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Critical Analysis of Provision Relating to Rape in India

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ABSTRACT

The concept of 'Rape' as a properly defined offence was first introduced in the Indian Penal Code of 1860 drafted by Lord Macaulay and since then it has continuously been evolving through various Criminal Law Amendment Acts which has modified the concept to meet the changing needs of society, but is that change sufficient enough to effectively deal with the persistent problem of rise in the number of sexual offences in the last few decades? Whether current provisions relating to rape under Indian criminal law adequate? If not then who is responsible and what further change is required?

The objective of this research paper is to answer all these questions through a comparative analysis of the original section 375 and major criminal law amendments which modified the original provision and the circumstances which led to such amendments, tracing the shortcomings and ambiguities in the existing laws relating to rape and finally to ascertain steps that are needed to be taken to overcome the inadequacy of current provisions relating to rape.

I. INTRODUCTION

The term rape originates from Latin term Rapere which means “to snatch, to grab, to carry off”, in Roman law mere carrying off of women by force constituted ‘raptus’. 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”². It can be observed that by comparing the Latin/Roman understanding of rape and the modern definition of rape that rape has not merely increased as a definition but it has evolved as a concept so as to accommodate the complex psyche of modern man and this evolution was essential to incorporate the concept of rape in penal statutes of various countries.

In India rape is defined under section 375 and punishment for rape has been provided under

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² Merriam-Webster Dictionary www.merriam-webster.com/dictionary/rape (last visited 22/04/2020)

section 376 of Indian Penal code, 1860, it was first introduced as a penal law under the code presented by Lord Macaulay since then it has gone through various amendments, when it comes to amendment of laws relating to rape two major criminal amendment act comes to mind, first is criminal law amendment act of 1983 which was passes by the legislature after the massive public outrage against Mathura Rape Case³. Second is Criminal Law Amendment act of 2013 which was a consequence of Nirbhaya Rape⁴ Case which shook the soul of our nation.

Despite various amendments to provisions relating to rape the statistics show a very different picture altogether. According to statistics published by National crime report bureau(NCRB) one woman reported rape every 15 minutes in 2018 on average⁵ and these are just the reported numbers, according to a livemint report 99% of cases of sexual violence go unreported⁶. The facts and figures paint a very clear picture that merely making the substantive law stringent doesn't act as a deterrent to the antisocial elements of our society; we have to make changes to the procedural part of law if we ever hope to see better statistics in future.

II. COMPARATIVE ANALYSIS OF ORIGINAL AND AMENDED SECTION 375

The original section 375 which was inserted in IPC, 1860 defined rape as-

“A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions- 1) Against her will, 2) without her consent, 3) With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt, 4) With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married, 5) With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent, 6) With or without her consent, when she is under sixteen years of age. Explanation.—Penetration is sufficient to constitute

³ Tuka Ram and Anr v. State of Maharashtra 1979, AIR 185

⁴ Mukesh & Anr vs State For Nct Of Delhi & Ors 2017, 6 SCC 1

⁵ India Today, NCRB Data 2018: 1 rape reported every 15 minutes January 11 2020 available at <https://www.indiatoday.in/india/story/ncrb-2018-woman-reports-rape-every-15-minutes-in-india-1635924-2020-01-11>(last visited 23/04/20)

⁶ Livemint, 99% cases of sexual assault go unreported April 24, 2018 Available at <https://www.livemint.com/Politics/AV3sIKoEBAGZozALMX8THK/99-cases-of-sexual-assaults-go-unreported-govt-data-shows.html>(last visited 23/04/20)

the sexual intercourse necessary to the offence of rape”⁷

The original definition of rape was ambiguous and rudimentary in nature as it confined the definition to mere vaginal penetration and any other form of sexual assault wasn't considered to be that severe which subsequently led to a very low rate of conviction. However because of various criminal law amendments the definition of rape has drastically changed, following is a brief analysis of important criminal law amendments to provisions relating to rape-

