

Comparison and Critical Analysis on Rape Laws in India (Before and After Criminal Amendment Act 2013)

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Abstract

Rape is a horrifying and invasive crime. It has the potential to completely change the victim's life. With some crimes, once the actual crime is over, the victim can move on with their life. This is not the case with rape victims. Once the attack is over, there are many other issues the victim will encounter. Many victims of rape experience long-term consequences of their attack. There may be physical consequences deriving from the attack. There also may be emotional consequences. Many rape victims have difficulties returning to their normal lives after the attack. They may exhibit symptoms of rape trauma syndrome, a type of post-traumatic stress disorder.

Keywords: Rape, Disrobing, Voyeurism, stalking, Girl Child, Prosecutrix, female precipitation, criminality

A. Introduction

Rape laws in India are a matter of debate since a long time although after the Delhi rape case incident the debate intensified leading to major changes in Rape laws in India. Rape laws in India are a part of the Indian penal code which was enacted in the year 1860. The situation since then has changed drastically since the offence have turned more heinous and the number of cases have increased in drastic way, Rape, the most heinous crime is still occurring in our society at a very alarming rate. Even after new laws being passed but still the situation has not changed a bit rather, the situation is worse since the number of cases have drastically increased keeping in mind that still most of the cases go unreported due to societal pressure. One of the main question which is to be answered is even after so many changes in laws why do the victims of rape still face the stigma of the society and the system. The paper deals with the Indian legal system in respect to minimize the offence of rape taking into account section 375 and 376 of the Indian Penal Code 1860.

B. Rape: Socio-legal challenge in India

The situation in India has changed a lot in last decade with rampant change in the social structure of the society, the combination of new generation thinking conflicting with previous generations traditional thinking has changed the pattern of crimes committed in India. The need to change the thinking and mentality along with judicial awakening is the need of the hour. Educating people about people to view Women as any other person and not a commodity promote women rights and enforce the same. The responsibility of protecting women should not be confined to the police authorities but also the general public. Changes must be made not only in the laws but also in the mindset of the people so that rape victims will no longer be victimized. Laws might have been strengthened after the the incident although the enforcement of the same still lacks at ground level with number of cases increasing every year. The major problem that is being witnessed by the society in the light of this law is that it is not water tight. Our leaders, like always, have failed to ensure the laws they enact are free from loopholes. The lack of gender neutrality in definition of Disrobing, Voyeurism, Rape etc, absence of law on marital rape, compensation for victims of rape, the age of consent and various other lacunas will create serious repercussions, realising this our political leaders Sushma Swaraj asked for tougher and efficient law in these kind of offences. Not only this, other politicians like Shailendra Kumar and Sharad Yadav remarked that such laws can be misused against men Seeing such inadequacy SP chief Mulayam Singh Yadav vehemently opposed the anti-rape bill too. Unfortunately, such inadequacy comes to light when an innocent dies in the hand of cruelty and then our legislature realizes that the time has come to make reformation in laws, the Mathura Rape Case¹ and the death of Damini is prime example of such legislative stunts because of the laziness of our legislature, over the years, the common men has lost his faith in the present legal system. To do away with the problem our legislature need to have a comprehensive look at the law making process. Much has been already said on the present laws, it's high time that legislature realises it's responsibility.

Crimes like rape have become a common incident with uses being reported daily newspapers. The controlled setup of the Indian society and the "dominating nature" of men in the society have led to added problems for the rape victims. With Indian judicial system being one the biggest hurdles in to get justice to the rape victims, the idea of accused being innocent until proven guilty tends to reduce the number of convictions in case leading to increasing trauma towards such victim. The Rape survivor not one has to go through the trial of the courts but also through public trial of people attaching a stigma to the rape victim. they are often blamed for filing a "false" case although just due to the fact that the case is not conclusively proved by the prosecution does not itself prove the that rape has been committed. In most of the cases victims are children under the age of 16 and Many-a-times, girls as young as 13 and 14 years were pregnant and the FIR was filed when medical examination revealed the pregnancy. Cases of family abuse were as high as stranger abuse and usually these cases are filed after the abuse has gone on for a few months or even a year or more. The procedural safeguards conferred on the accused often tend to be procedural persecution of survivors. It is one of the most controversial issues, and is a challenge to the contemporary thinking which perhaps makes it the most under-reported crime. Despite several changes in legislations and criminal procedure only few perpetrators of such heinous crime are

