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Shifting Paradigm: An Analysis of Evolution of Rape Laws in India

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ABSTRACT

Women across the world have been more prone to sexual offences, and this has been recognized as well by almost every country by criminalizing forceful sexual advances against women. Among this category, rape is considered as one of the most appalling, atrocious, barbarous crime that can be committed against any woman. There has been a significant evolution in rape law. However, instances of rape have only increased with passage of time. In India, at present the relevant provisions for criminalizing rape is provided under Sections 375 to Section 376E of the Indian Penal Code, 1860, and some specific provisions are there for criminalizing rape against minors under the Protection of Children from Sexual Offences Act, 2012. In this paper, an attempt has been made to trace the evolution of rape laws in India and to comment on the possible paradigm shift in the evolution of rape laws in India.

Keywords: Rape, Sexual Assault, JS Verma Committee.

I. INTRODUCTION

Women across the world have been more prone to sexual offences, and this has been recognized as well by almost every country by criminalizing forceful sexual advances against women. Among this category, rape is considered as one of the most appalling, atrocious, barbarous crime that can be committed against any woman. It is a crime not only against a woman's body but also against her privacy and sexual autonomy. It is gross violation of her basic human rights recognized internationally. The reason it is one of the most heinous crimes is that it has considerable impact on a victim ranging from psychological, physical, social to even economic. It not only affects the victim but also her family and the whole society in general.

According to Merriam-Webster dictionary "Rape is an unlawful sexual activity and usually sexual intercourse carried out forcibly or under the threat of injury against a person's will or with a person who is beneath a certain age or incapable of valid consent because of mental illness, mental deficiency, intoxication, unconsciousness, or deception"³ The word 'Rape' finds

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³ (June,01,2023, 10:00 AM) <https://www.merriam-webster.com/dictionary/rape>

its origin in the Latin word *Rapere* which use to means snatching, grabbing, and carrying away. It's evident that the word *Rapere* was given wide meaning as in roman law kidnapping of woman was also considered as Rape.⁴

Rape, unfortunately, is not a new crime peculiar to modern era; it was in existence even in ancient and medieval era. Since it was prevalent in those times, there were punishments prescribed for it as well. However, the content and concept of the crime of rape has greatly evolved over the centuries. The evolution is evident from a superficial comparison of modern definition of rape in various jurisdiction with the definition of rape prevalent in Roman era.⁵ Today the modern definition of rape considers modern man's complex psyche.⁶ This evolution is welcomed as a detailed definition of 'Rape' was always a necessity in penal codes of the various countries.⁷

In ancient time although law provided harsh punishment to rapist, but the severity of the punishment was directly related to the caste of the convict and victim.⁸ Corporal punishment, death penalty and confiscation of all property of Rapist are some of the punishments that can be found in code of Manu and other renowned code writers.⁹

In India, at present the relevant provisions for criminalizing Rape is provided under Sections 375 to Section 376E of the Indian Penal Code, 1860 and some specific provisions are there for criminalizing rape against minors under the Protection of Children from Sexual Offences Act, 2012. In this paper, we will analyze how the concept of anti-rape laws has evolved over the past few centuries, the present status and will also deliberate upon the way ahead.

II. LAW RELATING TO RAPE BEFORE INDEPENDENCE

As East India Company applied Muslim personal laws in criminal matters of Indian people, rape was regulated through Muslim penal laws.¹⁰ Later, an attempt was made to codify the acts amounting to rape and its punishment in the year 1828, and accordingly British colonies in Asia Act was passed for the same purpose.¹¹ Punishment prescribed in the legislation was imprisonment in general and death penalty in situations where the victim was less than 8 years

⁴ Suryansh Shukla, Critical Analysis of Provision Relating to Rape in India, IJLI, 2, 13,2020.

⁵ *Id* at 13

⁶ *Id* at 13

⁷ *Id* at 13

⁸ Ram Prasad Das Gupta, Crime and Punishment in Ancient India, 73,(1973), as quoted in Aarti Sharma, Rape Laws in India: An Analytical Analysis, IJRAR,3,1,(2016).

⁹ *Id* at 1

¹⁰ Kaseera, Pamini, A Historical Analysis of Rape Laws in India (June 5, 2020). <https://ssrn.com/abstract=3619807>

¹¹ *Id*

of age.¹² Thus, rape of a minor was considered to be more heinous back then also, but the upper age of minor was quite low as compared to what is prescribed now in Indian Penal Code.

