



RAPE: LEGISLATIVE DEVELOPMENTS IN INDIA

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ABSTRACT-

The Indian society adopts double standards in so far as her guaranteed rights are concerned. There has been over the decades alarming decline in moral values all around and the contemporary world faces a great challenge, particularly in India. In the name of progress and advancement, the people are losing out on moral values. It is rather sad that while one keeps celebrating women right in all spheres, the people exhibit no concern for her honour and her dignity. It is a sordid reflection on the attitude of indifference of the society. An attitude of men to treat women as a property, to be possessed to the extent beneficial to them, has almost become a value in itself. Further, an unchaste woman is treated as a symbol of sin, to be discarded from the society irrespective of her involvement or innocence, or the hostile circumstances that placed her in that situation. This newly highlighted, yet age-old problem regarding a safe and secured life for women folk is worthy of attention with an open mind. At one, there is doubt as to adequate security for moral values in existing criminal law; at another, there is a fear as to the development in the people of disrespect to these values. Women, no less than men, require to be treated as person, not statistical abstraction. 'Notwithstanding the enactment of the laws relating to dowry, rape, violence against women, the ground reality is rather distressing. It appears that our society is becoming a psycho-sick society with an uncivilized behaviour. The concept of rape can be best understood by considering rape as a crime of power and not of lust. Rape is not sexual act; it is the most blatant form of violence perpetuated against women. In India, chastity and virginity are considered to be great assets of a woman and loss of chastity whether out of choice or force, is a great handicap. On being raped, the woman is severely criticised and condemned for loss of chastity. The raped woman faces not only a personal sense of shame, but also is weighed down with guilt for no fault of her. In a society like ours, where a woman's chastity is valued more than her intellect, a woman who has been raped is ashamed and afraid to identify the criminal. Rape must be understood as the gravest kind of sexual violence against women — a crime of power, which is an extreme manifestation occurring in the continuum of sexual violence. Rape stems from sexist values and beliefs and it is not simply an issue affecting individual woman. It is a social and political issue directly connected to power imbalances between men and women in society.

Keywords- Sexual Violence,rape, Guaranteed Rights Women Dignity,Criminal Law etc.

Introduction-

History attests that man has subjected women to his will, used her as a means to promote his self gratification, to minister to his sensual pleasure, as an instrument in promoting his comfort, but never he has desired to elevate her to that rank which she was created to occupy. He has done all he could, to debase and enslave her mind and now he looks triumphantly on the ruin he has brought. All women fear, is that men should ask our brethren, is that they will take their feet from our neck and permit them to stand upright on that ground which God designed us to occupy. Though ancient literature pinpoints towards a better position for the females, yet many ancient writers eg:- Confucius, Aristotle, Manu etc., were of the opinion that it is a natural right of a male to assert dominance and the females were accorded inherently inferior position. As a type of property, they can be transferred or sold off, and even under the Greek civilization females were kept within the four walls of the houses. Therefore, these instances pinpoint that though they occupy a high position in the family, yet they were subjected to the dominance of male and were denied of any right. This domination gradually led to sexual perversities and was found to be the main cause of destruction of civilization as well as the family unit. The sexual perversities in breeding took place in the society on account of the inferior position of the females and their easy transferability and accessibility. Over the decades there has been an alarming decline in the moral values all around and the same can be witnessed in India leading to degeneration of moral and in the guise of open culture the adoption of immoral ways of existence. Violence is generally conceptualized in terms of physical force and destructive conduct. The simplest definition of violence is the behavior designed to inflict injury on a person or to cause damage to property. Sexual violence describes the deliberate use of sex as a weapon to demonstrate power over and to inflict pain and humiliation upon, another human being. Sexual violence may be defined as any violence, physical or psychological, carried out through sexual means or by targeting sexuality. Sexual violence is a brutal reality of women's lives and a slur on the face of civilized human society. Sexual violence, apart from causing immediate physical harm, leaves a permanent scar in the memory of the victim, which destroys her emotional psyche tremendously. Sexual violence not only negates the human rights of the victim concerned but at a large level, affects the society at large by lowering down the development prospects as it directly impinges upon the potential of nearly half of the human population i.e., women. Sexual violence may be homosexual as well as heterosexual. Women because of their oppressed and subjugated position in society are far more prone, in terms of vulnerability to sexual violence. The available evidence suggests that at least one in five of the World's Female Population has been physically or sexually abused at some time in their lives. Sexual crimes against women; the most shocking crime against human conscience and morality occupy a significant place in the penal statutes of every country. Though women can be subject to all types of crimes but some crimes are specific to women such as rape, molestation, sexual harassment and immoral trafficking. Among them rape is perhaps the most damaging and a serious offence against the dignity of women.

