inclusion of the word "intentionally" before the word "fails" in Section 3 of the Shakti Bill. The significance of *mens rea* in the imposition of criminal liability, in the case of Section 175A, attracts the mention of intentional omission especially as it flows from the concept under Section 175. The essentiality of intention under section 175 has also been reiterated in *The Superintendent of Police vs The Judicial Magistrate Court*[1]. Furthermore, the proposed Section 175A also introduces a timeframe of 7 working days unlike Section 175. Failure in introducing the element of intention would lead to the implication that a logistical failure, for example, impossibility in furnishing the information within the fixed timeframe of 7 working days may lead to fine and/or imprisonment. Thus, it is recommended that Section 3 of the Bill on the addition of Section 175A be amended to add "intentionally" before the word "fails".

3. AMENDMENT TO SECTION 4

Original Section

Section 4 of the Shakti Bill provides as follows:

[1] *The Superintendent of Police vs The Judicial Magistrate Court*, 2015 (5) CTC 511.

"*4. After section 182 of the Penal Code, the following section shall be inserted, namely: -—182A. Any person, who makes false complaint or provides false information against any person, in respect of an offence punishable under section 326A, section 326B, section 354, section 354A, section 354B, section 354C, section 354D, section 354E, section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E, solely with the intention to humiliate, extort, threaten, defame or harass, shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both.*".

Proposed Change

It is proposed that this Section should be removed due to its repetition of the objectives of offences punishable under Section 211 and Section 182 of the Indian Penal Code, 1860.

4. AMENDMENT TO SECTION 8

Original Section

Section 8 of the Shakti Bill provides as follows:
"*After section 354D of the Penal Code, the following section shall be inserted, namely: -*
354E. Whoever intentionally does any act to create a sense of danger, intimidation or fear to a woman, in addition to insulting her modesty, by any act, deed or words including, —
(a) offensive communication by telephone, email, social media platform or through any other electronic or digital mode of communication in a manner which is of lascivious or lewd nature;
or(b) threat to upload or disseminates any sound or video file including a real or fabricated depiction of any part of the body of that woman including the involvement of that woman in any sexual act through electronic or any other form of media;
or(c) use of social electronic media or any other media in any form to defame or cause disrepute to that woman;
or(d) use of that woman's name, particulars, photographs or any other means of identification to directly or indirectly outrage her modesty or violate her privacy,
shall be punished with imprisonment of either description for a term which may extend to two years and with fine which may extend up to one lakh rupees."

Proposed Change

Recommended text of the revised section:

"*354E. Whoever intentionally does any act to create a sense of danger, intimidation or fear to a woman, in addition to insulting her modesty, by any act, deed or words including, —*

(a) offensive communication by telephone, email, social media platform or through any other electronic or digital mode of communication in a manner which is of lascivious or lewd nature;

or(b) threat to upload or disseminates any sound or video file including a real or fabricated depiction of any part of the body of that woman including the involvement of that woman in any sexual act through electronic or any other form of media;

or(c) use of social electronic media or any other media in any form to defame or cause disrepute to that woman;

or(d) use of that woman's name, particulars, photographs or any other means of identification to directly or indirectly outrage her modesty or violate her privacy,

shall be punished with imprisonment which may extend up to ***5 years and with a fine which may extend up to 10 lakhs****''*

Section 354 (E) essentially deals with spreading of obscene material causing loss to a woman thereby inducing a feeling of fear or danger. The punishment recommended for this is of maximum 2 years of imprisonment and maximum fine of Rs 1 lakh. This section is similar to Section 67 of the IT Act, 2000[2] which provides for the punishment for publishing and transmitting obscene material in electronic form which tends to corrupt the minds of people and carries a maximum punishment of 3 years imprisonment and 5 lakhs fine for the first conviction and 5 years imprisonment and 10 lakhs fine for second conviction.