¹ available at: http://www.legalserviceindia.com/articles/rape_laws.htm (Visited on April 19, 2018).

punished, rather it is the victims who are accused of filing a false case because the prosecution was unable to prove the charges beyond reasonable doubt. Rape in Indian society has become a common incident with cases being reported but remaining unsolved for years.

After the Mathura Rape Case,² the Criminal Law Amendment, 1983 has been made. The main features of the criminal law amendment, 1983 are:

1. For the first time custodial rape has been recognized.
2. Closed proceeding for the rape trials.
3. It is also banned the publication of victims identifications.

The report first and foremost acknowledges that rape is not about sex or lust but about power struggle and dominance - a fact that is ignored both by the law, the society and even media while reporting on rape cases.

In the section "Education and Perception reform" the report lists down a series of issues that lead to gender discrimination and then on to sexual violence and also actions to be taken to ensure gender equality. The report notes that we live in a 'cult of masculinity' and goes on to describe society's norms for bravery. "Touching, harassment and forced intercourse are all seen as normal to masculinity. There is a prevalence of a misplaced belief among young men that a 'real woman' was meant to resist sexual advances. Thus the use of force becomes not only normal, but also essential and ideal. These notions carry over to sexual relationships, and there combine with notions of masculinity that involve explosive sexuality, sexual success, independent from relationships, physical toughness, and loss of empathy." The idea that sexual violence, especially rape is a deliberate act of dominance and not an act of impulsive expression of sexual desire, as popularly believed, has never been acknowledged in such clear terms before.

In the Mathura Rape case, for example, where 16-year-old Mathura, a tribal girl was raped by two policemen in the police station in Maharashtra. When the case came up for hearing at the sessions court in 1974, the police men were declared not guilty. The judgment stated that "because Mathura was 'habituated to sexual intercourse,' her consent was voluntary; under the circumstances only sexual intercourse could be proved and not rape." The Nagpur Bench of Bombay High Court eventually set aside the Sessions Court verdict saying "passive submission due to fear induced by serious threats could not be construed as consent or willing sexual intercourse." The Supreme Court however reversed the order saying the alleged intercourse was a 'peaceful affair' since there was no external injuries on the girl.

Section 375 says that penetration alone constitutes the sexual intercourse necessary to call it an offence of rape, but the JVC report broadens the definition to include any part of the man's body or an object manipulated by the offender. Further, Section 375 excludes marital rape. Sexual intercourse by a husband with his wife, against her consent, when the wife is above the age of fifteen is not considered rape. Whereas the committee notes that "The exemption for marital rape stems from a long out-dated notion of marriage which regarded wives as no more than the property of their husbands. The committee further observes that this immunity to the husbands has been withdrawn in most countries including United Kingdom whose laws the Indian constitution draws heavily from. The hurriedly drafted ordinance conveniently leaves marital rape out of its purview. The report also recognized sexual assault is not restricted to just women but extends to homosexuals, transsexuals and transgender as well and points out that the law has to take cognizance of this aspect as well.

The Verma committee also powerfully said no to capital punishment and amendment of juvenile justice laws. The latter, in particular, was a loud cry from the public since one of the rapists in the Delhi incident was a minor. The Committee was of the view that neither would actually result in bringing down the rape, nor would it increase the chances of prosecution.