Historical Perspective of Rape

The crime of rape is as old as mankind and Rape de famme is a crime against a woman. For a man cannot rape a person of equal sex due to its being homogeneous in character. It is technically termed as homosexual act of having sexual relationship between the members of the same sex. When such sexual aberration is between two females, it is termed as lesbianism. Henceforth sexual crime of rape is penetration of male organ to the female genitals. If Gnostics are to be believed, the first woman to be raped was the mother of mankind, Eve. According to them, the visible universe was the evil creation of a stupid, false God whose henchman raped Eve in the Garden of Eden. To us, neither God was stupid or false, nor was Eve raped. But undeniably this most heinous crime existed and does exist since times immemorial.

Concept under Hinduism

The Mitakshara states that sangrahana means the unlawful coming together of a man and a woman for sexual enjoyment. Sinful sangrahana is of three kinds, viz, brought about by force, deceit or sexual passion. The first (which is rape) occurs when intercourse is had in a secluded place against the will of woman, or with a woman who is intoxicated or is disordered in mind or is under a mistake or who she raises a cry; the second occurs when a woman is brought to one's house by some trick or pretense, an intoxicant (such as dhatura) is administered to her or her mind is brought under control (by chants or otherwise) and sexual intercourse takes place; the third occurs when intercourse takes place by conveying (passion) to each other by means of the eyes (glances) or by employing a go-between and when the parties are drawn to each other by the temptation of beauty or of wealth. The first is characterized by winking at a woman, smiling at her, sending a go-between, touching her ornaments or clothes; the second by the sending of flowers, fruits, incense, food, clothes and indulging in private talks; the third is characterized by lying on the same bed, dalliance, kissing and embraces. Strisangrahan by force (that is rape) is really included under sahasa as stated by madanaratna. Brihad states that if a man commits rape on a woman of the same caste, he was to forfeit all his property, to have his male genitals cut out and was to be paraded on the back of an ass. That if woman raped was of a lower caste, then half of his punishment was to be awarded and if she was of a higher caste, he was to be sentenced to death together with confiscation of all property.

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Criminal Law of a country, in its quest to preserve social order and solidarity, not only prescribes a set of norms of human behaviour but also forbids the human conduct against social conditions. It also stipulates punitive sanction 'for the perilous outlawed conduct. However, the kind of conduct to be forbidden 'and to the formal penal sanction' considered as best calculated to prevent the officially outlawed conduct depending upon the social setting' and socio-moral-legal ethos' of a community. Nature and contents of criminal law and social (punitive) reaction to the violation of penal law, therefore, varied with changes in social conditions. Penal law of a country, therefore, needs to be appreciated and understood in the backdrop of its prevailing social, moral and cultural values and political ideologies.

Rape: Perception Of Macaulay's Commission

In British India, the Courts set up by the East India Company administered and adopted Muslim penal norms of criminal justice. In 1828, an Act for improving the administration of criminal justice in the British colonies in Asia was passed, which declared rape as an offence punishable with death, provided the girl was below 8 years and with imprisonment in other cases. In 1834, Thomas Macaulay landed in India to take his seat as Law member on the Supreme Council, under the charter of 1833. He undertook the herculean task of providing a code of substantive criminal law for India. He devoted clauses 359 to 360 to the offence of rape in the Penal Code. Section 359 defined the offence and section-360 specified the punishment for it.