A more increased punishment is also warranted in light of the fact that the right to live with dignity of an individual emanating from Article 21 (as said by the Supreme Court in the case of *Maneka Gandhi v. Union of India*[3] is also violated as circulation of such material damages their reputation in the society too making it difficult for them to live with dignity.

5. AMENDMENT TO SECTIONS 6, 9, 10, 11 AND 26.

[2] §67 IT Act, 2000.
[3] *Maneka Gandhi vs. Union of India*, 1978 AIR 597.

Original Sections

Section 6 of the Bill (amending Section 326A of IPC), Section 9(a), Section 9(b)(ii) and Section 9(c) (amending Section 376 of IPC), Section 10 (amending Section 376D of IPC), Section 11 (amending Section 376DA of IPC) and Section 26 (amending Section 4 of the POCSO) suggest the addition of the following to the existing provisions:
"*in case which have the characteristic of offence is heinous in nature and where adequate conclusive evidence is there and the circumstances warrant exemplary punishment, with death*".

Proposed Change

It is proposed that the part of the provisions mentioned above be removed.

The addition of "*in case which have the characteristic of offence is heinous in nature and where adequate conclusive evidence is there and the circumstances warrant exemplary punishment, with death"* to the existing provisions would result in the introduction of death penalty as the most severe form of punishment. It is suggested that this amendment be omitted.

The Hon'ble Supreme Court has, time and again held that life imprisonment is the rule and death penalty is the exception.[4] A death sentence is only awarded in the cases which fall under the "rarest of the rare" category.[5] Moreover, the Court has also stated that the option of awarding the death penalty can only be used when all the other options are unquestionably foreclosed.[6] The stance of the courts has always been to avoid granting death penalty and grant it only when the cases have been of extreme nature and where the circumstances have demanded so.

The Court in *Sukhlal Singh* judgement also observed that a case may be heinous or brutal in nature but it still may not fall under the category of rarest of the rare.[7] In addition to this, heinous offences are those which entail an imprisonment of 7 years or more. This indicates that heinous offences, as a category, are not necessarily directly classified as "rarest of the rare" cases. Thus,

[4] *Sukhlal v. State of Madhya Pradesh*, Criminal Appeal Nos. 1563 -1564 of 2018.
[5] *Bachan Singh v. State of Punjab*, 1980 2 (SCC) 684.
[6] *Id.*
[7] *Sukhlal v. State of Madhya Pradesh*, Criminal Appeal Nos. 1563 -1564 of 2018.

creating a category of heinous offences in the aforementioned sections and granting a sentence of death in such offences would be against the numerous precedents set by the Hon'ble Supreme Court of India. Furthermore, even if take into consideration the safeguards that the Bill has placed in these provisions (i.e availability of adequate conclusive evidence and the circumstances warranting exemplary punishment) and consider them to be a measure to act as an increased threshold while granting a death sentence, the amendment would still be introducing an entire new category of offences for consideration for a death penalty, even though they would still not fit into the rarest of the rare doctrine.

Thus, adding heinous offences within the scope of this punishment would be akin to going against the stance that the Supreme Court has taken in numerous judgments. Thus, it is suggested that the provisions of granting death penalty in cases of heinous offences be amended.

If the provision of death penalty as a punishment in the aforementioned sections still has to be included, considering the reasons previously mentioned, it may only be granted in the "rarest of the rare" cases, as is the practice followed by the judiciary, and not for "heinous offences" where the circumstances warrant so.

6. AMENDMENT TO SECTION 12

Original Section

Section 12 of the Shakti Bill provides as follows:

"*After section 37 of the Code of Criminal Procedure, 1973, in its application to the State of Maharashtra (hereinafter, in this Chapter, referred to as "the Code of Criminal Procedure"), the following section shall be inserted, namely: —*

37A. Every social media platform or internet or mobile telephony data provider, including any intermediary or custodian shall be bound to share any data, including the document or electronic record to the Investigation Officer on demand, for the purpose of investigation of offence, punishable under section 326A, section 326B, section 354, section 354A, section 354B, section 354C, section 354D, section 354E, section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E of the Indian

Penal Code, or any offence punishable under the Protection of Children from Sexual Offences Act, 2012."