In 1834, Lord Macaulay was elected as a Law member in the council that was entrusted with the responsibility to codify criminal offences and provide respective punishments. In the draft prepared by the council, rape was recognized as an offence against human body and was penalized under Clauses 359 and 360 of the draft. While Clause 359 provided for the definition of rape, Clause 360 prescribed punishment for it.

It is to be noted that under this draft only a man could be punished for the offence of rape against a woman when he has sexual intercourse with any woman against her will or without her consent. The draft also included the situations where the consent given by the woman does not matter like when she is not physically or mentally fit to provide free consent, when such consent has been obtained by putting her in fear of death or other injury or when she has been deceived to believe that the man is her husband. Moreover, it also stated that sexual intercourse with any girl below nine years of age would amount to rape irrespective of the fact whether she has consented or not. Another prominent provision in the draft is that it explicitly excluded marital rape by providing an exception at the end of the provision.

There was a wide range provided for the punishment starting from imprisonment for two years to fourteen years. The huge difference between upper limit of the punishment and lower limit bagged a lot of criticism as it would give judiciary tremendous discretion which might have led to discrimination. However, despite these criticisms, the final Section 375 of the Indian Penal Code contained the same provision as in the Clauses 359 and 360 of the draft with only one exception i.e., it criminalized marital rape provided the age of the wife is less than ten years.

The law of rape remained unchanged till thirty years after the enactment of Indian Penal Code. An amendment was brought about in the year 1891 by the efforts of Sir Andrew Scoble in the form of Amendment Act 1891.¹³ The age of consent was increased from eight years to twelve years by the said act.¹⁴ This change was applicable to both rape and marital rape.¹⁵ Increase in consent age was made to protect female child from sexual exploitation.¹⁶

To further increase the age of giving consent to fourteen years, Hari Singh Gour brought a new

¹² *Id*

¹³ Act X of 1891, 1891, (IND) as quoted in Aarti Sharma, Rape Laws in India: An Analytical Analysis, IJRAR,3,1, (2016).

¹⁴ *Id* at 1

¹⁵ *Id* at 1

¹⁶ *Id* at 1

bill to amend section 375 of IPC.¹⁷ However, a major change was made in the bill when it was sent to select committee for consideration.¹⁸ Select committee had reduced the age of consent to thirteen years in marital rape and the provision finally became law through Amendment Act 1925.¹⁹ Continuous efforts were made by the reformists to increase the age of consent to protect young girls from sexual violence. Another attempt to increase the age of consent to sixteen year was made by Hari Singh Gour via a bill.²⁰ This bill led to formation of Age of Consent Committee which recommended that age of consent should be raised to fifteen years in case of marital rape, and that the term marital rape be replaced by marital misbehavior.²¹ It further suggested that the offense of marital behavior should be included in a new section and removed from section 375 and 376 of India Penal Code.²²

III. LAW RELATING TO RAPE AFTER INDEPENDENCE

Not much changed with respect to the definition of ‘Rape’ under the Indian Penal Code after the independence too. The only change was that age of consent for both marital as well as extra-marital rape to fifteen years and sixteen years respectively.²³

The task of review of the Indian Penal Code was given to the Law Commission in the year 1959 but it was able to present its report in the year 1971. In its 42nd Report, the Law Commission recommended significant changes in Section 375 of the Indian Penal Code.

(A) Major Recommendations under the 42nd Law Commission Report

The issue whether the consent given by the woman who is of unsound mind or under the influence of intoxication should be considered valid consent for the purpose of Section 375 was taken into consideration, and it was suggested that more clauses shall be added to the said section to invalidate consent by any woman who either by unsoundness of mind or under the influence of intoxicating substance is unable to understand the nature and consequences of her consent.²⁴

Moreover, the then existing provision did not cover consent obtained by putting the woman in the fear of injury to any other person other than herself, therefore it was suggested that the scope of that clause should be widened to include fear of injury to others as well as. The Law

¹⁷ Government of India, Report of the Age of the Consent Committee, at 11,(1928-29) as quoted in Aarti Sharma, Rape Laws in India: An Analytical Analysis, IJRAR,3,2, (2016).

¹⁸ *Id* at 2

¹⁹ Aarti Sharma, Rape Laws in India: An Analytical Analysis, IJRAR,3,2, (2016).

²⁰ *Id* at 2

²¹ *Id* at 2

²² *Id* at 2

²³ Indian Penal Code 1860 and Code of Criminal Procedure (Amendment) Act 1949.