A. Criminal law (Second Amendment) Act, 1983

This amendment was the result of outrage of people against the infamous judgment by the apex court in Tuka Ram And Anr vs State Of Maharashtra⁸ also known as Mathura rape case where a young girl was raped in police custody and despite of conviction by Bombay High court, it was overturned by supreme court after SLP was filed on the reasoning that there was no resistance on part of Mathura and that she was habituated to sexual intercourse. This erroneous judgement by apex court led to nationwide protest by various social activists and NGOs which led to following amendments to provision relating to rape –

- Section 114 A was added in Indian Evidence Act which states that where sexual intercourse by the accused is proved and the victim in her evidence states that she didn't either directly or indirectly gave her consent then the court shall presume that there was no consent on part of victim.
- Section 376 which deals with punishment for the offence of rape was also amended making custodial rape punishable of atleast 7yrs.
- Section 228A of IPC was inserted which made publication of Name of rape victims a criminal offence punishable with up to 2 yrs of imprisonment.
- 327(2) was also added which provided that trial of rape cases should be conducted as in-camera proceedings.

B. Criminal Law Amendment Act, 2013

Criminal Law Amendment Act, 2013 also known as Anti rape bill was a result of nationwide protest against the inadequacy of rape laws in India which came into light after the gruesome rape and murder of Nirbhaya⁹ in the December of 2012, human rights activists and various women organisations demanded for stricter and swifter laws for the perpetrators of the crime of rape, as result of which criminal law amendment act was passed by the parliament and

⁷ Indian Penal Code No.45 of 1860 (before 2013 criminal amendment Act)

⁸ *Supra* Note 2 at 2

⁹ *Supra* Note 3 at 2

came into force on 3rd February 2013 with the objective to overhaul the current rape laws of country. Following amendments were made-

- Various new sections were added which specifically dealt with various forms of sexual offences like Sexual harassment- section 354A, Assault or Use of Criminal Force to woman with intent to disrobe – Section 354B, Voyeurism-Section 354C, Stalking 354D.
- The definition of rape provided under section 375 was expanded to include oral sex and penetration was not only limited to penile vaginal penetration but it also included penetration by any object as well, furthermore manipulation of the body of the woman so as to cause penetration was also added to the definition to expand the scope of the section.
- A new explanation was added which defined consent as “unequivocal voluntary agreement” which means absence of resistance doesn’t signify presence of consent and also age of consent was raised from 16 to 18 yrs.
- Procedural law was also amended like section 154(1) of CrPC that deals with FIR was amended that in certain cases(rape) FIR has to be included by a woman police officer furthermore if the victim is Physically or Mentally disabled FIR has to be recorded at her place of residence or a place of her choice in presence of a special needs interpreter if needed.
- Also certain sections of Indian Evidence Act were also amended like section 53A was added which provides that where the question of consent is an issue then any evidence which relates to past sexual history or character of the victim shall not be relevant on issue of such consent.

C. Criminal Law Amendment Act, 2018

Because of various amendments with the objective of increasing stringency of provision relating to rape, one ought to assume that such an evolution of rape laws will surely result in ensuring a safer environment for women in our country, but sadly the reality is not such. India witnessed numerous infuriating incidents of rape out of which two of them stand out in particular which led to another criminal law amendment to provisions relating to rape, these incidents are the Kathua¹⁰and Unnao¹¹ rape case which reignited the yearn among the population to end the prevalent rape culture as a consequence of which Criminal Law

⁹ State of Jammu Kashmir v. Deepak Khajuria @ Deepu (Case registration no. 34/2018)

¹¹ C.B.I v. Kuldip Singh Sengar, (Cri. Case No. 1228/2018)

Amendment act, 2018 was drafted and came into force on 11th August 2018. Criminal amendment act, 2018 amended the rape laws in following manner-