Proposed Change

Section 37 of the Criminal Procedure Code (Cr.P.C), 1973:

(a) **Background**: S.37 of the Cr.P.C. obligates every person to provide reasonable assistance to the Magistrate or the Police, to: (i) prevent escape of the person whom the Magistrate and Police are authorized to arrest; (ii) prevent or suppress breach of peace; (iii) prevent injury inflicted on public property, railway, canal or telegraph. The amendment proposes to include the category of social media platform, intermediary and internet or mobile telephony operator as well, meaning the aforementioned entities will also be obligated to provide reasonable assistance to Magistrate or the Police by sharing any document or electronic record to Investigation Officer on demand for the purposes of investigating offences against women and children under the Indian Penal Code ("I.P.C") and Prevention of Child Sexual Offences Act, 2012 ("POCSO").

(b) **Issues**:

(i) **Right to Privacy and Profiling**: The primary issue which arises from the review of the proposed amendment is the threat to the right of privacy. The Supreme Court of India in *KS. Puttuswamy vs Union of India*[8] guaranteed the fundamental right to privacy in 2017. Justice Kaul J. noted that the right to privacy is threatened by the use of 'profiling' techniques by law enforcement agencies across the world. Profiling is based on the personal data obtained in the course of criminal investigation from the document (s) and/or electronic record (s) received. The European Union Regulation of 2016 defines 'profiling' as processing of personal data which predicts the person's preferences at work, economic condition, overall behavior, reliability etc. [9]

[8] *KS. Puttuswamy v. Union of India,* 2018 1 SCC 809
[9] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

Profiling can lead to discrimination on basis of race, religion, caste etc. With respect to the present proposed amendment, the lack of clarity regarding how any data, especially sensitive personal data information of women and children obtained or derived from document or electronic record shared by the aforementioned entities to the Investigating Officer is to be processed raises the danger of discriminatory profiling.

(ii) **Rights of Data Subjects / Data Principals**: Other issues pertain to rights of those whose data is being collected for the purposes of gathering electronic evidence. India does not have a personal data protection legislation, though the Personal Data Protection Bill (the "Bill") has been tabled in the Parliament. Hence, important rights such as the right to be forgotten[10], right to confirmation[11], right to correction[12] etc. cannot be exercised. The significance of these rights is evident from the fact that these are enshrined in globally relevant data protection regimes such as the General Data Protection Regime (GDPR) of the European Union. For example, Article 10 of the GDPR lays down provisions specific to "*processing of personal data relating to criminal convictions and offences or related security measures*" – it mandates that such processing shall be carried out by the official authority only, taking into account the rights and freedoms guaranteed to data subjects[13].

(iii) **Lack of limitations:** Following from the assertion about the danger of discriminatory profiling as mentioned in (i), it is evident from the language of the proposed amendment that there are no limitations proposed on the power of the Investigating Officer. Whereas, in data protection regimes, limitations such as purpose limitation[14], collection limitation[15], data storage limitation[16] are imposed on entities empowered to collect and use such data (in this case,

[10] Personal Data Protection Bill, 2019, §27
[11] Personal Data Protection Bill, 2019, §24
[12] Personal Data Protection Bill, 2019, §25
[13] General Data Protection Regulation, 2018 §10.
[14] Personal Data Protection Bill, 2019, §5
[15] Personal Data Protection Bill, 2019, §6
[16] Personal Data Protection Bill, 2019, §10

the Investigating Officer who would presumably use the same as electronic evidence).

The language of the proposed amendment takes none of these concerns into account, and prima facie, gives wide discretion to the Investigating Officer.

