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Inconsistency between Protection of Child from Sexual Offences and Indian Penal Code: Analysis of Child Sexual Abuse in India

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ABSTRACT

Child sexual abuse is a grim reality that is all too common in India, with various negative consequences. Child sexual abuse is a worldwide concern as well as a violation of human rights. The goal of this research is to raise public awareness about this atrocity. Child sexual abuse is a widespread issue, with a high number of victims even at the lowest frequency. The Government of India has brought in a new law to deal with child sexual abuse, titled "The Protection of Children Against Sexual Offences (POCSO) Act, 2012." Child sexual abuse has been officially recognised as a significant problem in India. The legislation makes a variety of crimes illegal, including child rape, harassment, assault, and pornography, among others. This research focuses on the different types of child abuse, child sexual abuse, different forms of child sexual abuse, such as child marriage, online child marriage, and child trafficking, legal provisions in India for child sexual abuse, risk factors for victimization, and the consequences of child sexual abuse. The research also brings attention to the issue of child sexual abuse in India.

I. INTRODUCTION

It's natural for any civic body to want more protection, more rigor, and, to achieve these goals, more regulations in tough circumstances. The issue remains, however: what precisely is 'more'? Is the response 'more' appropriate? The history of India's legislative reactions to sexual assault demonstrates that every law passed in the wake of a "highlighted" incident may be based on a quick, sometimes erroneous, and inaccurate assessment of the issue.

Instead of a comprehensive and holistic strategy, Indian legislators have pursued a piecemeal approach to law modification, particularly when it comes to criminal laws dealing to sexual crimes. The fact that political leaders may advocate for severe legislation in order to earn sympathy or avoid popular reaction demonstrates the mobocratic character of legislation changes in India. Typically, such legislation lacks scientific and rational data analysis, as well

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as full legislative debate. The political elite is under great pressure to adopt legislation at breakneck speed without appropriate investigation or consideration of the consequences. To put it another way, fast legislation is the result of a stifled discussion. Those hastily imposed tough limits may meet society's collective demand for action. Symbolic pleasure in society, on the other hand, has a negative and cascading influence on the criminal justice system. A rushed attempt at law reform generally ignores the intricacies of legislative language, resulting in ambiguous legislation that must be read by the courts.

Recent rape attacks in Kathua² and Unnao³ have rekindled memories of the December 16, 2012 tragedy. The horrendous and horrifying "gang rape of a 23-year-old physiotherapy" understudy was a turning point in post-freedom India, when society went against the predominant "framework". In a nation where "rape culture" isn't just endured however empowered, common society has not just communicated dismay with the predominant the state of affairs, yet has likewise effectively prepared to battle the 'framework'.

Following Nirbhaya, a significant public outcry and agitation led in not only substantial changes⁴ to criminal legislation, but also awoke the "State, society, and people" to the fact that rape and crime against women are important societal issues. Despite strict "post-nirbhaya" restrictions, the Kathua rape case shook the nation's collective consciousness, as an 8-year-old girl succumbed to a gang's ravenous hunger, was brutally sexually abused, and murdered to satisfy their warped sexual need and sadistic satisfaction. These horrible crimes, as well as alleged government support for the offenders, served as a strong reminder that In our society, where such atrocities are perpetrated with impunity, India's rape culture has not only lasted, but also looms large. As a result of extensive media attention and popular indignation, the administration was obliged to adopt "corrective measures." The Criminal Law (Amendment) Ordinance, 2018 was enacted by the government (the Ordinance). The President of India signed the Ordinance, which took effect on "April 21, 2018". The Ordinance raised the severity of punishment (including the death penalty) for individuals convicted of raping minors while also instituting a number of procedural changes.

The aim of this paper is to look at several "CLAA" clauses in light of current criminal justice system realities. The author aimed to conduct an objective examination into the role of laws in societal issues concerning sexual offenses, as well as to assess the nature of state-provided solutions (with reference to "CLAA"). Furthermore, the author investigated the inflated state

² *State of Jammu Kashmir v. Deepak Khajuria @ Deepu* (Case registration no. 34/2018).

³ *C.B.I v. Kuldip Singh Sengar*, (Cri. Case No. 1228/2018).

⁴ Criminal Law (Amendment) Act, 2013.

narrative of deterrence that has been attempted to be constructed by expanding the death penalty to new crime and changing procedural processes.

