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Rape-Violence Against Person of Women: A Critical Analysis Antagonism Rule



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Abstract

Rape is crime, not only against the person of woman; it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crises. It is a humiliating and traumatic event in a woman's life, which leads fear for existence and state of powerlessness. The conscience of the country was shaken up when the horrendous gang rape of a 23-year-old girl in Delhi. In response to public outcry over the brutal rape and resulted in her death compel the Government to set up three member Committee headed by Justice J.S.Verma. This committee gave various recommendations on how to tackle gender violence in the largely patriarchal society. But still the gang rapes are going on.... The rising graph of crimes against women, perceived internationally as a blot against India. Although penal provisions are provided for the offences against the women under the penal laws but still the women are not safe anywhere, not even in their homes. Then what about the equality laws and fundamental rights under Articles 14 and 21 respectively, given under Indian Constitution? Would Capital punishment for rapists help India's girls and women? The Government should adopt stringent punishment to deter the rapist criminals and stop the rape crimes in society.

"Women and Children are often in great danger in the place where they should be safest: within their families."

--Mehr Khan, Director, UNICEF Innocentive Research Centre

Introduction

"A wave of sexual assaults has rocked the northern Indian State of Haryana. In the last few months, a dozen, mostly Dalit girls and women have been raped, raising concerns about the security of women in India." The Daily Mail, a British middle-market daily newspaper (established 1896) with the average daily circulation of 1,991,000 copies and readership of approximately 4.37 million reported in its columns the shame of India-the rape of Dalit women in Haryana-under the banner "Haryana's rape shame: The Daily, Oct 7, 2012, said that between January and August 2012, 455 women were raped in Haryana, the equivalent to two each day"; the police are habitually reluctant to register FIRs for rape. The Daily Mail referring to the Thomson returns Trust survey, bemoaned: "This year, India is the most dangerous country of the G-20 for women because of child marriage, foeticide and infanticide, sexual trafficking, domestic slave. India occupied the fourth position while Afghanistan, Pakistan, Congo top three slots respectively while Somalia grabbed fifth. (*Mainstream Feb. 9, 2013 Article by A.k Biswas*)

Rape is crime, not only against the person of woman; it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crises. It's a crime against basic human rights. Rape is the ultimate violation of self. It is a humiliating and traumatic event in a woman's life, which leads fear for existence and a state of powerlessness. The fear of rape affects all women. There is no typical 'rape victim' or conversely, every woman is a potential rape victim-old women, little girls, women in wheelchairs, lesbians, virgins, women of every race and class, are raped. (*Vandana; Sexual Violence against women*)

Rape is about power, violence, intimidation and humiliation. [Anup Surendranath; "Castration is not the right legal response", The Hindu, Dec 24, 2012], and is a manifestation of patriarchy. Rape happens mainly in three places: homes, public spaces and public offices, and happens in the home as often as in public spaces and in public offices. It is well to understand the effect of rape on a surviving victim's psyche.

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Concept of Rape

The word 'rape' is derived from Latin rapio, which means to snatch, hence it literally means a forcible seizure, and this element has become the characteristic feature of the offence. According to Guberman and Wolfe, three main aspects are inherent in concept of rape-dominance, a violent taking away of control and a violation of pride and dignity. Rape must be understood as the gravest kind of sexual violence against women- an extreme manifestation occurring in the continuum of sexual violence. Rape is a classic act of domination, where in the words of Kate Millett, 'the emotions of hatred, contempt and desire to break or violate personality take place. The traditional concept of male and female sexuality-males being sexually aggressive and females sexually passive-pave way for the assumption that rape is a natural fact, the occurrence of which cannot be stopped. (Vandana; *Sexual Violence against women*)

Definition [Sec.375]

The crux of the offence of rape under section 375, Indian Penal Code is sexual intercourse by a man with a woman against her will and without her consent under any one of the six circumstances mentioned below thus a woman cannot be liable for rape. However, a woman can be liable for abetment of rape under section 109, IPC. There is following ingredients of rape given below:-

1. Against her will [clause 1]

A man is guilty of rape if he commits sexual intercourse with a woman against her will. This provision regarding consent is based on the policy and principle of law that a person is the best judge of his own interest and that one who suffers harm or injury voluntarily has no cause to complain when it comes about. This common sense principle is expressed in the Latin maxim, *volenti non fit injuria*.

State of Punjab V. Gurmit Singh

In this case the three accused Gurmit Singh and his two friends committed rape on a young girl below 16 years of age. When the three accused after abducting the prosecutrix, subjected her sexual intercourse forcibly, the Apex Court held that the act was against her will and it amounted to rape within the meaning of section 375 clause (1) punishable under section 376, I.P.C. (*AIR 1996 SC1393*)

2. Without her consent [clause 2]

When a woman is incapable of knowing the nature of the act thus legally unable to give a rational consent or being aware of its nature thinks that the act is being done under circumstances which make it an innocent act, this position occurs. Consent means an intelligent, positive concurrence of the 'will' of the woman. (*Indian Penal Code, B.M Gandhi pg.no546, 47*)

Williams Case

In this case, where the accused, a choir-master had sexual intercourse with prosecutrix making her to believe that he is performing a surgical operation to improve her singing voice, was held guilty of rape. Consent was vitiated by fraud and it was obtained under misconception, that the physical manipulation would provide her with extra air supply to improve her singing skill. In the above case it is

non-consent sexual intercourse rather than the fraud of the doctor or choir-master that makes the offence rape. [*AIR. 1923 1.KB (CCA)*]