²⁴ Law Commission of India,42nd Law Commission Report at 275

Commission substantiated this suggestion by referring to few cases where the man was held not guilty of rape as the consent was obtained by putting the woman in the fear of injury to someone else.²⁵

The Report also stated that the exception clause of marital rape should be completely removed from the Section 375 and, it should not be named as rape at all, but it should be made a distinct offence named 'Sexual Intercourse with a child-wife'.²⁶ It was also highlighted in the report that the situation where husband and wife are living separately under the decree of judicial separation is not addressed in the present law, and forceful sexual intercourse by such husband upon wife should be considered as rape.²⁷

It was also recommended to insert three new sections in which consent is obtained by dominating the will of any woman by undue influence. The three sections included sexual intercourse by public servants of woman under their custody, sexual intercourse by person in-charge of jails, hostels etc. of woman residing within their authority, sexual intercourse by hospital manager or ward of woman who is getting treatment for any mental disorder.²⁸

To give effect to law commission recommendation, IPC (Amendment) Bill 1972 was introduced. Joint Committee reviewing the bill made following observation

- i. The offense of Marital rape should be abolished altogether
- ii. Punishment for rape should be within a range of ten years to imprisonment for life. Depending on the gravity of rape, a punishment falling in the said range can be given.
- iii. Three years punishment should be there for rape committed by husband on her wife in case a decree of judicial separation is ongoing.
- iv. Rape which has a higher gravity like rape in custody, rape by a person having undue advantage over the woman etc. should be compulsorily punished with certain duration.
- v. Consent of mental patient shouldn't be considered as consent in case of Rape.

However, the Indian Penal Code amendment bill 1972 could not culminate into law.

(B) The Infamous Mathura Judgment

Mathura Case²⁹ is one of the most important judgments that shaped the anti-rape laws in India. It resulted in massive backlash from the society and academia and led to one of the major

²⁵ *Id* at 276

²⁶ *Id* at 277

²⁷ *Id* at 277

²⁸ Indian Penal Code, 1860 §376C, §376D and §376E.

²⁹ Tuka Ram And Anr v. State of Maharashtra, 1979 AIR 185.

amendments in anti-rape laws.

In the year 1972, an Adivasi, 16-year-old girl was brutally gang raped by the police officers in the premises of police station. Although the incident itself was criticized but how the case was handled by the judiciary started a series of protest across the country. While dealing with the case, the lower court gave extremely problematic observations such as the victim being of loose morals and being habitual of sexual intercourse and acquitted the accused. Fortunately, Bombay High Court reversed the judgment and held that there is a difference between 'submission' and 'consent'. However, the Supreme Court again reversed the judgment of the High Court and set the accused free. It held that since there were no signs of injury on her body, it can be assumed that she had consented. The judgment of the Supreme Court was heavily condemned as it equated 'submission' with 'consent'. This observation is completely flawed as when a victim faces such situation, they cannot be expected to react in one particular manner. Infuriated by the verdict, four law professors wrote an open letter to the Supreme Court criticizing this judgment. They pointed out that sometimes, the victim merely submits because of fear and therefore there is a difference between 'consent' and 'submission'.³⁰

(C) 84th Law Commission Report

As a result of the protests and public uproar caused by the Mathura Judgment, Law Commission was appointed to identify issues relating to rape laws in India and the report submitted by the Law Commission recommended amendments in the Indian Penal Code, 1860 and the Indian Evidence Act 1872. The Commission presented its report in the year 1980 within one month of its formation.

The report focused on interpreting the concept of 'consent' under Section 375 and analyzed its position before and after 42nd Law Commission Report Recommendations. It reiterated the importance of consent to be 'voluntary and free' and inclusion of instances such as fear of injury, intoxication that render the consent invalid in Section 375 of the Indian Penal Code.³¹ Moreover, the report also focused on distinguishing between the 'consent' and 'submission' and suggested that an explanation should be added after Section 375 stating that mere helpless submission in situations of compulsion and non-resistance should not be deemed as consent.³²

The Law Commission also considered the question of revising the age of consent in the then existing provision and making it to eighteen years. It further suggested that since the age of

³⁰ Justice JS Verma, Report of the Committee on Amendment to Criminal Law, 79, 2013.