II. IPC AMENDMENTS: ISSUES AND CONCERNS

The Indian Penal Code (IPC) is one of the country's most important pieces of criminal legislation. It includes a full list of offenses, as well as definitions and consequences for each. Prior to the "CLAA", the IPC was last updated in 2013 by the Criminal Law (Amendment) Act, which made significant modifications to the field of sexual offenses.

By adjusting existing "sections" of the IPC; and, second, by adding new "sections" to the IPC, which brought about the arrangement of new offenses. The new approaches are meant to battle the developing pattern of sexual violence against children. Nonetheless, the law's planned "deterrence" has come to the detriment of criminal enactment's proportionality and impartiality. A nearby survey of the provisions uncovers an enormous expansion in the punishments that the State accepts will fill in as a deterrent to such demonstrations of sexual violence.

The law, then again, can't accommodate itself with both the real factors of gender related sexual assault in India and perceived criminal law principles.

“Rape Punishment Increased and Rape Classification Blurred”

A thorough reading of “sections” 375 and 376” indicates a difference between rape simpliciter and aggravated rape⁵. The initial rape gives birth to the offenses in rape and provides less severe punishment. The later kind of rape as 14 situations in which the seriousness of rape is much more because of worst situations which brings excessive penalty. The person who makes worst situations in rape is held for the prosecution which ensures a not less than 10 years of sentence and a maximum LI. ⁶, committed an act against a woman⁷ is liable for prosecution⁸. Prior to the “CLAA”, the minimum term for rape simpliciter was seven years in jail, with a maximum of LI.

The “CLAA”, on the other hand, has raised the minimum sentence from seven to ten years in prison.⁹ On the surface, the measure appears to be a strong anti-rape provision. A deeper look, however, exposes its full implications. The most distressing feature of the latest law is that it eradicates the difference between rape simplified rape and worst rape. Logically any Worst thing specified in "376(2)" from clause (a) to (n) should have ensured a severe punishment.

⁵ Indian Penal Code, 1860 (Act 45 of 1860) s. 376 (2)

⁶ Indian Penal Code, 1860 (Act 45 of 1860), s.376 (2) clause (a) to (n).

⁷ Indian Penal Code, 1860 (Act 45 of 1860), s. 375.

⁸ Indian Penal Code, 1860 (Act 45 of 1860) s 376 (1)

⁹ The Criminal Law (Amendment) Act, 2018 (22 of 2018), s. 4.

However, following the implementation of the “CLAA”, both types of rape will suffer the same punishments. There seems to be no logical reason why rape simpliciter should be treated the same as severe rape.

Furthermore, if the IPC scheme accepts categorization based on the aggravated nature of the offense, the penalty should be appropriate to that classification. It's unclear if this absence was intentional or the result of careless drafting, but it has far-reaching and disastrous repercussions. When the culprit is a minor, the law has the reverse consequence. Assume the offender is “17 years old”. “Since the passage of the Juvenile Justice Act (Care and Protection of Children), 2015 (hereafter JJA), a juvenile can be tried as an adult and sentenced to jail under the Indian Penal Code (save for death and LI)”¹⁰. The lack of clarity in the JJA's application, as well as the ineffective execution by “law enforcement agencies”, is a persistent cause of concern. Several experts have expressed worry about uncertainties in the JJA, which are contributing to the denial of justice in cases involving juveniles who have broken the law.¹¹ In such cases, a minor who has broken the law may face a “term of 20 years” in prison. This sentence, which is not for a short period of time, may be unjust to the juvenile and obstruct the purpose of change. While the 2013 amendment established a mandatory minimum sentence of ten years, the “CLAA” introduced “a mandatory minimum sentence” of twenty years, a considerable increase without any legitimate proof or explanation.

III. NEW OFFENCES FOR RAPE AND GANG-RAPE OF MINOR’S

The “CLAA” amends the statute to include three new offenses¹². These offenses are intended to combat the growing number of rapes against minors. These new offenses create a gradient in terms of severity and consequence for raping children. a new crime of raping a woman under the age of 12 years, with a minimum prison term of 20 years, a maximum prison penalty of life in prison (meaning the rest of the person's natural life), and a maximum sentence of death.¹³¹⁴, on the other hand, are extensions of gang rape provisions¹⁵.

These rules were created to address gang rape instances involving women under the age of 16 or under the age of 12. A mandatory sentence of LI for gang raping a female under the age of

¹⁰ By virtue of section 21 of the JJA, a child cannot be sentenced to death or life imprisonment.

