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Contrast in Section 309 of the Indian Penal Code and Section 115 of the Mental Health Care Act 2017: An Analysis

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The Indian Government passed the Mental Healthcare Act (MHCA), 2017, in the middle of 2018. Section 115 of this act decriminalized the attempt to die by suicide, thereby reducing mental stress on victims. However, Section 309 of the Indian Penal Code, which punishes attempts to suicide, continues to exist in the statute book. This law, which was brought in by the British in the 19th century, reflected the thinking of the time was killing or attempting to kill oneself was considered a crime against the state, as well as against religion. The Law Commission has twice, in 1971 and 2008, recommended the repeal of this section. The IPC (Amendment) Bill, 1978, was even passed by the Rajya Sabha, but the Parliament dissolved it before it could be passed by the Lok Sabha and the Bill lapsed. In 2011, even the Supreme Court recommended to the Parliament to consider the feasibility of deleting this Section. With the passage of the Mental Healthcare Act, 2017, there was a common misconception among the general public that Section 309 of the IPC had been repealed. However, this is not true. The passage of the Mental Healthcare Act, 2017, significantly reduced the scope of Section 309 but did not eliminate it. The lack of clarity and the eminent contrast between these two aspects of the Indian legal framework has led to confusion amongst the parties affected by it. In the case of P. Rathinam v/s Union of India, the court held that Section 309 deserves to be effaced from statute books to humanize India's penal laws. This decision of the court was ruled out in the case of Gian Kaur v/s State of Punjab, where the court concluded that the Right to Life provided for in Article 21 of the Indian Constitution does not include the right to die. In this paper, an attempt will be made to analyze the conflict between the two provisions and discuss the various arguments that have been made for and against these provisions. Finally, the paper will discuss the morality and legality of the laws mentioned.

Keywords: *suicide, mental health, validity.*

INTRODUCTION

The Mental Healthcare Act, 2017 was passed with the intent of strengthening the human rights of individuals suffering from mental illness and ensuring that these individuals have timely access to healthcare and treatment. This act aims to tackle the social stigma present around mental health and mental illness as well as provide a mechanism for India to fulfill its obligations relating to the Convention on Rights of Persons with Disabilities and its Optional Protocol.¹ Its enactment has indeed lit up the eyes of suicide survivors as it focused on decriminalizing the attempt to suicide and allowing survivors to continue to live with dignity and respect. However, as per the Indian Penal Code, the attempt to commit suicide is still punishable with a jail term of up to one year.² It is important to understand what the Indian Penal Code is in the first place. The Indian Penal Code or IPC is the official criminal code of India. Its main aim and objective are to cover and define all the substantive aspects of criminal law and lay down appropriate punishments. When we look at the Mental Healthcare Act, we notice that it presumes an individual is under severe stress upon the attempt to commit suicide and therefore excludes him from the relevant provisions of the Indian Penal Code.³ This contrast that exists here is that if an individual is always under severe stress while attempting to commit suicide, then the relevant provisions of the penal code will never be in effect. However, it is worth noting that the word "severe stress" has not been clearly stated in the act. The Mental Healthcare Act states that it is the duty of the government to provide rehabilitation and treatment for those who attempt to commit suicide to relieve them of the "severe stress" they are facing in spite of the provisions in the Indian Penal Code that arranges for the incarceration of these individuals. This contradiction in the legal framework has to lead to widespread ambiguity in cases relating to the attempt of suicide which has ironically increased the mental burden and stress of individuals. The morality aspect of the provisions in the

¹ UN General Assembly, 'Convention on the Rights of Persons with Disabilities' (*RefWorld*, 2007)

<<https://www.refworld.org/docid/45f973632.html>> accessed 11 July 2021

² Indian Penal Code 1860, s 309

³ Mental Healthcare Act 2017, s 115(1)

Indian Penal Code punishing the attempt to suicide has been questioned many times. However, the idea behind the provision is that if the person attempting suicide is not prosecuted, the various circumstances surrounding the attempt may be hushed up. For example, if a woman has been subject to torture by her husband and is prosecuted under Section 309 of the Indian Penal Code, then the true circumstances surrounding the suicide attempt are likely to surface.⁴ Hence, it is quite evident that both these provisions of the Indian legal framework have strong arguments regarding their effectiveness towards the lives of suicide survivors. However, as long as the previously stated contrast is present in the legal system, suicide survivors will not have clarity and will be forced to survive amidst ambiguity.