³¹ Law Commission of India, Report on Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence, 84th Law Commission Report at 6-7, (1980)

³² *Id* at Para 2.13, Pg. 7

marriage has been set at eighteen years for women therefore it can be assumed that a girl can give free consent at this age, and hence it should be made the 'age of consent' for the purpose of Section 375 of the Indian Penal Code too.³³

While considering the suggestion to increase the minimum punishment in cases where two or more men rape a woman, the Law Commission pointed out that rape is a single act of sexual intercourse and if performed by several men then they shall be liable in individual capacity for the offence of rape. Hence, the commission did not acknowledge the offence of gang rape as more severe offence and deserving of higher minimum punishment.³⁴

The commission also enumerated certain measures with respect to arrest of woman and medical examination of victim of rape as well as accused of rape to be included by amending the Code of Criminal Procedure. The objective was to facilitate prosecution in rape cases.³⁵

Moreover, the Commission emphasized on making an exception to general rule of public trial in cases of rape and allied offence due to intimate and private nature of offence. The commission highlighted that due to embarrassment, the victim may not be able to give complete testimony in public trials and therefore there is a need to amend the relevant provisions of the Code of Criminal Procedure to allow in-camera trials in cases of rape and allied offences. It was also suggested that the names of the victim as well as the accused should remain anonymous during the investigation and, the name of the victim shall remain anonymous even after publication of judgment.³⁶

An important suggestion to introduce a new Section 111A in the Indian Evidence Act, 1872 was made that would state that in cases where the victim testifies that she had not consented then the court shall presume that she did not consent.³⁷

(D) Criminal Law (Amendment) Act, 1983

To effectuate the recommendations laid down in the 84th Law Commission Report, a Criminal Law (Amendment) Act, 1983 was passed, and it received President's assent on 25 December 1983. The Amendment Act intended to amend the provisions of the Indian Penal Code, 1860; the Code of Criminal Procedure, 1973; the Indian Evidence Act, 1872.

The Act inserted Section 228A in the Indian Penal Code, 1860 which penalized publication of names/identity of the victim of Rape and prescribed punishment for a term extending to 2 years.

³³ *Id* at Para 2.20, Pg. 9

³⁴ *Id* at Para 2.26, Pg. 10

³⁵ *Id* at 22-27

³⁶ *Id* at 28-31

³⁷ *Id* at 32

So, the recommendation given by the Law Commission has been implemented in this regard.

Moreover, the recommendations given by the Law Commission in its 42nd Report and reiterated in its 84th Report regarding the criteria of ‘free consent’ were also incorporated in the Code by this Amendment Act. Therefore, consent given under the effect of intoxicating substance, under fear of hurt or by a girl who is of unsound mind was declared to be invalid consent. However, the age of consent was not raised to eighteen years in case of extra-marital rape cases as was suggested in the 84th Report of the Law Commission. Moreover, the age of consent for marital cases was also not increased and it remained unchanged i.e., fifteen years

(E) Nirbhaya Case³⁸

A female physiotherapist was inhumanely gang raped in Delhi in the year 2012. This incident shook the collective conscience of entire country and soon there were protests across India. The citizens started to lose faith in the criminal justice system and the responsibility of the State to protect its citizens. It also gained attention from several international organizations and the Government was pressurized to review the position of anti-rape laws in India. This case highlighted various lacunae in the then existing laws as it did not include non-penile vaginal penetration within its scope, there was no aggravated punishment for Gang Rape etc. Apart from rape, various other sexual crime against women were demanded to be amended/included. This led to the formation of J.S. Verma Committee.

(F) Justice JS Verma Committee report³⁹

The committee recommended following changes in rape laws:

1. Public servant who does not conduct investigation in any case and does not record FIR of offences which is punishable under Section 354, Section 354A, Section 354B, Section 354 C(2), Section 376(1), Section 376(2), Section 376(3), Section 376A, Section 376B(1), Section 376B(2), Section 376C, Section 376D or Section 376F shall be punished with up to five years of Imprisonment
2. The offence of disrobing the modesty of women under section 354 of IPC be replaced by the offence of ‘Sexual Assault’. The offence sexual assault was defined by the committee as any intentional sexual touch without the consent of the person being touched or creating unwelcome threat of sexual nature or unwelcome advance by spoken words, act, and gesture. When such spoken words, act and gesture is directed toward the

³⁸ Mukesh & Anr v. NCT of Delhi & Ors, (2017) 6 SCC 1.

³⁹ *supra* note 29

victim or are used in the presence of the victim.