- Various new sections were added to the punishment section i.e. section 376 of IPC, 1860 to increase the punishment in cases where rape is committed against a minor. Section 376AB¹² was added which provides for punishment of rape of woman less than 12 yrs of age. Section 376AB provides minimum punishment of 20 years or life imprisonment (remainder of persons natural life) or death sentence.
- Procedural law like CrPC was amended as well to ensure delivery of justice within reasonable time by reducing investigation time in all the cases of rape specially in cases of rape of minor where investigation period was reduced from 3 months to 2 months. Furthermore anticipatory bail which is provided under section 438 cannot be granted in case of rape of a minor (below 16 yrs)
- Section 53A and section 146 of Indian evidence act, 1872 has been amended so that it can be applied in cases of rape and gang rape of minors below 16yrs of age.

III. SHORTCOMINGS OF PRESENT RAPE LAWS

By observing the original section 375/376 and various criminal law amendment acts of various years which led to evolution of rape laws in India, one has to admit that provisions relating to rape have come a long way since it was introduced in our penal code by Lord Macaulay but the real question is, whether existing rape laws of India are potent enough to curb the culture of rape that has been raging for past few decades? The answer can be found in the recent statistics published by NCRB¹³ which clearly means that the current rape laws are inadequate to effectively deal with the persistent phenomenon of rape in India.

The efforts put in by the legislature are meager which is evident if we take a look at the 2013 Criminal law amendment act which was primarily based on the recommendation of justice Verma Committee¹⁴. The committee in 630 pages gave various recommendations to improve the status of women like the committee recommended that the exception of marital rape which is provided under IPC which states that ‘Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape’¹⁵ should be removed and rationale provided by the commission can be understood by the judgment of

¹² Indian Penal code, No.45 of 1860 §.376AB

¹³ *Supra* note 4 at 2

¹⁴ Justice J.S Verma “Report on the amendment to criminal law”(23rd January 2013)

¹⁵ *Supra* note 11

European commission of human rights in *C.R Vs UK*¹⁶ in which it was said that ‘a rapist remains a rapist regardless of his relationship with the victim. Importantly, it acknowledged that this change in the common law was in accordance with the fundamental objectives of the Convention on Human Rights, the very essence of which is respect for human rights, dignity and freedom’. Despite the recommendation by the Verma committee marital rape to this day is an exception provided under section 375 which is beyond the comprehension of any pragmatic member of society.

Upon a reading of section 376 one thing can be observed that a distinction has been made between the first and the second clause of section 376. Before the Criminal Law amendment act of 2018 section 376(1) provided that whoever except in the case provided under section 376(2) committed the offence of rape shall be punished with minimum 7 years of imprisonment and in certain forms of aggravated rape which was provided under 376(2) shall be punished with minimum 10 yrs of imprisonment. This means that originally intent of the legislators was to make a distinction based on severity of the offence where Rape Simpliciter which was less severe ipso facto had lesser punishment and the aggravated form of rape which was comparatively dreadful offence ipso facto had a more severe punishment. After the 2018 criminal law amendment act the distinction between rape simpliciter and aggravated form of rape is no more as both are punishable with rigorous imprisonment of minimum 10yrs which may extend to life imprisonment which may seem like bold step to improve the stringency of law but in reality it merely defeats the principle of proportionality which states that the punishment should be proportional to the crime committed.

Another shortcoming of the definition of rape provided under section 375 IPC is that the definition uses gender-specific terms like-man, woman instead of gender neutral terms like ‘Person’. The justice verma committee in its report suggested that instead of using gender specific terms like “Woman” for a victim, a gender neutral term like “person” and the perpetrator shall continue to be regarded as “man”, but this suggestion was ignored by the legislature and the government in power back in 2013 tried to make the whole definition of rape gender neutral which led to serious backlash by various Women organizations on the basis that this change can be used as a tool against women only which was justified considering the situation of our country post the horrific incident of nirbhaya, but now it’s time that rape laws in India become gender neutral which can be understood by these pragmatic words of Justice Bhagwati in the case of *National Textile workers union V. P.R*