(c) **Recommendations:** While it is recognized at the outset that implementing the full scheme of data protection in matters of collection and usage of electronic evidence sourced from social media platforms and intermediaries is not exactly central to the scope of the proposed amendments, yet, from the above discussion, it can be indeed inferred that there is a need to curb the discretion available to the Investigating Officer in collecting document or electronic record. For this, inspiration could be taken from certain provisions of the Police Data Act (*Wet Politiegegevens*) enacted in the Netherlands. The Police Data Act provides the personal data rights (available in general data protection legislations) to data collected and processed for police work. Article 24b of the Police Data Act directs the Controller to provide the data subject with the following information:

(i) *"the legal basis for processing';*[17]

(ii) *"the retention period of the police data";*[18]

(iii) *"where appropriate, the categories of recipients of police data";*[19]

(iv) *"where necessary, additional information, in particular where the police data are collected without the knowledge of the data subject"*;[20]

Personal data rights such as the:

(i) right to rectification (correcting incorrect data of the data subject)[21];

(ii) destruction of police data[22];

(iii) access to personal data (including objectives, legal basis for processing, categories for personal data concerned, right to lodge complaint with the personal data authority, recipients of personal data – such as third parties)[23]

[17] Wet Politiegegevens, 2007 §24b
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] Wet Politiegegevens, 2007 §28
[22] *Id.*
[23] *Id.*

are also provided upon receipt in writing from the data subject to the controller.

Hence, it is recommended that the above-mentioned features be adopted to address the issues raised. These could be delegated either in part or whole to any appropriate authority (till the time a Data Protection Authority is set up in the country), with the Investigating Officer being subject to the said authority exercising the above-suggested functions.

7. AMENDMENT TO SECTION 13

Original Section

Section 13 of the Shakti Bill Provides as follows:

"*In section 39 of the Code of Criminal Procedure, in subsection (1),—*

(1) after clause (v), the following clauses shall be inserted, namely: -

(v-l) sections 326A and 326B (that is to say, offences related causing grievous hurt by use of acid and attempting to throw acid, etc.);

(v-2) sections 354, 354A, 354B, 354C, 354D and 354E (that is to say, offences related to assault to outrage modesty, sexual harassment, disrobe, voyeurism, stalking, harassment of woman by any mode of communication, etc.);";

(2) after clause (va), the following clause shall be inserted, namely: "(vb) sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB and 376E, both inclusive (that is to say, offences related to rape and gang rape, etc.);".

Proposed Change

Recommended text of the revised section -

"(2) after clause (va), the following clauses shall be inserted, namely: *"(vb)* ***sections 366, 366A, 366B, 370, 372 and 373 (that is to say, offences related to Kidnapping, Abduction, Slavery and Forced Labor)****; (vc) sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB and 376E, both inclusive (that is to say, offences related to rape and gang rape, etc.);*".

Section 39 of the CrPC provides for certain offences wherein a person aware of the commission of a crime or aware of the intention of any other person to commit a crime is required to provide the said information to a Magistrate or Police Officer. The objective of the Bill is to bring about amendments so that the control on heinous and sexual offences against women and children becomes more effective. The scope of the amendment should be extended to Section 366, Section 366A, Section 366B, Section 370, Section 372 and Section 373 as the offences listed in these sections fulfill the criteria of being heinous as well as sexual. Since the proposed amendment in the Shakti Bill provides for further expanding the scope of Section 39 of the CrPC with the addition of more offences it is recommended that the provisions relating to Kidnapping, Abduction and Slavery too be added to Section 39.

8. AMENDMENT TO SECTION 15

Original Section

Section 15 of the Shakti Bill provides as follows:
"In section 164 of the Code of Criminal Procedure, in sub-section (5A), in clause (a), after the words "punishable under" the words, figures and letters "section 326A, section 326B," shall be inserted."