CONSTITUTIONAL VALIDITY OF SECTION 309 OF THE INDIAN PENAL CODE

Section 309 of the Indian Penal Code which criminalizes the attempt to commit suicide was brought into existence by the British leaders and its enforcement reflected the thinking of that time. During those days attempting to kill oneself was considered a crime against the state and religion. Over the years the constitutional validity of this particular section has been questioned numerous times. It is essential to highlight that the enforcement of the Mental Healthcare Act, 2017 and, in particular, section 115 of the act, does not decriminalize suicide attempts entirely. Section 115 of the act merely presumes that all individuals that attempt to commit suicide are under some severe stress. However, the courts have clearly stated on various occasions that this presumption of the act is not absolute and if the police authorities can bring on record suggestive evidence that the individual was not under severe stress, then the individual can be held liable and guilty.⁵ It has been noted that several police officers at the police station are not even completely aware of the new Mental Healthcare Act and continue to simply adhere to the penal code. Moreover, there are quite a few problems that arise relating to this section in general. For instance, Section 309 has the potential to deprive individuals of

⁴ Dr KN Chandrasekharan Pillai, 'Comment on Rathinam v Union of India' (SCC, 1995) <http://www.supremecourtcases.com/index2.php?option=com_content&itemid=54&do_pdf=1&id=221> accessed 11 July 2021

⁵ Akshay Shekhawat & Bhaskar Agarwal, 'Why Penalization of Attempt to Commit Suicide is still a Valid Law?' (*The Criminal Law Blog*, 2020) <<https://criminallawstudiesnluj.wordpress.com/2020/07/13/why-penalization-of-attempt-to-commit-suicide-is-still-a-valid-law/>> accessed 11 July 2021

medical treatment in the golden hour as hospitals wait for the approval of the police. Furthermore, it paves the way for ill-intentioned hospital authorities to charge extra for treatment by not informing the police of the details of said treatment. Apart from this, the individual attempting suicide along with his or her near and dear ones would have already gone through severe stress during the attempt. It seems to be morally inconsistent to further add on to this stress by the threat of prosecution.

In the case of *P. Rathinam v Union of India*,⁶ the Hon'ble Supreme Court of India initially decriminalized the attempt to suicide by deeming Section 309 to be unconstitutional as it violated Article 21 of the Indian Constitution which gave individuals the right to life and personal liberty. The bench stated that the right to life is inseparable from the right to die. Based on these observations, it is worth noting that the Apex court also deemed Section 306⁷ of the Indian Penal Code as ultra vires to the constitution as well. However, the precedent laid down by this case did not last long within the Indian legal framework as in the case of *Gian Kaur v State of Punjab*,⁸ it was declared that the right to die was not an integral part of the right to life. Hence, this case brought back Section 309 as the judges stated that extinguishing life is inconsistent with its continual existence. It is worth noting that the *Gian Kaur* case did reaffirm the right to live with dignity does include the right to die with honour but specifically mentioned that it would not deal with euthanasia. From this point on Section 309 and Section, 306 were held as perfectly valid and in sync with the values of the constitution until the scope of Section 309 was significantly reduced by the Mental Healthcare Act, 2017. Another important issue that must be discussed is whether an individual voluntarily declining medical treatment prolonging one's life is subject to repercussions under Section 309 and whether the medical authorities would be held liable under Section 306. This medical issue in particular also greatly involves an individual's moral consciousness. In the case of *K.S Puttaswamy v Union of India*,⁹ it was stated that privacy is an important part of Article 21 and includes the right of an individual to decline life prolonging medical care. It was stated that "Forced