¹⁶ *C.R. v UK* Publ. ECHR, Ser.A, No. 335-C; see *Palmer Feminist Legal Studies* Vol.V no.1 [1997] pp. 1-7

Ramakrishnan¹⁷ “We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adapting itself to the fast changing society and not lag behind”. Rape laws in India are lagging so far behind that they are starting to conflict with other laws like POSCO act, 2012¹⁸ which was made specifically for protection of minors against sexual offences. Section 42¹⁹ provides “Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376AB, 376B, 376DA, 376DB 376C, 376D, 376E or section 509 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree” which means if the perpetrator has committed an offence which comes under certain sections of IPC as well as POCSO act then the punishment which is in greater degree will be provided. This means that if any person commits the offence rape on a minor girl (below 12 yrs of age) he will be liable under POCSO act and section 376AB of IPC and he will be punished under section 376AB of IPC which is minimum life imprisonment but if the same offence is committed against a Minor boy(Under 12 yrs) the punishment will be provided under POCSO act which is imprisonment of a term which is not less than 7 yrs but which may extend to imprisonment to life. This disparity defeats the purpose of POCSO act which was enacted for protection of minors against sexual offence irrespective of their gender.

IV. STEPS TO OVERCOME THE SHORTCOMINGS OF RAPE LAWS

To overcome the growing problem of rape in India a multidimensional approach has to be adopted which would not only include making appropriate amendments to present anti-rape laws but would also include making changes on a social as well as cultural level.

Initiative on part of the legislative wing of the government has to be taken to make necessary changes to existing laws, the disparity between recommendations of law commission/committees and the criminal law amendment acts which are based on the law commission reports has to diminish. The first change that should be made to the substantive law is that the

¹⁷ (1983) 1 SCC 228, pg 256

¹⁸ Protection of Children from Sexual Offences Act, Act No.32 of 2012

¹⁹ POCSO act,2012(Criminal Law (Amendment) Ordinance), 2018

terminology which defines a victim as a “woman” should be gender neutral and the victim should be defined as “person” and be according to Justice Verma committee of 2013 which would also fix the conflict between section 376 of IPC and POCSO act. Secondly Marital Rape should be criminalized and the exception provided under section 375 which provides that “if a man has sexual intercourse with his wife, the wife not being under 15yrs of age is not rape”. This exception is a blatant violation of Fundamental rights like Article 21 and article 14 of the Indian constitution and should have been repealed back in 2013 through Criminal law amendment act, 2013 and despite the filling of plethora of cases like Independent Thought vs. Union Of India²⁰ lack of initiative on part of government²¹ is the reason why an erroneous exception like this hasn’t been repealed yet. But these amendments are all legislative changes and Legislation by itself would not suffice because violence against women is a deep rooted social problem. It is worth quoting late Prime Minister, Jawaharlal Nehru, who remarked: “Legislation cannot by itself normally solve deep rooted social problems. One has to approach them in other ways too, but legislation is necessary and essential and hence that it may give that push and have educative factors, as well as the legal sanctions behind it, which help public opinion to be given a certain shape”²², So another dimension from which this problem can be approached is fixing the low conviction rate²³ i.e. 27.2% as of 2018 and an astronomical amount of pending rape cases²⁴ which shows that there is a dire need for fast track courts to adjudicate in the matters related to sexual offences, however this feat cannot be accomplished with current strength of our judiciary which is 20 judges per 10 lakh people²⁵ as of 2019 which if not fixed will lead to people losing faith in Judiciary followed by absolute anarchy in form of extra-judicial killings of rape accused like in Hyderabad Veterinarian case in which the police shot dead four suspected of raping and killing the 27 year old victim which was celebrated by people as well as certain politicians²⁶.