The main recommendations of the 42nd Law Commission Report are as follows

1. The members of Law Commission noted that under the third clause of section-375, consent of the woman is vitiated only when she has been put in fear of death or bodily hurt to herself. The clause did not cover the situations, where death or grievous hurt is threatened to someone else present on the spot. They suggested the addition of words either to herself or to anyone else present at the place after the word hurt to cover such situations.
2. The members of Law Commission took note of the case of forcible sexual intercourse by the husband, when the couple had been living apart under a decree of judicial separation or by mutual agreement. They considered that such sexual intercourse should be treated as rape.
3. The members recommended that the forcible intercourse by husband when the wife is under 15 years of age, should not be called rape in the technical sense and the punishment for the offence may be provided in a separate provision. They recommended section-376-A, which provided for the punishment for sexual intercourse with his child wife.
4. The members opined that in case of a girl between 12-16 years, who consented for the intercourse, the offence should not be equated and not punished as severely as rape. They recommended a separate section-376-B for such cases and the maximum period of punishment was prescribed as 7 years.

The 42nd report had few inherent anomalies :

1. Section - 376-A as suggested by the Law Commission, which provided for the punishment for sexual intercourse with child wife in fact diluted the punishment in case of wife under 12 years of age. The Law, then prevailing, provided a discretion to the Court to extend the punishment upto 2 years in all rape cases, whereas the suggested Section reduced the punishment to a maximum of 2 years.
2. The patriarchal notions were reflected in the provisions as the maximum punishment provided in section-376-B, for the rape of a girl between 12-16 years, who had consented was 7 years with fine and the maximum punishment for her married counterpart only 2 years
3. Whereas the cases of illicit intercourse of public servant, superintendent of children's or women's institution and manager of a hospital, etc., were covered under sections 376-C, D, E, custodial rapes committed by police, were not even recognised by the Law Commission.

The Substantive Law

1. The Law Commission devoted special attention to the concept of consent. They emphasized that the consent should be active consent, which is not said to be implied by silence. They suggested the substitution of the word '_consent_' by the words '_free and voluntary consent_' in section -375.
2. The Law Commission considered that in the third clause to section-375, the consent is vitiated not only when a woman is put in fear of death or hurt, but also when she is put in fear of any '_injury_' being caused to any person, including herself in body, mind, reputation or property and also when her consent is obtained by criminal intimidation. Thus, they suggested the insertion of word '_injury_' in third clause to section-375, which would take care of situations, in which woman is threatened with injury to herself or anyone else in whom she is interested.
3. The Law Commission pointed out that rape can be committed without overt violence and the injuries on the person of the woman are not the compulsory and conclusive evidence of the commission of the crime.
4. The Law Commission suggested that addition of sub-clause (b) to clause fourthly, to take into account numerous situations falling under the guise of misconception.

Medical Examination of Accused and the Victim

The Law Commission observed that procedures for examining the accused and victim are quite cursory and tardy. Hence, they recommended addition of sub-section (1A), (1B), (1C) and (1D) to section-53, Cr. P.C., which deals with the medical examination of the accused in all cases and the insertion of a new section 164-A to Cr. P.C. to improve in the Camera existing and provisions regarding of the medical examination of the victim.

With or without her consent, when she is under sixteen years of age.

This is one of the important clause under the section and enacted with the view to protect minor girl of the society. The clause simply declares that an act done even though with the consent of a child under 16 years of age would be a rape, her consent had precocity being both immaterial. The fact that such a girl can discriminate between right and wrong and invited the accused to the act are both wholly irrelevant, for the policy of law is to protect children of such immature age against sexual intercourse. The age limit in this clause was raised to 16 years by an amendment of the Act in 1949. The Indian Penal Code has raised the age twice earlier prior to present standard. The age limit was raised from 10 to 12 years by the Indian Criminal Law Amendment Act of 1891. It was again raised from 12 to 14 years by the Indian Penal Code Amendment Act of 1925. The age limit at present is 16 by an Act of XLII of 1949. The limit raised in age is to protect children from pre-mature cohabitation and prostitution in view of our society which is afforded by other sections of IPC. The Criminal Law Amendment Act has substantially changed sections 67, 375 and 376 of the IPC. Several new sections have been introduced therein- viz., sections 376(A), 376(B), 376(C), 376(D) of the IPC. Section- 376(A) punishes sexual intercourse with wife without her consent by a judicially separated husband. Section- 376(B) punishes for sexual intercourse by a public servant with a woman in custody. Section- 376(C) punishes sexual intercourse by superintendent of jail, remand house, etc. whereas.