Proposed Change

Recommended text of the revised section –
"In section 164 of the Code of Criminal Procedure, in sub-section (5A), in clause (a), after the words "punishable under" the words, figures and letters "section 326A, section 326B, ***section 366, section 366A, section 366B, section 370, section 372, section 373****" shall be inserted."*

The objective of the Bill is to bring about amendments so that the control on heinous and sexual offences against women and children becomes more effective. The scope of the amendment should be extended to Section 366, Section 366A, Section 366B, Section 370, Section 372 and Section 373 as the offences listed in these sections fulfill the criteria of being heinous as well as sexual.

9. AMENDMENT TO SECTION 16

Original Section

Section 16(ii) of the Shakti Bill provides as follows:

"(ii) after sub-section (1A), the following sub-section shall be inserted, namely :—

(1B) In relation to offences under section 326A, section 326B, section 376, section 376A, section 376AB, section 376D, section 376DA, section 376DB or section 376E of the Indian Penal Code, the investigation shall be completed within a period of fifteen working days from the date on which the information was recorded by the officer-in charge of the police station : Provided that, if it is not possible to complete the investigation within the period of fifteen working days from the date on which the information was recorded, then the reasons for the same shall be recorded in writing by the concerned investigating officer; such instances may include the inability to identify the accused; whereupon the said period can be further extended by seven working days by the concerned Special Inspector General of Police or Commissioner of Police: Provided further that, nothing contained in this section shall be deemed to have any effect on the various provisions of bail specified in this Code."

Proposed Change

Recommended text of the revised section –

(ii) after sub-section (1A), the following sub-section shall be inserted, namely :— "(1B) In relation to offences under section 326A, section 326B, ***section 366, section 366A, section 366B****,* ***section 370, section 372, section 373****, section 376, section 376A, section 376AB, section 376D, section 376DA, section 376DB or section 376E of the Indian Penal Code, the investigation shall be completed within a period of fifteen working days from the date on which the information was recorded by the officer-in charge of the police station : Provided that, if it is not possible to complete the investigation within the period of fifteen working days from the date on which the information was recorded, then the reasons for the same shall be recorded in writing by the concerned investigating officer; such instances may include the inability to identify the accused; whereupon the said period can be further extended by seven working days by the concerned*

Special Inspector General of Police or Commissioner of Police: Provided further that, nothing contained in this section shall be deemed to have any effect on the various provisions of bail specified in this Code."

The objective of the Bill is to bring about amendments so that the control on heinous and sexual offences against women and children becomes more effective. The scope of the amendment should be extended to Section 366, Section 366A, Section 366B, Section 370, Section 372 and Section 373 as the offences listed in these sections fulfill the criteria of being heinous as well as sexual.

10. AMENDMENT TO SECTION 19

Original Section

Section 19 of the Shakti Bill Provides as follows:

In section 327 of the Code of Criminal Procedure, in sub-section (2),—

(1) after the words "offence under" the words, figures and letters "section 326A, section 326B," shall be inserted;

(2) after the second proviso, the following proviso shall be added, namely :—

"Provided also that, in camera proceedings shall be held in the chamber of the Presiding Officer recording the evidence and every effort shall be made by such Presiding Officer to make the victim or vulnerable witnesses feel comfortable and this shall be recorded in the evidence.".

Proposed Change

(a) **Background:** Section 327 of the Cr.P.C. provides that court proceedings shall be conducted in open. However, proceedings shall be conducted *in camera* for offences under S.376, 376A, 376B, 376C or S.376D of the IPC. The proposed amendment suggests that the same should apply for offences under S.326A and S.326B and that the Presiding Officer shall record the evidence of the victim or the vulnerable witness *in*

camera. It further entrusts the responsibility of making the victim and vulnerable witness in question comfortable upon the Presiding Officer.