²⁰ Independent Thought vs. Union of India reported in (2017) 10 SCC 800

²¹ Why Criminalization of Marital Rape a Distant Dream In India, Available at https://www.business-standard.com/article/current-affairs/why-criminalisation-of-marital-rape-is-still-a-distant-dream-in-india-118102900084_1.html (last visited 10/05/2020)

²² Sharma, Indira. “Violence against women: Where are the solutions?” *Indian journal of psychiatry* vol. 57,2 (2015)

²³ Conviction Rate for Rape at only 27.2% even as Country celebrates Justice In Nirbhaya Case Available at <https://economictimes.indiatimes.com/news/politics-and-nation/conviction-rate-for-rape-only-27-2-even-as-country-celebrates-justice-in-nirbhaya-case/articleshow/73169787.cms> (last visited 10/05/2020)

²⁴ Over 2.4 Lakh cases pending available at <https://www.indiatoday.in/india/story/over-2-4-lakh-cases-relating-to-rape-and-pocso-pending-in-courts-across-country-says-government-1652567-2020-03-05> (last visited 10/05/2020)

²⁵ Livemint, There are 20 Judges per 10 Lakh people in India Available at <https://www.livemint.com/politics/news/there-are-20-judges-per-10-lakh-people-in-india-govt-1549457164121.html> (last visted 10/05/2020)

²⁶ Scroll.in, Murdered Vet’s Father Praises Police, Others warn of Extra Judicial Killings Available at <https://scroll.in/latest/945983/hyderabad-murdered-vets-father-praises-police-others-warn-of-dangers-of-extra-judicial-killings> (last visited 10/05/2020)

However this much will not suffice, in order to tackle this problem appropriately entire society's perception of concepts like 'Masculinity', 'Gender' and 'Feminism' etc has to transmute and this cannot be accomplished without a complete overhaul of Indian education system which pays little to no regard to subjects like sex education as they are considered to be a cultural taboo. Students as well as teachers are to be trained in concepts like gender sensitivity and the curriculum of each and every school has to have the subject of sexual education mandatory. Proper implementation and adoption of sexual education guidelines like International guidelines on sexuality education as provided by UNESCO²⁷ has to take place if we as a country ever hope to counter the rising culture of rape in the foreseeable future.

V. CONCLUSION

Dr. B.R Ambedkar once said "I measure the progress of a community by the degree of progress which women have achieved" and going by his words India is far off from the definition of a progressive community considering the rising number of sexual offences against women in the past few decades.

From an analysis of various Criminal Law amendment acts which led to evolution of laws relating to rape, an inference which can be drawn is that the legislature time after time in every criminal law amendment acts has ignored major recommendations of Law commission reports on which such amendments are based and time after time the ignorance of legislature has yielded dreadful results in form of cases like Nirbhaya, Kahtua, Unnao and numerous other cases which are not reported. Merely making the law stringent will not be sufficient to ensure safety and protection of women from rising number of sexual offences, a multidimensional approach has to be adopted by the government where not just the legislature but the executive and the judiciary have to work in consonance with each other. The legislature has to adopt the recommendations of Justice Verma committee and make necessary changes to section 375 and 376 of IPC which have numerous loopholes currently. The judiciary has improve the no. of judges to people ratio to effectively deal with the huge no. of pending cases in a timely manner which can only be done by increasing the strength of judiciary, also retired judges can be appointed as ad-hoc judges to ensure timely delivery of justice. The executive has to ensure that the executive agencies like police are given sensitivity training especially while handling cases of sexual offences against women and the administrative agencies of the government should ensure that the curriculum of schools is

²⁷ UNESCO "International technical guidance on sexuality education: an evidence-informed approach for schools, teachers and health educators" ED.2009/WS/36 REV.3

changed so that the youth of the country can have a proper understanding about concepts like Gender, masculinity, sensitivity training etc.

Only after adopting a multifaceted approach like the one discussed above and ensuring that the three wings of the government work in synergy striving towards the goal of ensuring a safe and healthy environment for its citizens, only then we can hope to see a positive effect in the NCRB statistics in the foreseeable future.