Special Legislation

The Indian Penal Code was drafted in 1860, and is still holding the ground to deal with the cases of sexual assault against the females including rape. The substantive Law stands thoroughly complemented by the procedural Laws, i.e; Criminal Procedure Code, 1973 and Indian Evidence Act, 1872. Due interpretation to the legal provisions contained in these enactments has been provided by the Indian judiciary, yet despite of these significant developments, the crime rate against women remain unabated. The data put forth by national crime record bureau portrays the sordid state of affairs. The statistical data from 1953 to 2010 reveals that this offence of rape has increased tremendously i.e. 791%. Statistics given above reveals that the offence of Rape is increasing at a very high rate. It is not enough to punish rapists nor is it enough to treat (reform) the rapists. Therefore, the increase in crime rate can be attributed to the shortcomings of the legislations as one of the reasons warranting the adoption of altogether a fresh piece of legislation especially dealing with the cases of sexual assaults concerning females. Recently there has been an attempt in India to frame out a special piece of legislation dealing with sexual assault in the form of Criminal Law Amendment Bill 2012. This bill has been prepared on the lines of Sexual Offences Act of 2003 of England. The most impressive feature of this bill is, it gives protection not only to females but is gender neutral.

Classification of Rape

Two schools of thought are significantly predominant in the classification of rape. One school considers rape as a sexual offence; whereas the other consider it as a sexual assault. In recent times the school which consider rape as sexual assault has gained predominance over the other school. It believes that Rape is an act of aggression in which the victim is denied her self-determination. It is an act of violence, which, if not actually followed by beatings or murder is nevertheless always quite close to a life threatening situation. It is an act of violation, which leaves woman in a state of humiliation, degradation, fear and rage. Recent research findings contradict the traditional view and establish that rape is an act of violence and aggression, reflecting the assailant's feelings of inferiority and insecurity and is far from being sexually motivated. At the most, rape can be considered as the sexual expression of frustration and anger and the motivation to assert power and authority. It is a vain delusion to perceive rape as the expression of uncontrollable desire of sex rather it is a declaration of domination, whereby the rapist loses control over his aggressive drives and not sexual passions. This school of thought favours the rape as sexual assault approach, which stresses the violent character of rape without denying its sexual overtones or undercurrents. These feminists are convinced that rape is a power crime directed against the female sexuality. They maintain that for the power rapist, the choice of the genitals as the object of aggression is not accidental, but essential because he is interested in inflicting a particular kind of damage on the victim. It is imperative that the offence must be seen in terms of violence than 179 sexuality. As long as rape is perceived as an act of sexuality rather than aggression and hostility, it will continue to be interpreted as predominantly pleasurable to both parties rather than harmful to the victim. It is emphatically pointed out that rape should be removed from the category of sexual offences and reclassified as an assault for recognizing and respecting the human rights of women

PUNISHMENT OF RAPE:

Section 376 itself is a substantive one as it describes as to how many years of imprisonment will be suffered by a person who commits a rape. In view of section 376(2) punishment appended therein shall be inflicted upon a convict with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both. The court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years. When the offence is committed against those listed under section 376(2) (a) to (g) i.e., Whoever being a police officer commits rape within the limits of the police station to which he is appointed; or in the premises of any station house whether or not situated in the police station to which he is appointed; or on a woman in his custody or in the custody of a police officer subordinate to him; or being, a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or being, on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or commits rape on a woman knowing her to be pregnant; or commits rape on a woman when she is under twelve years of age; or commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine.

