

Anti-rape Law: Fortunes and Misfortunes

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I. Introduction

Right to life of a woman is under threat when she is subjected to masculine violence. It is the most brutal manifestation of women's oppression. It violates a woman's right to bodily integrity and liberty; to be free from torture, inhuman, and degrading treatment². The unequal power distribution between men and women and the dependent position of women in the existing social structure has made her the prime victims of violence. Yet in addressing violence against women the international community was silent for a long time. However in the 1960s and 70s women liberation movement was getting intensified throughout the world. They raised their voice against male hegemony which was occupying almost all spheres of public life. Feminist theories focused their attention on sexual violence and sexuality and have organized campaign against the sexual victimization of women and girls³. These campaigns exerted considerable influence upon the United Nations and later on it has formally recognised violence against women as a human rights issue. By adopting Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979 UN took up the issue of violence against women by casting an obligation on the state parties to legislate and take all appropriate measures to end violence against women and to ensure full development and advancement of women in all walks of life⁴. The formal expression of this new commitment can be found in the 1993 UN Declaration on the Elimination of Violence against Women (DEVAW). The Declaration on the Elimination of Violence Against Women, adopted by the United Nations General Assembly in 1993, defines violence against women as “*any act of gender based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering*

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² Ursula A. O'Hare(1999), “Realizing Human Rights for Women”, *Human Rights Quarterly* 21(2) 364-402

³ Liz Kelly & Jill Radford (1998), “Sexual Violence against Women and Girls: An Approach to an International Overview”, in R. Emerson Dobash & Russell P. Dobash, *Rethinking Violence Against Women*, Sage Publications

⁴ Article 2 and 3 of CEDAW. Source <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article2>

to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life”⁵.

Examining the functioning of Indian legal system with respect to the issue of violence against women, the country have never been short of laws to curb violence against women, even then the crime level against women is increasing. This violence has its roots in the male dominated socio-economic, legal and political order. The notion that women need protection is linked to the traditional value placed upon their virginity and chastity. This has influenced the legal treatment of women as well, both in the provisions of the Indian Penal Code (IPC) and in justice procedures⁶. Since its inception the criminal laws in India hardly escaped the clutches of patriarchal approach of law makers. In addition to IPC there are several specific laws that address violence against women. For eg The Immoral Traffic (Prevention) Act 1956, The Dowry Prohibition Act 1961, Medical Termination of Pregnancy Act, 1971, Protection of Women from Domestic Violence Act 2005, Protection of Children from Sexual Offences Act 2012, Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 etc are some among them. In this paper the author seeks to explore the changes that have been brought by the Criminal Law Amendment Act 2013. The Amendment Act of 2013 brought in a new formula to address sexual violence against women. Before examining the current situation it is pertinent to look into the earlier position of law.

II. Curbing Rape: Ambiguity of Section 375 of Indian Penal Code

Originally the offence of rape as defined by IPC covers only non-consensual and penetrative sexual intercourse. As regard to the non consensual sexual intercourse the extra ordinary decision of Supreme Court in *Tukaram v. State of Maharashtra*⁷ also known as Mathura rape case fetched a nationwide protest. In this case Mathura a 16 year old illiterate, orphan, tribal girl was raped by two policemen in the station while they were on duty. But since the young girl had eloped with her boyfriend and was brought to the police station due to a complaint filed by her brother, she was viewed as a woman of loose moral character. Overruling the conviction of the Bombay high court the Supreme Court acquitted the two policemen took into consideration the fact that Mathura had not “raised any alarm for help” and the “absence of any injuries or signs of struggle” on her body. The restrictive nature of the provisions of IPC along with the conservative and

⁵ Article 1 of the Declaration on the Elimination of violence against women <http://www.un.org/documents/ga/res/48/a48r104.htm>

⁶ Chandan Mukherjee, Preet Rustagi, N Krishnaji (2001). Crimes against Women in India Analysis of Official Statistics, *Economic and Political Weekly*

⁷ AIR 1979 SC 185

patriarchal view of the judiciary denied justice to the victim Mathura who was brutally raped by two public servants. The decision was condemned as it sacrificed human rights of women under constitution and other laws. Protest across nation made the parliament to amend the law relating to rape in 1983. Reforms such as “custodial” rape was introduced and the “burden of proof” in these cases was shifted on to the accused, provision for in camera trials was introduced and the law prohibited the disclosure of the identity of the victim, and punishments were made more stringent⁸. Notwithstanding all these efforts ‘non consensual act’ of the victim remains a basic criteria for punishing the offenders.