¹¹ Prof. Ved Kumari, Dean Faculty of Law, University of Delhi, April 3, 2017 *available at*: <http://www.lawyerscollective.org/the-invisible-lawyer/dr-ved-kumari-on-her-new-book-juvenile-justiceact-2015-in-the-aftermath-of-nirbhaya> (last visited on June 13, 2021).

¹² Indian Penal Code, 1860 (Act 45 of 1860), ss. 376AB, 376DA, 376DB.

¹³ Indian Penal Code, 1860 (Act 45 of 1860), s. 376AB

¹⁴ *Supra* Note 8, s. 376AB.

¹⁵ Indian Penal Code, 1860 (Act 45 of 1860), s. 376DA and 376DB

16¹⁶. In contrast, Section 376DB of the IPC, which deals with gang rape of a girl under the age of 12, imposes a heavier sentence of LI (for the rest of that person's natural life) or even death. The notion of a mandatory sentence, as defined under Section 376DA, is novel. To cope with gang rapes of women under the age of 16, "CLAA" inserted Section 376DA to the IPC, which carries a mandatory life sentence. In terms of proportionality, the validity of obligatory LI is debatable. In the first place, without court's discretion an obligatory sentence of LI will restrict individualisation of justice dependent on the criminal's and the crime's conditions. Second, in light of the fact that the punishment is compulsory, judges may request a better quality of evidence prior to conveying a conviction, possibly bringing down conviction rates.

Another issue with the "CLAA" is the effect it has on certain JJA requirements. "sections" 376DA and 376DB's mandatory sentencing clauses may conflict with Section 21 of the JJA. Section 21 of the JJA prohibits a juvenile in conflict with the law from getting a life or death sentence. On the other hand, it is required to have an obligatory punishment of LI (for the remainder of a person's natural life); It establishes LI as the minimum sentence and death as the maximum sentence. In this case, a juvenile cannot be convicted because both have mandatory minimum penalties that cannot be imposed on a juvenile who is in violation of the law owing to section 21, JJA. As a result, the question arises, if not under the IPC, what will be the punishment quantum in the absence of any law? The "CLAA" is disconcertingly silent on the matter.

A woman who was a member of a group and assisted in the conduct of rape, on the other hand, cannot be charged with gang rape because she did not commit rape.¹⁷ The Supreme Court decided in the Priya Patel case¹⁸ that the phrase "in furtherance of their common intention" in gang rape refers to the intent to commit rape, and that women cannot rape another woman.¹⁹ The Supreme Court's limited approach rejects the idea of shared responsibility, which holds the wrongdoer's "associates" liable regardless of the nature or amount of their involvement in the crime. The Justice Verma Committee report²⁰, which recommended that in circumstances of gang rape, each perpetrator be punished equally regardless of gender, also backed gender neutral responsibility in gang rape cases.²¹ In contrast, such a change was not included in the 2013 amendment. Similarly, the "CLAA" has been unable to bridge this difference. A

¹⁶ Indian Penal Code, 1860 (Act 45 of 1860), s. 376 DA

¹⁷ K.I. Vibhute, *PSA Pillai's Criminal Law* 824 (Lexis Nexis, 13th edn. 2017), at 829.

¹⁸ *Priya Patel v. State of Madhya Pradesh* (2006) 6 SCC 263.

¹⁹ *State of Rajasthan v. Hemraj* (2009) 12 SCC 403.

²⁰ Justice J.S. Verma, Justice Leila Seth, *et.al.* Report of the Committee on Amendments to Criminal Law (2013).

²¹ *Id.* at 444.

newspaper described a case shortly after the Ordinance was passed in which a mother supported her boyfriend in the rape of her 13-year-old niece.²² Given the recent Supreme Court judgements on the matter, it will be fascinating to see what type of accountability the woman suspects who assisted in the gang rape bears.²³

IV. GENDER NEUTRALITY: AN INHERENT CONFLICT BETWEEN “POCSO” & IPC

By altering Section 42 of the Act, the “CLAA” has modified the “POCSO”. Because the IPC stipulates higher punishments for rape, Section 42's purpose is to give conventional IPC laws preference over “POCSO” in terms of punishment.²⁴ Only that the conduct or omission be illegal under both the IPC and the “POCSO” is required. For example, under “POCSO”, the minimum punishment for penetrative sexual assault is seven years in jail, but under the IPC, the punishment is ten years (if the woman is between the ages of sixteen and eighteen) or twenty years (if the woman is between the ages of sixteen and eighteen) in jail (if woman is under 16 years of age). In such circumstances, the perpetrator shall be sentenced in line with the guidelines of the IPC. The revision of “POCSO” was necessitated by the inclusion of additional offenses to the IPC, as specified by the “CLAA”.