Rape: Judicial Approach In India

As an institution, the Indian judiciary has always commanded considerable respect from the people of this country. The roots of this high regard lie in the impartiality, independence and integrity of the members of the judiciary. Respect for the judiciary was part of the common man's aspirations for maintaining Rule of Law and building a just society. The deeper aim of the law was creation of a good society. Chankya said, —Law and morality sustain the world. But morality stems from ethical values. The societal perception of judges as being detached and impartial referees was the greatest strength of the judiciary. The real source of the strength of the judiciary lies in public confidence in the institution. Today it was because of the public perception that the higher judiciary in the country occupies a position of pre-eminence among the three organs of the state. The Latin maxim, *boni judicis est ampliare jurisdictionem* - it was the duty of a good judge to extend the jurisdiction - based as it was on the principle that law must keep pace with society to retain its relevance because if the society moves but the law remains static, it should be bad for both. The Indian judiciary has, during the last few decades, acted on the maxim extensively in cases where protection of fundamental rights or basic human rights were concerned. This line of precedent was both dramatic and educative. It was the tardiness of legislatures and the indifference of the executive to address itself to the complaints of the citizens about violations of their human rights and unfair treatment, which provides the necessity for judicial intervention. The judiciary could neither prevaricate nor procrastinate. It must respond to the knock of the oppressed and the downtrodden for justice by adopting certain operational principles within the parameters of the Constitution and pass appropriate directions in order to renderful and effective relief. Judicial activism generally encompasses an area of legislative vacuum in the field of human rights. The Supreme Court and the High Courts have played a significant role in protecting the fundamental rights of the people. The judges were after all part of the society and cannot be totally immune from the dominant trends of social thoughts prevailing therein. Cardozo rightly observed, —The tides and currents which engulf the rest of men do not turn aside pass the judges by. An analysis of the judicial decisions therefore was undertaken to show to what extent the judges shared the gender predilections prevailing in the society and how in spite of such predilections they rendered decisions which advanced the progress of the law towards gender justice. Thus the, Indian judiciary has paid a yeoman's service in protecting and preserving the rights of the females as well as sensitising the society concerning the rights of the half of the human population. Time and again the Supreme Court of India has extended the ambit of Article 21 of the Constitution of India and held that mere existence was not the right to live- it was the right to live with dignity. Thus, whenever the crimes were committed against women the same should be viewed in the context of violation of her right under Article 21 of the Constitution of India and not merely as a crime against the society.

Conclusion

The Indian Constitution advocates social justice, a poignant component of which is gender justice. What is demanded is neither charity, nor grace, nor as legal aid to a weaker sex. The militant claim is the woman's right to be oneself, not a doll to please, nor an inmate of a workhouse. She has the human right to be woman. The courts have taken greater recourse to the right to life and personal liberty guaranteed by Article 21 of the Constitution for mainstreaming women's right into the paradigm of human rights. The concept of rape can be best understood by considering rape as a crime of power and not of lust. Rape is not sexual act; it is the most blatant form of violence perpetuated against women. In India, chastity and virginity are considered to be great assets of a woman and loss of chastity whether out of choice or force, is a great handicap. On being raped, the woman is severely criticised and condemned for loss of chastity. The raped woman faces not only a personal sense of shame, but also is weighed down with guilt for no fault of her. In a society like ours, where a woman's chastity is valued more than her intellect, a woman who has been raped is ashamed and afraid to identify the criminal. Rape must be understood as the gravest kind of sexual violence against women—a crime of power, which is an extreme manifestation occurring in the continuum of sexual violence. Rape stems from sexist values and beliefs and it is not simply an issue affecting individual woman. It is a social and political issue directly connected to power imbalances between men and women in society. The traditional concept of male and female sexuality, males being sexually aggressive and females sexually passive, paves the way for the assumption that rape is a natural fact, the occurrence of which cannot be stopped. In patriarchal societies, the social training imparted to the individuals, perpetuates the belief that domination is the inherent aspect of all sexual activity and thus, emerges the close association between violence and sexuality. In fact, violence and sexuality remain so intricately intertwined that it becomes difficult to draw a line between normal heterosexual relations and rape. The rape victim not only undergoes a sequential pattern of emotional reactions called rape trauma syndrome but is also ostracised from the society. The rape victim undergoes varied reactions which may be immediate or long term reactions, aimed at physical and mental integration, worldly adjustment and personality adjustments. In patriarchal societies, virginity and chastity are considered to be the great assets of a woman without which her existence becomes meaningless. The jurists and criminologists have identified the motivation for rape; and on the basis classify the typology of rape and rapists, be it may blitz rape, confidence rape ; or the criminal rapists, the mentally -ill rapist ,group reformer, incompetent romeo, debt collector ; yet rape is considered to be a transgression against chastity and the raped woman is severely criticised and condemned for loss of chastity. For women, the awareness of the possibility of rape determines their life in a very basic way—curtailing the choices of daily behaviour which are extremely threatening to the liberty of women. Preservation of the dignity of the females has been a concern world over and all the countries try to preserve the same by classifying the acts likely to interfere with the dignity of the females, be it may the developed country like England under the Sexual Offences Act 2003 , or the United States Of America under the Federal Criminal Code of 1986;or the developing country like India under Indian Penal Code of 1860.

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