Concerning the aspect of penetration this stringent definition led to the situation that any sexual conduct that ceased to satisfy the requirements of section 375 was dealt under sections 354⁹ which criminalises outraging the modesty of women. As section 354 is bail-able and compoundable offence even the harsh offenders were excused with a disproportionate punishment. Moreover Section 375 failure to include the possibilities of oral sex, sodomy and penetration by foreign objects brought in several criticisms from civil society groups. Insertion of objects such as wooden splinters, iron rods, glass bottles, knives and swords into the vagina causes serious damage to the female anatomy. However such kind of violence has never been inflicted with same kind of punishment as prescribed for rape as a “state worse than death”¹⁰. Even the Supreme Court in *Sakshi v. Union of India*¹¹ observed that this restrictive definition has created a certain form of hierarchy within the acts of sexual violence¹².

Hardly any change has been effected to the definition of rape since Macaulay drafted IPC in 1860. Attempts have been made by the law commission of India to revise rape laws. Between 1980 and 2000, two specific Law Commissions were set up to review rape provisions in the IPC. The 172nd Law Commission report of 2000 proposed the substitution of the definition of rape with that of sexual assault. Despite these efforts neither the parliament nor the judiciary has made any attempt to define or interpret the

⁸ Laxmi Murthy (2013), “From Mathura to Bhanwari”, *Economic & Political Weekly*, 48 (23): 16-18

⁹ It reads as follows: Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

¹⁰ Flavia Agnes (2013), “No Shortcuts on Rape: Make the Legal System Work” *Economic & Political Weekly* 42(2) : 12-15

¹¹ AIR 2004 SC 3566.

¹² Shantanu Dey (2014), “Criminal (Amendment) Act 2013: Antirape Legislative Messiah Or A Humble Step In The Right Direction- Resolving The Unending Debate”, *International Journal of Legal Studies and Research*, 3(1): 1-27

issue of consent or to substitute the term rape with that of sexual assault. Even after 152 years the Victorian notion of morality continues to occupy the provisions of IPC¹³. Invoking the imprecise definition of rape the offenders has made the criminal legal system a mockery. This led to a situation where violence against women in India in general and rapes in particular was burgeoning.

The statistics issued by the National crimes records bureau (NCRB) report is shocking. According to the report a woman is raped every 22 minutes; every 58 minutes a daughter in- law burnt for dowry and every 51 minutes a woman faces harassment in the public spaces. NCRB report shows that in 2003 15,847 rapes were committed in India and this went up to 24915 in 2012¹⁴.

III. Incident that Led to Criminal Law Amendment Act 2013: Case of Nirbhaya

The horrific gang rape and brutal sexual assault committed to a 23 year old physiotherapy intern (Indian society called her Nirbhaya) in Delhi on December 16, 2012 provoked the whole nation. Nationwide demonstrations and public outrage against this horrific event has got wide spread coverage from the mainstream media and the social media. State machineries failure to ensure good governance and protection to women was questioned. The nationwide protest propelled the government to initiate sudden actions. Consequently the Government of India appointed a three member judicial committee headed by former chief justice Justice J.S Verma and Justice Leila Seth and Gopal Subramaniam as members requesting them to submit its report within a period of 30 days. Submitting its report the committee pointed out that violence against women has been aggravated because of the lack of good governance. Further the committee mentioned that Violence against women can be thwarted effectively only through amending criminal laws and by reforming the existing police system. A 631-page report consisting of 14 chapters include recommendations on laws related to rape, sexual harassment, trafficking, child sexual abuse, medical examination of victims, police, electoral and educational reforms. An anti rape ordinance was promulgated on the basis of certain recommendations of Justice Verma Committee on 3rd February 2013. Later on this ordinance was replaced by the Criminal Law Amendment Act 2013 which came into force on 3rd April 2013.

¹³ Rukmini Sen (2010), "Law Commission Reports on Rape", *Economic & Political Weekly*, 45(44): 81-87

¹⁴ Crime in India 2012 statistics. Source <http://ncrb.nic.in/CD-CII2012/Statistics2012.pdf>

IV. Features of Criminal Law Amendment Act 2013 Pertaining to Rape

The criminal law amendment act 2013 brought massive changes in the Indian penal code by incorporating new provisions to deal with rape. Thus for the first time in the history of IPC the conservative view of rape as penile penetration has been substituted with a wider expression of sexual assault. Thus the definition of rape encompasses not only penetration of penis but also the insertion of objects or any part other than penis into the vagina, mouth, urethra or anus of a woman or making her to do so with him or some other person or applying his mouth to the vagina, anus or urethra of a woman. In spite of this the amendment act prescribed stringent punishment for committing the offence of rape. The following table¹⁵ shows a comparative analysis of punishment prescribed before and after the criminal law amendment 2013