Section 42 of the “POCSO” was altered to apply the heavier sanctions under the IPC to “POCSO” crimes, and additional offenses were substituted. The “CLAA”, on the other hand, failed to examine the fact that POSCO is a gender-neutral statute, whereas the IPC's rape legal framework is gender-specific. “POCSO” refers to victims and abusers as “persons,” whereas “sections” 375, 376, and succeeding clauses refer to victims and perpetrators as “woman” and “man,” respectively. Persons who commit penetrative sexual assault on a girl under the age of 12 face a minimum punishment of LI or the death penalty, “POCSO”. However, because there is no analogous provision in the IPC for rape of males, the sentence for penetrative sexual assault on a boy will be reduced to ten years or life imprisonment. The same inconsistency will apply to gang rape laws, with the same offense committed against a boy and a female being treated differently. Because it violates the equal protection principle, the “CLAA” violates Article 14 of the constitution to the extent that it discriminates between sexes in terms of punishment. It's also worth mentioning that it's in the public interest to begin a discussion about enacting gender-neutral criminal legislation for sexual offenses, as well as effective measures to prevent their exploitation. Globally, countries have made required changes to their criminal

²² Woman forces 13-year-old niece to drink, lets her boyfriend rape the child in Delhi, *available at*: <https://www.hindustantimes.com/delhi-news/woman-forces-13-year-old-niece-to-drink-lets-her-boyfriend-rapethe-child-in-north-west-delhi/story-Ci6w90DViuEH9RCTLzkTbN.html>. (last visited on June 6, 2021).

²³ *Om Prakash v. State of Haryana* (2015) 2 SCC 84.

²⁴ Protection of Children from Sexual Offences Act, 2012 (Act 32 of 2012), at s. 42.

laws to include gender-neutral clauses. The significant proportion of male and transgender sexual assault victims is gaining acceptance.

V. CONCLUSION

The criminal law is one of the most important links in the chain that impacts a state's interaction with its citizens. As a result, it is preferable if the penal law expresses this relationship in detail and without ambiguity. Criminal law which is the core to protect the citizens fundamental rights to life and liberty, must not be put in a situation of getting conflicts with any other law and should not have any absurdness. The first hand rule of today's legislative interventions appears to be ambiguity and vagueness.

When it comes to crafting legislation, the three Macaulay-valued criteria of a good code⁶⁵ have been tried and tested. The imprecise phraseology of criminal laws demonstrates their lack of specificity. Due to apparent contradictions in Indian criminal laws, ordinary people and even legal specialists find it difficult to define the scope of a certain provision. On the one hand, due to a lack of progress in law reform, the IPC and its revisions are still subject to frequent judicial interpretation, limiting legislative power. On the other hand, important legislative reform suggestions provided by expert groups and committees continue to be ignored by the legislative and executive departments.

As a result, the IPC and its most recent anti-rape amendments are plagued with ambiguities, contradictions, and legislative lethargy. A hurriedly written bill aimed at quelling public rage may be good in terms of aesthetics and political rhetoric. However, it jeopardizes the quality of legal amendments and causes a backlog of requests for authoritative legal declarations in the court system.

The existing legislation making sexual assaults against children a crime were long overdue. People should have a feeling of conflict and legitimacy throughout the process, from inception to adjudication, if the adjudication system is made more transparent and police involvement in such cases is made swifter. The deterrent effect of this act is enough, but in order to overcome and eliminate this issue at the grassroots level, the people's collective consciousness must be pure and filled with feelings of love and compassion.

The Parliament has missed yet another opportunity to make important modifications to the IPC, which were left unchanged by the 2013 amending Act. The administration appears to have overlooked the more pressing need for a full reform of the penal code by making cosmetic modifications. Furthermore, the state's deterrent narrative is founded on erroneous institutional antipathy that is unrelated to reality. Every government have some duties to study a law to

research about it and to evaluate the outcomes of its implementation before enacting it. In absence of study and research of law the legal body of government will go to face confusion and irrelevancy in law which will violate the key objectives and principles of criminal law jurisprudence and constitution. Only when leaders will feel to protecting a citizen's rights in regard to society as well as in the interest of state to maintain dignity of law and order then the respect and obedience of the law will be attained.