The committee is also explicit on the issue of consent that is often debated in rape cases. The JVC report suggests that Armed Forces Special Powers Act (AFSPA) and AFSPA-like legal protocols need to be reviewed, a call the political class has been unwilling to make, in all the years of protests. The two-finger test conducted on the victim to ascertain rape has also come under heavy fire by the committee. The report states "The issue of whether sexual assault occurred is a legal issue and not a medical diagnosis. Consequently, doctors should not, on the basis of the medical examination conclude whether rape had occurred or not." This practically turns the investigation mechanism followed by law officers on its head, since much of the case is based on the medical opinion. The JVC defines consent as "an unequivocal voluntary agreement when the person by words, gestures or any form of non-verbal communication, communicates willingness to participate in the specific act." In the absence of such, it would be concluded that there was an act of sexual violence against a woman's will. But even as the JVC report takes a layered view of the huge range of issues related to sexual violence against women, the ordinance comes across as being hasty, ill thought out and with a lack of empathy towards victims of rape. Activities of advocates for women's rights have come down heavily on it saying that it reverses the progressiveness found in the JVC report. The committee also takes a progressive view on the rape victim itself. It notes that rape is just like any another crime against a human body and that there is a need to "deconstruct the paradigm of shame and honour in connection with a rape victim."

C. The Criminal Law Ordinance 2013

The Criminal Law Amendment Act of 2013 was brought into effect after the horrific Delhi Gang Rape case which shocked the whole nation with the brutality of the act committed. Widespread protests and agitations forced the legislature to contemplate the changing of the prevalent rape laws. The basic idea was to make them more stringent and introduce harsher punishments besides broadening the ambit and definition of the term rape.

Late Justice J.S.Verma, Gopal Subramaniam and Ex-Justice Leila Seth comprised the rather famous 'Justice Verma Committee' which was made to collect suggestions and make recommendations for the legislature to make a law to combat rape and other crimes against women. The technical committee was so proactive with its working that during its short duration it received as many as 80,000 suggestions over which deliberations were done. These suggestions were sent by various activists, lawyers, NGOs and other persons representing the 'civil society'. Since the legislature was adjourned and there was no session, the committee's recommendations were introduced via an ordinance.

²Ibid

The offence rape was now amended or given a broader meaning which was comprehensive enough to include any kind of penetration and also in any body part of the woman or girl. This was the most important change because earlier section 375 of the IPC only stipulated the Penile Vaginal penetration as rape. The fact that the new recommendations added that any penetration would be considered as rape was the most efficient tool in widening the ambit of the term rape which was being demanded earlier on the basis of the recommendations of the fifth law commission report. There was also the inclusion of registering complaints and medical examination.

A new crime that was introduced and was not provided for in the country's earlier legislations was 'voyeurism' which means the recording or viewing images, movies or any such media material without the permission of the person portrayed or screened in them would result in penal punishment. Another very important change from previous legislations is the much required change in the procedure of providing evidence in the court of law. After the Mathura rape case the outcry did result in amendment of Section 114A of the Indian Evidence Act. Lastly and very importantly, there was also an introduction of Sexual Harassment at Workplace (under section 354 of the IPC in addition to the Sexual Harassment at Workplace Act, 2013) and an enhanced definition of rape provided for in the amended law. In India, the victim is the most traumatised after the rape, the society rather than supporting the victim usually subjected to humiliation.

Women are often harassed by the police officers while filing an FIR and by Doctors during Medical Examination, victims are harassed so much by the authorities that they have the tendency to commit suicide. Rape in school girls have attempted to commit suicide. Rape and other forms of sexual assault on a child can result in both short-term and long-term harm, including psychopathology in later life. Psychological, emotional, physical, and social effects include depression, post-traumatic stress disorder, anxiety, eating disorders, poor self-esteem, dissociative, and anxiety disorders; general psychological distress and disorders such as somatic neurosis, chronic pain, sexualized behavior, school/learning problems, and behaviour problems including substance abuse, destructive behaviour, criminality, and suicide.

Rape is ashamed thing, a rape Victim especially one who was previously a virgin) may be viewed by society as being "damaged." Victims may suffer isolation, be disowned by friends and family, be prohibited from marrying, be divorced if already married, or even killed.³

D. Problems Faced by Rape Victims

There are several problems of rape victim.