⁶ *P Rathinam v Union of India* (1994) 3 SCC 394

⁷ Indian Penal Code 1860, s 306

⁸ *Gian Kaur v State of Punjab* (1996) 2 SCC 648

⁹ *KS Puttaswamy v Union of India* (2017) 10 SCC 1

feeding of certain persons by the State raises concerns of privacy. An individual's right to refuse life prolonging medical treatment or terminate his life is another freedom which falls within the zone of privacy."¹⁰

The Law Commission of the country has recommended that this section be repealed once in 1978 and again in 2008. In 2011, it was even recommended by the Hon'ble Supreme Court to look into the possibility of repealing this section. However, before arriving at any conclusions regarding the constitutionality of the section, we must look at the pros and cons of the section. It is indeed true that with the threat of prosecution the true circumstances surrounding a failed suicide attempt are likely to surface. This seems to be the most pressing and effective argument for maintaining this section. However, when we look at the drawbacks of the provision, we see that it brings unwanted stress to families and individuals who would have already been traumatized by the suicide attempt. This is quite ironic and whimsical as the stress an individual must have already been facing before the suicide attempt is amplified by the failure of such an attempt by means of prosecution. Hence, it is important to walk a fine line between the investigative approach for arriving at the true circumstances around such events and also keep in mind the stress and anxiety present after such events take place. Section 309 of the Indian Penal Code clearly fails to look into the stress factor and still displays the mindset of those who created it in the first place. Due to these reasons, it must be deemed unconstitutional to reflect the thinking of modern society.

COMPARATIVE ANALYSIS

The Mental Healthcare Act, 2017 replaced the Mental Health Act, 1987. The latter had replaced various colonial legislation before it that had deemed it okay to confine patients suffering from mental illness. Although it did replace many colonial attributes of the legislations before it, it still held onto the concept of "involuntary confinement", thus displaying certain colonial mindsets. To provide a new legal framework to issues regarding mental health, the Mental Healthcare Act was passed in 2017. Looking specifically into the issue of suicide, according to a 2017 World Health Organization (WHO) report, India had the highest suicide rate among 10

¹⁰ *KS Puttaswamy* (n 9)

Southeast Asian countries. Looking at the Indian Penal Code, suicide, in particular, has nowhere been defined and is not a crime as when the offender is dead, he cannot be punished. However, Section 309 states that “Whoever attempts to commit suicide and does act any towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year (or with fine, or with both).”¹¹ It should be clearly noted that suicide is a result of psychiatric issues and must be dealt with accordingly. Equating the attempt to suicide as equal to a crime with jail term as punishment is quite archaic in nature. In that sense, we can see that the Mental Healthcare Act, 2017 is a progressive one. The concept of “mens rea”, which literally means a “guilty mind” and is essential for determining what constitutes a crime, is not clearly distinguishable in acts of “attempt to suicide.” It was stated by Justice R.A. Jahagirdar in the 210th Law Commission¹² report that Section 309 of the Indian Penal Code cannot act as a deterrent as individuals attempt to commit suicide for reasons beyond their control, it is not reformatory as placing individuals who suffer psychologically are with criminals in incarceration and finally it does not uphold punitive theory as attempting suicide does not harm other individuals. When we look specifically at the Mental Healthcare Act, 2017 and its relation to suicide, we see that in Chapter XVI under the miscellaneous in Section 115(1)¹³ it states that “Notwithstanding anything contained in section 309 of the Indian Penal Code any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said Code”. Hence, by interpreting this statute we can understand that for Section 309 to be used against an individual, it must be proved that the individual was not under severe stress. The issues that arise from this scenario is that it has firstly not been defined as to what constitutes “severe stress” and secondly it would be highly unlikely that an individual who has resorted to taking this extreme step of committing suicide was not under great mental pressure. Under Section 115(2)¹⁴ of the Mental Healthcare Act, 2017, it is stated that “The appropriate Government shall have a duty to provide care, treatment and rehabilitation to a person, having severe stress and who attempted to commit suicide, to reduce the risk of recurrence of attempt to commit