(b) **Issues:** The primary issue which is evident from this proposed amendment is that how and in what manner is the Presiding Officer expected to make the victim or the vulnerable witness comfortable while recording evidence. Without such enumeration, this otherwise progressive amendment would be rendered ineffective and would not be able to achieve its specific objective. The Supreme Court in *State of Punjab v. Gurmit Singh*[24] and *Sakshi v. Union of India*[25] have provided extensive guidelines on treatment of the victim or the vulnerable witness while recording evidence. In this light, it is pertinent to take a look at the Supreme Court's observations regarding this aspect in *Sakshi v. Union of India*. The court noted that "*Deposition of the victims of offences under Section 354 and 377 IPC can at time be very embarrassing to them.* (i.e. the victims)"[26]. It further noted that "*The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice*".[27] Hence, it can be understood from the above discussion that "*Rules of procedure are hand-maiden of justice and are meant to advance and not to obstruct the cause of justice*"[28] as was succinctly concluded by the Supreme Court in the *Sakshi v. Union of India* case.

Furthermore, in a 2014-2015 study conducted by the Partners in Law and Development ("PLD Study"), it was found out that even when the above guidelines were followed (case in point, in Delhi courts), yet access to the victim for the accused and his relatives was available in the court premises. This was noted to be one of the leading factors as to why victims / vulnerable witnesses turn hostile (due to intimidation from the accused or his relatives).[29]

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[24] *State of Punjab v. Gurmit Singh* 74 PLR 845
[25] *Sakshi v Union of India (UOI) and Ors*. AIR 2004 SC 3566
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] Partners for Law in Development, *Towards Victim Friendly Responses And Procedures For Prosecuting Rape: A Study Of Pre-Trial And Trial Stages Of Rape Prosecutions In Delhi* PLD report.pdf (doj.gov.in)

It is in this spirit therefore, that the issue of the judicial system turning hostile towards the victim / vulnerable witness, or vice-versa, as follows from the above discussion, should be addressed, because it ultimately affects the administration of justice, mental health of the victim/vulnerable witness and quality of testimony given.

(c) Suggestions and recommendations:

(i) **Adopting and Incorporating SC Guidelines in the proposed amendment**: The Supreme Court in *Sakshi v. Union of India* suggested the following guidelines to be followed while recording the deposition of victim or vulnerable witness in sexual offences:

- "*a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;*
- *the questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;*
- *the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.*"

(ii) **Institution of Vulnerable Witness Deposition Complex (VWDC):** The VWDC was first instituted in the courts of Delhi in 2012. [30] The Vulnerable Witness Guidelines followed in Delhi courts envisage such a set up. The significance of the Vulnerable Witness Deposition Complex lies in the way it envisages the physical layout of the courtroom. The victim/vulnerable witness is completely physically separated from the accused. It is sequestered away from the main court complex. It provides separate entry and exit for the victim/vulnerable witness. The victim/vulnerable witness is also provided with a separate waiting room so that there is minimal or no chance of interaction between accused and/or his relatives.

[30] *Id.*

Hence, inclusion of Vulnerable Witness Guidelines, along the lines of Delhi, would go a long way in realizing the objective of the proposed amendment.[31]

(iii) **Routing questions to the victim/vulnerable witness via the Presiding Officer:** It has been often observed that the defense often engages in an uncomfortable, sexually explicit line of questioning. Such line of questioning can un-nerve the victim/vulnerable witness, which ultimately adversely affects the quality of testimony. The PLD study and the Vulnerable Witness Guidelines followed in Delhi courts both reveal that the aforementioned could be avoided by routing questions of the defense counsel through the Presiding Officer, which could possibly blunt the sharpness of such line of questioning.

11. AMENDMENT TO SECTION 22

Original Section

Section 22 of the Shakti Bill provides as follows:

"In section 438 of the Code of Criminal Procedure, as amended by the Code of Criminal Procedure (Maharashtra Amendment) Act, 1993, after sub-section (2), the following sub-section shall be inserted, namely :—

"(2A) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under section 326A or section 326B or section 376 or section 376A or section 376AB or section 376D or section 376DA or section 376DB or section 376E of the Indian Penal Code.".