1. Deprivation of right to life and personal liberty
2. Forced to undergo uncomfortable procedures and inquiries both inside the court as well as from the people outside.
3. Ostracized by the society and at times, prohibited from right to education as well.
4. Exploitation by media and the people concerned by making her a public figure.
5. Interference of various political parties into the matter or changing it as a political issue.
6. Deprivation of the victim from certain rehabilitative and aftercare treatment.
7. Delay in the trial proceedings which results in delay in delivering justice.
8. Delay on the part of investigating agency in finding out the real culprits.

E. Judicial Approach

The courts and the legislature have to make many changes if the laws of rape are to be any deterrence.⁴ The sentence of punishment, which normally ranges from one to ten years, where on an average most convicts get away with three to four years of rigorous imprisonment with a very small fine; and in some cases, where the accused is resourceful or influential- may even expiate by paying huge amounts of money and get exculpated. The courts have to comprehend the fact that these conscienceless criminals- who sometimes even beat and torture their victims- who even include small children, are not going to be deterred or ennobled by such a small time of imprisonment. Therefore, in the best interest of justice and the society, these criminals should be sentenced to life imprisonment.

Law remains but the number of victims (including minor) continues to increase destroying the very soul of the helpless women. The concept of marital rape does not exist in India. Contrary to the popular belief rape is almost never perpetrated for sexual gratification. It is an 'acts of violence that happens to be expressed through sexual means'.

The Amendment 1983 has brought about some important changes in the existing laws of rape as a response to the growing public opinion demanding more stringent anti rape laws. It amends Section 376 IPC and enhances the punishment of rape it also provides enhanced punishment of minimum of 10 years of imprisonment for police officers or staff of jail, the remand homes or other places of custody established by law. The Act further inserts a new Section 114-A IEA, by raising a presumption as to absence of consent in cases of custodial rape, rape on pregnant women and gang rape at least partially, removed the infirmity from the evidence of a victim of rape that was hitherto unjustly attached to her testimony without taking note of the fact that in India, unlike the occident a disclosure of the girls identity, rehabilitation in society for all times to come and unless her story was painfully true she would not have taken such a grave risk merely to malign the accused.

Severe and certain punishment in a time bound manner, of the rapists has some deterrent value. Arrest alone may not constitute a strong societal response. Lengthy prison sentences have some behavior-altering deterrent values. Many well-known jurists and public men have advocated capital punishment for the criminals who commit rape as it is an offence worse than murder so far as its impact is concerned. Still there is need for amending the anomaly related to the age of consent, and of wife in accordance with the Marriage Act in India.

*Kaini Rajan v. State Of Kerala*⁵ In this case the prosecutrix alleged that on 17.9.1997 she was forcibly taken and raped by her brother's friend whom she had known for two years. She stated that she made a hue and cry but was threatened with death and made quite. However, it was submitted that her cries were not heard by the neighbours. It was later found that she continued to

³ available at : <https://legaljugaad.wordpress.com/rape-laws-in-india-a-critical-analysis> (Visited on April 19, 2018)

⁴ Available at : <https://www.legalindia.com/rape-laws-in-india> (Visited on April 19, 2018).

⁵ AIR 2013 (9) SCC 113.