¹¹ Indian Penal Code 1860, s 309

¹² Law Commission, *Humanization and Decriminalization of Attempt to Suicide* (Law Com No 210, 2008)

¹³ Mental Healthcare Act 2017, s 115(1)

¹⁴ Mental Healthcare Act 2017, s 115(2)

suicide.” This provision of the act humanizes the lives of those who have attempted to commit suicide, in contrast to Section 309 of the Indian Penal Code which demonizes them. This is a much more solutions oriented approach and rightfully puts the burden on the Government to rehabilitate these individuals. As far as the risk of recurrence is concerned, Section 115 of the act vastly reduces the chances of an individual attempting to commit suicide again as it works on reducing the stress an individual is facing. Section 309 of the penal code inevitably increases the stress level of individuals and puts them at a higher risk of recurrence. Overall, these provisions in the legal system have led to a lot of ambiguity among individuals. The progressive nature of the Mental Healthcare Act 2017 must be acknowledged and embraced within society to ultimately benefit the lives of individuals affected by it. Although it is true that the act greatly reduced the scope of Section 309 of the IPC, more clarity is ultimately needed to solidify the legal framework of those who attempt to commit suicide.

MORAL ISSUES RAISED BY SECTION 309 OF THE INDIAN PENAL CODE

The term “moral” relates to the principles of right and wrong behaviour. The majority of the society in most cases sets the general norm in society relating to what is right and wrong. We must look objectively at Section 309 and see where it falls short from a moral standpoint. On many occasions, countries throughout the world had implemented laws that were immoral but perfectly legal. Slavery in the United States is the best example of this. When an individual attempt to commit suicide, it is quite clear that the individual is severely stressed and in need of psychological help. It seems quite cruel to burden an individual who is already fed up with the world with prosecution and jail time. When an individual attempts to take his life, he does not value it. By placing this depressed individual among criminals in jail, only affects the individual's self worth further. As stated earlier in this paper, who is to say that due to further burden, stress, and attacks on the individuals self worth the individual will not attempt to take his life again? The legal framework of the country must strive to provide a solid path towards rehabilitation and normalisation of that individual's life in society. This section of the Indian Penal Code does not do that and instead focuses on further punishing an individual who is already broken and without hope. Due to these reasons, Section 309 completely falls short on a

moral standpoint.

CONCLUSION

From this paper, we do know that the Mental Healthcare Act, 2017 has vastly reduced the scope of Section 309 of the Indian Penal Code. As we know, the main contrast that exists between these two sections is the concept of "severe stress". The Mental Healthcare Act presumes that an individual is filled with severe stress upon the attempt to suicide unless proved otherwise. Only when it is proved that an individual is not putting up with severe stress can Section 309 come into play. However, as stated along with this paper, any individual who has led himself to the point of attempting to take their own life will undoubtedly have some degree of stress. The problem arises as the term "severe stress" has not clearly been defined. Furthermore, when we look at the moral background of Section 309 of the penal code we see that it clearly falls short as it adds stress and punishment upon an individual who is already fed up with the world and hence further strays that individual from the path of rehabilitation. The main argument behind Section 309 is that it would allow the true circumstances surrounding the suicide attempt to surface. However, it is not correct to place this burden on the individual who is quite clearly affected by their surrounding environment. This burden must be placed upon investigative bodies. Section 115 of the Mental Healthcare Act puts the burden of rehabilitating the individual on the government whereas Section 309 of the IPC reflects the thinking of a long time ago. Hence, it is clear that Section 115 of the Mental Healthcare Act 2017 is progressive whereas Section 309 of the IPC is archaic. Hence, to remove ambiguity and to provide a solid legal structure for those who attempt to take their life, Section 309 of the Indian Penal Code, 1860, must be repealed.