Offence	Earlier position / before 2013 act	Current position/after 2013 act
Rape resulting in death or vegetative state	Rape and murder dealt with as two separate offences. Rape: 7 years to life imprisonment	Punishment 20 years to life imprisonment (rigorous imprisonment) or death
Gang rape (rape by one or more of a group having common intention)	10 years to life imprisonment and fine,	20 years to life imprisonment (rigorous imprisonment) and fine payable to the victim, that is reasonable to meet medical expenses
Rape by armed Personnel	No specific Provision. Public servant includes Armed personnel. Punishment: 10 years to life imprisonment and fine, IPC, 1860	Specific offence. Shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life
Repeat offenders (persons previously convicted of an offence of rape, custodial rape, and gang rape)	No specific provision	Specific offence. Life imprisonment (rigorous imprisonment) or death

¹⁵ Rituparna Bhattacharyya (2013), "Criminal Law (Amendment) Act, 2013: Will it ensure women's safety in public spaces?" *Space and Culture India*, 1(1): 1-16. Source <http://www.spaceandculture.in/index.php/spaceandculture/article/view/11/2>

Other forms of rape	In the absence of penile-vaginal penetration offence of outraging modesty of a woman punishable with maximum 2 years and fine	Specific offence. Punishable with 7 years to life imprisonment (rigorous imprisonment)
Marital rape (Forceful sexual acts committed without the consent of the partner.)		Is not an offence if the wife is over 16 years of age.

To address the issue of violence against women the 2013 Act also introduced several other new offences such as causing grievous hurt through acid attacks¹⁶, sexual harassment¹⁷, use of criminal force on a woman with intent to disrobe¹⁸, voyeurism¹⁹ and stalking²⁰. With a view to ensure the efficacy of changes under IPC the criminal law amendment also encompasses Criminal Procedure Code and Indian Evidence Act. Cr.P.C has been amended stating that in case of sexual offences including rape, the statement of victims shall be taken by a woman police officer or a woman officer²¹. This amendment literally nullified the prejudicial attitude of male dominated police force that was insensitive in dealing with victims subjected to sexual violence. Another important amendment has been effected in section 273 Cr PC. The provision reads as follows “in the case of woman below the age of eighteen years who has been subjected to rape or other

¹⁶ Section 326 A and 326 B Throwing of acid on women for a multitude of reasons Causing permanent or partial deformity or burns on any person by throwing or administering acid.

¹⁷ Section 354 A physical contact and advances involving unwelcome and explicit sexual overtures; or (ii) a demand or request for sexual favours; or (iii) making sexually coloured remarks; or (iv) forcibly showing pornography; or (1) any other unwelcome physical, verbal or non-verbal conduct of sexual nature

¹⁸ Section 354 B assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked in any public place

¹⁹ Section 354C. Whoever watches, or captures the image of, a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator

²⁰ Following a woman, attempting to foster personal interaction despite indication of victim’s disinterest, spying, monitoring electronic communications

²¹ Section 161 Cr.P.C

sexual offence the court shall ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused". To combat the prolonged delays in rape trials section 309 has been amended and fixed two months time for completion of trial. Through this amendment an effort has been made to protect the victim from undergoing mental trauma for a prolonged period due to the delay in trial. Amendment has also been effected with respect to compensation provided to the victims of acid attack and rape. It has also been added that the treatment of victims has to be done free of cost.

As far as the Indian evidence act is concerned section 53A has been inserted. Respective section provided that in case of offences of sexual harassment and rapes, evidence relating to the character of the victim or her previous sexual experience are not relevant. Another notable change is in section 114A of the evidence act which provides that if sexual intercourse by the accused is proved and the victim states in her evidence that she has not given her consent, then the court shall presume that the victim has not consented. This section settles down the much debated non consensual sexual intercourse.