have consensual relations with the accused after this incident on the promise of marriage. The prosecutrix became pregnant and gave birth to a child in 1998. Accused did not keep his promise to marry her and even disputed the paternity of the child. The prosecutrix then filed a complaint against him. The Supreme Court found doubt in the version of the prosecutrix as her shouts were not heard by anyone and the report was filed 10 months after the incident. Also, although her family knew the accused's family, no attempts were made to marry the two by the prosecutrix's family. All of these cast a doubt on the prosecutrix's allegations. The Supreme Court acquitted the accused *Parminder @ Ladka Pola v. State Of Delhi*⁶ In this case, the prosecutrix, a 14 year old, who had gone to meet her friend who lived near her house, was raped by the friend's brother and threatened with death if she raised an alarm or narrated the incident to anyone. That evening she narrated the incident to her mother and a complaint was filed against the accused. The court found that the conduct of the accused at the time of commission of the offence of rape, age of the prosecutrix and the consequences of rape on the prosecutrix are some of the relevant factors which the Court should consider while considering the question of reducing the sentence to less than the minimum sentence. In the facts of the present case, the Court found that the prosecutrix was a student of eighth class and was about 14 years on 28.01.2001 and she was of a tender age. She had gone to the house of the appellant looking for her friend- the sister of the appellant. When she asked the appellant as to where the sister of the accused was, he told her that she was in the room and when she went inside the room, he followed her into the room, bolted the room from inside and raped her. As a result of this incident, her parents stopped her from going to the school and asked her to study eighth class privately. Considering the age of the prosecutrix, the conduct of the appellant and the consequences of the rape on the prosecutrix, the Court did not think that there were adequate and special reasons in this case to reduce the sentence to less than the minimum sentence under Section 376(1), IPC. The appeal against his conviction was dismissed⁷

F. Social Perspective on Rape

Society's attitudes⁸ towards rape can be broadly classified into three categories. The first view blames the perpetrator and lists three causes of rape – male sexuality (men cannot control their sexual needs), male pathology (rapists are mentally ill), and male hostility (hatred or dislike of women). Interestingly, while the first two causes hold men responsible for the crime, they shift the responsibility of prevention to the victims. The notion that men cannot control their sexual urges holds women responsible for situations that might incite men -- an act they can prevent. The male pathology view claims that rapists can be identified and hence it is the responsibility of women to be careful of such people of course, mere identification does not always help since the victim may not have the ability to protect herself. Male hostility is believed to be a cause for rape situations involving strangers.

The second view differs from male sexuality in nuanced manner by holding the victim responsible for rape and is labelled "female precipitation". This view has a clear male bias – blaming the victim for creating an environment suitable for rape, like dressing provocatively, drinking with male friends and so on. Causes of rape (male sexuality, male pathology and female precipitation) that put the responsibility for prevention on the victim and exonerate the perpetrator are quite aptly called 'rape myths'. All three rape myths are present in our society and contribute to the high incidence of rape in India.⁹

The third view holds society responsible for rape and attributes the crime to gender inequality or male dominance. The strength of the male dominance view is clear from the fact that rape is still considered to be a way to punish women and their families. The recent gang rape of a 20-year-old woman ordered by a West Bengal village panchayat highlights the fact that rape is acceptable as a punishment not only by individuals but even by society.

G. Social And Economic Factors

There are a number of social and economic forces at work in India that also lead to the high incidence of rape. To start with, a low literacy rate is associated with higher crime rates. The absence of toilets within the house is one of the factors contributing to the large number of rape incidents. Women who are forced to use open fields as toilets in the dark are easy targets for rapists who, being from the same village, know when and where to attack. Social hierarchy plays an important role too, especially in the rape of Dalit and tribal women, who are treated like personal property without any human rights because of their lower social standing. Moreover, unlike in the West, incidents of date rape or rape by a partner are not reported as rapes in India which is an additional factor contributing to the lower number of reported rapes. It is our view that in the Indian context, social and economic factors play a more important role in explaining the number of rapes, while the rape myths discussed above provide indirect social approval by directly or indirectly blaming the victim for the rape.

H. Conclusion

In last of my writing, I mention that although no one can protect themselves from every bad person in the world, there are some strategies to help lessen the chance of being attacked. Alertness is the number one factor in avoiding a dangerous situation. It is critical to always be aware of the surrounding area. There are also many self-defense strategies that can be learned to help out in an attack. Ultimately, rapists can be anywhere and look like anyone, so it can be difficult to distinguish the good from the bad. Even if someone does get raped, there is help for them from both the government and non-profit organizations to try to get their life back together.

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⁶ ILC-2014-SC-CRL.

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