Proposed Change

It is suggested that this proposed amendment be removed from the Shakti Bill.

Section 438 of the Code of Criminal Procedure, 1973 (hereinafter "CrPC) in its current form states:

[31] Delhi District Courts, *Guidelines for recording of evidence of vulnerable witnesses*, Microsoft Word - Vulnerable_Witness_Guidelines.doc (delhidistrictcourts.nic.in)

"Direction for grant of bail to person apprehending arrest - (1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest, he shall be released on bail; and High Court may, after taking into consideration, inter alia, the following factors:-

(i) the nature and gravity or seriousness of the accusation as apprehended by the applicant;

(ii) the antecedents of the applicant including the fact as to whether he has, on conviction by a Court previously undergone imprisonment for a term in respect of any cognizable offence;

(iii) the likely object of the accusation to humiliate or malign the reputation of the applicant by having him so arrested, and

(iv) the possibility of the applicant, if granted anticipatory bail, fleeing from justice, either reject the application forth with or issue an interim order for the grant of anticipatory bail:

Provided that where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(2) Where the High Court or, as the case may be, the Court of Session, considers it expedient to issue an interim order to grant anticipatory bail under sub-section (1), the Court shall indicate therein the date, on which the application for grant of, anticipatory bail shall be finally heard for passing on order thereon, as the Court may deem fit; and if the Court passes any order granting anticipatory bail, such order shall include inter alia the following conditions, namely:-

(i) that the applicant shall make himself available for interrogation by a police officer as and when required;

(ii) that the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the accusation against him so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) that the applicant shall not leave India without the previous permission of the Court; and

(iv) such other conditions as may be imposed under sub-section (3) of section 437 as if the bail was granted under that section.

(3) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice, being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Commissioner of Police, or as the case may be, the concerned Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(4) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(5) On the date indicated in the interim order under sub-section (2), the Court shall hear the Public Prosecutor and the applicant and after due consideration of their contentions, it may either confirm, modify or cancel the interim order made under sub-section (1)."

Section 438 of the CrPC finds its basis in the 41st Law Commission Report,[32] which expressed the need for a safeguard allowing anticipatory bail because instances of false accusations might arise. Furthermore, it was observed that *"where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail"*.

The Law Commission, in its 154th Report,[33] stated that the misuse of the anticipatory bail provision cannot be a valid ground for its deletion from CrPC altogether, and what is required is that adequate safeguards be out in place to ensure that the provision is not prone to misuse.

The principles of liberty and presumption of innocence hold a very high standard and importance under Indian law. The presumption of innocence is a fundamental principle of criminal

[32] Law Commission of India, *The Code of Criminal Procedure, 1898*, Report No. 41, 321 (September 1969).
[33] Law Commission of India, *The Code of Criminal Procedure, 1973*, Report No. 154 (Vol. 1), 29 (August 1996).

jurisprudence.[34] International law and standards too lay emphasis on the principle of presumption of innocence. The principle of presumption of innocence has been enshrined under Article 14(2) of the International Covenant on Civil and Political Rights, Article 11(1) of the Universal Declaration of Human Rights, Article 6(2) of the European Convention on Human Rights, Article 48(1) of the Charter of Fundamental Rights of the European Union and Rule 111 of the United Nations Standard Minimum Rules for The Treatment of Prisoners (Mandela Rules). Therefore, just because a person has an apprehension of an accusation under Sections 326A, 326B, 376, 376A, 376AB, 376D, 376DA, 376DB or 376E of the Indian Penal Code should not be a reason to completely bar the accused from availing the provisions of anticipatory bail under Section 438 of the CrPC. This is because the Section in itself consists several safeguards which provide for the analysis of the nature, gravity and seriousness of the offence and the possibilities of the accusation being frivolous or false.