3. Following offences should be added to protect women against non-penetrative sexual assault
 - a. Section 354A Assault or use of criminal force to woman with intent to disrobe her
 - b. Section 354B should be added to protect women against 'Voyeurism'
 - c. Section 354C should be added to protect women against 'Stalking'
4. A wider definition of rape should be provided which should include penetration by penis or any body part or any object in vagina, anus or urethra, any manipulation of body of a person to cause penetration in any other person's vagina, anus or urethra or performance of 'cunnilingus' or 'fellatio'
5. The concept of unequivocal voluntary agreement in case of consent should be adopted whereby the women engaging in sexual intercourse should give some positive communication about her willingness whether that communication be verbal or nonverbal
6. That the age of consent to be made sixteen years.
7. Minimum punishment for aggravated form of rape should be increased.
8. Gangrape should be defined and punished by a new section 376C and a punishment of not less than twenty years to life imprisonment should be awarded in case of Gang Rape.
9. Life imprisonment should be awarded in case if victim is in persistent vegetative state after Rape or Gang Rape.
10. Repeat offenders of Rape should be punished with Imprisonment of Life under a new section 376 E of IPC.
11. An offence of breach of command responsibility should be added to punish the officer in command who failed to prevent sexual assault and rape under certain section of IPC.

Before the appointment of Justice Verma committee. Legislators were about to introduce criminal law amendment act 2012. However, the committee made recommendation to amend the criminal law amendment act 2012. Therefore, another amendment act that Criminal Law Amendment Act 2013 was passed after incorporating the recommendation of Justice Verma Committee.

All the recommendation of Justice Verma Committee mentioned in this section except the

abolition of martial rape and enactment of offence of breach of command responsibility was given effect by Criminal Law Amendment Act 2013. For some offences different punishment than what was prescribed in the Criminal Law Amendment Act 2013 was provided.⁴⁰

(G) Criminal Law Amendment Act, 2018

Even after all these changes the rate of rape crimes in India didn't decrease, and heinous rape like 'Unnao' and 'Kathua' still happened. Another amendment act in the form of Criminal Law Amendment Act 2018 was passed which led to following changes in rape law:

1. Punishment of rape was increased to minimum of ten years from seven years⁴¹
2. Minimum punishment of twenty years to be given in case of rape of a girl below sixteen years of age⁴²
3. Minimum punishment of twenty years to be given in case of rape of a girl below twelve years of age and the punishment can be extended to life imprisonment or death⁴³
4. Minimum punishment of life imprisonment to be given in case of gang rape of a girl below sixteen years⁴⁴

IV. CONCLUSION

It is clear from above discussion that we have come a long way as far as anti-rape laws are concerned. From very narrow and restrictive definition of 'Rape' to a much wider definition that includes not just penile-vaginal penetration but also insertion of objects and other acts such as cunnilingus etc. The concept of 'consent' has also evolved a lot to ensure that it does not become an obstacle to establish the case of victim.

Therefore, we can conclude that there has been a significant evolution in Anti-rape law. However, instances of rape have only increased. This is not to say that the changes in rape law was not necessary but increasing rate of rape after these changes suggest that something more needs to be done. The deterrence effect of 'enhanced punishments' should also be researched upon to understand whether future amendments should be in the similar line, or some other aspect needs to be addressed. Moreover, the Anti-rape Law in India is gender specific and the reasonably so, however as our society is progressing, steps should be taken by the government

⁴⁰ For example, a different punishment was provided in §166A of Indian Penal Code that what has been suggested by JS Verma Committee.

⁴¹ Criminal Law Amendment, Act 22 of 2018, s. 4

⁴² *Id* at s.4

⁴³ *Id* at s. 5

⁴⁴ *Id* at s. 6

to conduct research to identify the need to make it gender-neutral in the lines of POCSO.

Perhaps, role of law in eliminating fundamental factors which are root cause of rape can be explored. There are many studies that points towards factor like patriarchy⁴⁵, misogyny⁴⁶, inequitable gender view⁴⁷, victim shaming etc. as root cause of rape. Often a case is made out, and rightly so, that law reform in penal law alone can't reduce rape and that the mindset of society needs to change. However, a pertinent question that is often not raised is can law play a role in changing the mindset of society? The answer to this question is certainly in affirmative in the opinion of authors of this paper. Law can play some role in changing the mindset of people and it's about time that legislators take notice of this fact.

⁴⁵ WHO, WHO Department of Reproductive Health, Understanding and Addressing Violence Against Women https://apps.who.int/iris/bitstream/handle/10665/77434/WHO_RHR_12.37_eng.pdf

⁴⁶ Gurvinder Kalra and Dinesh Bhugra, Sexual violence against women: Understanding cross-cultural intersections, *IJP*, 55(3),244-249,2013.

⁴⁷ *Supra* note 44.