V. Current scenario: Post Criminal Law Amendment

Despite all these efforts sexual violence against women continued to exist. Rape cases are reporting from every part of the country. According to NCRB data, there is a gradual increase in the number of rapes reported in India - from 24,915 in 2012 to 33,707 in 2013. The number of rapes in Delhi has almost doubled from 585 in 2012 to 1,441 in 2013. Delhi is followed by Mumbai (391), Jaipur (192) and Pune (171) among the top unsafe cities in the country²². These numbers once again questions the efficacy of our present legal system. After the coming into force of the criminal law amendment a dreadful event that got a wide media coverage is the Mumbai shakti mills case. The significance of this case is that it was the first "high profile" one after the amendment to the rape laws in April 2013²³. In this case a 22 year old journalist was gang raped in Mumbai, India's safest city for women on August 22 2013. But this time the barbaric event happened in the early hours of evening and that too in a busy city. Despite the horrific assault, the journalist along with her male colleague was courage enough to report the crime immediately. Within a few days all the five accused were picked up. These five persons one being a minor admitted that they have done sexual assault in several instances and they had the notion that this time

²² <http://timesofIndia.Indiatimes.com/India/93-women-are-being-raped-in-India-every-day-NCRB-data-show/articleshow/37566815.cms>

²³ Flavia Agnes, Audrey D'Mello, Persis Sidhva (2014), "The Making of a High Profile Rape Trial, *Economic & Political Weekly*, 19(29): 37-41

too they can get away. However this time the story was different. It was proved that three persons out of the five have committed rape against a telephone operator in the same premise on July 31 2013 which came to light after the shakti mills case. Two cases were tried together and the marathon trials were concluded in record time. A sessions court of Mumbai sentenced the three repeat offenders in the two Shakti Mills gang-rape cases to death under the provision of section 376E (punishment for repeat offenders) under the Indian Penal Code that carries the maximum of death penalty²⁴. The fourth offender was given life imprisonment. The fifth offender who is a minor was tried separately in juvenile court. Delivering the judgement the court has noted down that despite stringent laws being made, young youths are repeatedly indulging into such barbaric inhuman offence, having least regard to the sanctity of human life and individual dignity, totally defying law and order, was beyond toleration and understanding of the society”. The judge also applauded the valour of the victim and opined that her statement was of such sterling quality that no one can afford to not believe it. “Her sole testimony is of such sterling quality, giving vivid and truthful account of entire incident, that it clinches the fate of the case. It is alone sufficient to prove the guilt of the accused on all the counts. Her evidence is standing like rock. The trauma faced by her reliving the entire incident at the time of giving evidence in the court is so touching and heartrending that no one can afford or dare to disbelieve her.”²⁵

This being the status of high profile cases there are several instances of sexual assault that barely get the attention of media or the general public. In the case of lower caste women living in villages and small towns who are facing caste based violence sometimes are denied of justice. The Budaun rape and murder of two teenage girls that occurred in Uttar Pradesh on may 27 2014 exposes a depressing reality that caste based violence still have deep roots in this fragmented society. The rapists of this case not only raped and killed the victims but they also chose to hang their dead and assaulted bodies from a tree. After this incident several other horrific incidents of rape has also been reported in the media. For instance rape of a 19-year-old girl in Gurgaon, an IT professional in Bangalore, a woman bus conductor in Maharashtra, women in Jharkhand, Rajasthan, Gujarat, Jammu and Kashmir, and West Bengal and the latest in this chain is the uber taxi rape issue. All these sexual assaults uncover the dominant culture of rape reigning the country even after having harsher laws and punishments²⁶. The factors

²⁴ <http://www.hindustantimes.com/India-news/mumbai-shakti-mills-gang-rape-case-3-repeat-offenders-get-death-life-term-for-1/article1-1204174.aspx>

²⁵ <http://www.thehindu.com/news/cities/mumbai/shakti-mills-gang-rape-her-evidence-is-standing-like-rock/article5899890.ece>

²⁶ Editorial (2014), “Lessons from a Hanging”, *Economic & Political Weekly* 49 (25)

responsible for the growth of this culture have to be seriously handled. Otherwise women in this country have to live a life which is always under a threat of violence. Furthermore the State should be more vigilant to protect the women by employing effective mechanisms to curb heinous crimes against women.

VI. Conclusion

Despite all these stringent laws violence against women is on the rise. Transformation of the society in tune with all these laws is not occurring. Moreover the response of the state machineries especially the police force are not reacting quickly despite prompt complaints and the availability of advanced communications technology. The problem is not with respect to the insufficiency of suggestions or laws to deal with the horrific crimes but with the perspective of the government. The question is whether the government cares enough about the safety of its women citizens to ensure their right to live in a safe environment. The government has to show keen interest in nullifying all the factors that impairs women from enjoying her rights and fundamental freedom. For this purpose the government should take all possible measures to empower women and inform them of their rights. In addition to this everyone should be informed of women's rights and of the existing penalties for violating those rights, and engage men and boys, as well as families, as agents of change in preventing and condemning violence against women.

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