The Apex Court, in *Siddharam Satlingappa Mhetre v. State of Maharashtra*,[35] observed that *"a person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints and conditions on his freedom, by the acceptance of conditions which the court may deem fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail".* The Court further observed, *"We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualised for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on the facts and circumstances of each case"*.

The Supreme Court, in *Gurbaksh Singh Sibbia v. State of Punjab*,[36] made an important observation that the restrictions provided under Section 437 with regards to offences punishable with death or imprisonment should not be read into Section 438. The Court further observed:

"Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks

[34] *State of Rajasthan v. Mohan Lal*, (2009) 12 SCC 515.
[35] *Siddharam Satlingappa Mhetre v. State of Maharashtra* , (2011) 1 SCC 694.
[36] *Gurbaksh Singh Sibbia v. State of Punjab,* (1980) 2 SCC 565.

bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned."

As per the facts of the case in *Bhadresh Bipinbhai Sheth v. State of Gujarat*,[37] allegations of rape were added to the original charges after 17 years and the Supreme Court observed that there was no reason to deny the benefit of anticipatory bail to the accused. *"Merely because the charge under Section 376 IPC, which is a serious charge, is now added, the benefit of anticipatory bail cannot be denied when such a charge is added after a long period of time and inaction of the prosecutrix is also a contributory factor."*

Therefore, even in accusations of heinous offences, certain facts can point to the fact that the accused should be given the benefit of anticipatory bail. The complete exclusion of the remedy of anticipatory bail to a separate class of offences would be counter-productive to the intent of the legislature in introducing Section 438. The required safeguards are already in place to ensure that the grant of anticipatory bail be analyzed on a case-to-case basis, and therefore, it is recommended that the amendment regarding Section 438 be removed from the present Bill.

12. AMENDMENT TO SECTION 31

Original Section

Section 31 of the Shakti Bill provides as follows:

"After section 23 of the Protection of Children from Sexual Offences Act, the following section shall be inserted, namely: —

23A. Notwithstanding anything contained in any law for time being in force, any social media platform or internet or mobile telephony data provider including any intermediary or custodian who fails to share any data with the Investigation Officer as requested, for the purpose of investigation of offence, punishable under this Act, within a period of seven working days from

[37] *Bhadresh Bipinbhai Sheth v. State of Gujarat*, (2016) 1 SCC 152.

receiving request, shall be punished with to imprisonment for a term which may extend to one month or a fine of five lakh rupees, or with both."

Proposed Change

Recommended text of the revised section:

"23A. ***Provided that the safeguards enumerated in Section 37A of the Code of Criminal Procedure are followed****, any social media platform or internet or mobile telephony data provider including any intermediary or custodian who fails to share any data with the Investigation Officer as requested, for the purpose of investigation of offence, punishable under this Act, within a period of seven working days from receiving request, shall be punished with to imprisonment for a term which may extend to one month or a fine of five lakh rupees, or with both.".*

It is suggested that the clause should not be a non-obstante clause and the word 'notwithstanding' be removed from the Section. A proviso regarding the proposed Section 37A of CrPC (*as mentioned in Section 12 of the Shakti Bill*) should be added, incorporating the suggestions provided by the Centre for Research in Criminal Justice under sub-heading 6 of this report. Thus, the safeguards suggested to be included in Section 37A of CrPC should be laid down as a condition for the applicability of the proposed Section 23A of the Indian Penal Code.

IV. CONCLUSION

Meticulous crafting and amending of important criminal laws is essential to contribute towards a smooth functioning of the criminal justice system. The recommendations on the amendment of the provisions of the Bill are made keeping in mind the objectives of the Bill i.e., to bring into effect an effective legislation to counter crimes against women and children.

There are certain lacunae in the Bill that shall result in discrepancy and ambiguity. The researchers have brought to light the lacunae and have proposed a change to the existing provisions with substantiation. It is for these reasons that the above-mentioned recommendations to the provisions of The Shakti Bill become relevant.