Tukaram V. State of Maharashtra

This case is more popular Mathura case. Mathura was a girl living with her brother Gama. Mathura was working at Nushi's house, where she contacts with Ashok, who was the Nushi's sister's son. They decided to marry, but Mathura's brother Gama against their marriage. He lodged a complaint against Nushi, her husband and Ashok had kidnapped Mathura. The two constables called both the parties to police station and obtained statements of Ashok and Mathura. While the parties leave the police station Tukaram told Mathura to wait. Ganpat grasped Mathura's hand and took her behind the police station where he raped her; since Tukaram was drunken. And he also raped her. In this case the court said that the prosecution had failed to prove its case. This decision came to be criticized by various bodies, public men and professors of law. The criticism made the Parliament amend the provisions of rape and now custodial rape of this kind is punishable. In such cases, now if the girl says that she did not give consent, the court shall presume that she did not consent. (*AIR 1979 SC. 185*)

3. Consent obtained by putting a woman in fear of death or hurt [clause 3]

The fear which prompts a woman to give her consent must be of the kind stated in clause (3) of this section; consent must have been obtained by putting a woman in fear of death or hurt. (*Indian Penal Code, S.N Mishra, pg.no 611*)

4. With consent but given under misconception of fact that the man was her husband [clause 4]

Now when the male knows this but the female does not know of it and the sexual intercourse takes place he is guilty of rape because he knows that the woman's consent is due to misconception of certain facts of which she is not aware and he himself is aware. Had she known such facts, she would not have consented. Under such circumstances the person is guilty of rape under clause fourth of section 376. *Elbekkay case* In this case the Court held that if D procures P to have sexual intercourse by misrepresenting her boy friend, he commits rape. Perhaps to obviate the confusion and doubts the 1994 Act has provided in sec.3 of Sexual Offences Act, 1956 that; "A man also commits rape if he induces a married woman to have sexual intercourse with him by representing her husband". (*AIR 1995 Cri LR 163*)

5. Clause Fifth

In this clause, "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. Where a man and woman unite under a belief that they are legally married husband and wife sec.375 does not operate."

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6. Consent of a girl under sixteen not valid in law [clause 6]

The policy of law is to protect a girl of immature age against sexual intercourse. Consequently, connection with a preconscious girl less than 16 years of age would be rape, even though she consents to it. This is so because she is unable to understand the nature and consequences of that to which she consents. In clause 6th the age limit was raised to 16 years and in the exception it was raised to 15 years by an amendment in 1949. (*AIR 1995 Cri LR 163*) In Harpal Singh Case The Apex court held that even if the girl of fourteen is a willing party and invited the accused to have sexual intercourse with her, the accused would be liable for rape under this clause. (*AIR 1981 SC 361*)

Development of Law of Rape

Different legal systems have dealt with the concept of rape and ingredients in different manners. Whereas a few legal systems have taken the traditional approach and focused on the patriarchal understanding of what constitutes rape, there are a few other legal systems where attempts have been made to develop new approaches that place greater emphasis on the sexual violence that is suffered by victim.

The jurisdictions where broader approach concerning legal recognition is exhibited in the provisions related to rape, a clear cut departure from adherence to patriarchal expressions and terminology is visible and legal preference has been to use gender neutral terminology instead.

The new offence of rape is created by sec 1 of the 2003 Act, under English Law which provides: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Amendments made in Law of Rape vide Act 43 of 1983

During 1984 anti-Sikh riots in Delhi and elsewhere, Sikh women were raped and murdered in broad daylight by rampaging mobs. In 1973, a Bombay hospital nurse, Aruna Shaunbag was raped and strangled; she continues to survive in a permanent Ventilator State. (*AIR 1981 SC 361 Article by S.G Vombatkere*)

Taking a serious note of the inadequacy of the law of rape manifested in a number of judgments of the apex court in *Tukaram v. State of Maharashtra* and its failure to safeguard the rights of the innocent victims against the heinous crime against humanity and public criticism, the Parliament in 1983 extensively amended the law rape so as to make the law more realistic. Some of the important changes brought about by the Act 43 of 1983 and other provisions are listed below:

1. Burden of proof of innocence on accused

The Evidence Act was amended by inserting sec.114A drawing a conclusive presumption as to the absence of consent of the woman in case of prosecution of rape under sec.376(2) clauses a, b, c, d, e or g, IPC .shifting the burden of proof of innocence on the accused.

2. Prohibition of disclosure of identity of the victim:-

Om Parkash V. State of Uttar Pradesh

In this case sec.228, IPC clause (1) as stated that open Court prohibits the disclosure of the identity of victims in rape cases under sections 376, 376A, 376B, 376C, or 376D, IPC. However, perhaps due to oversight in major faux pas, the Supreme Court breached its own code of not naming a rape victim in its judgments in *Munshi v. State of Rajasthan*, pronounced on October 12, 2007. (*AIR 2006 SC 2214 Cr.LJ 2919*)

3. Trial in camera

Section 327 of Criminal Procedure Code which confers the right of an open court trial has been amended making the provisions for trial of rape cases or an offence under sec.376A to 376D, IPC in camera and prohibition of publication of trial proceedings in such cases without the prior approval of the Court.

4. Custodial Rape

Section 376B to Section 376D of IPC is a group of sections that create a new category of offence, known as custodial rape which does not amount to rape because in such cases the consent of the victim is obtained under the compelling circumstances. (*Indian Penal Code, K.D Gaur*)

Punishment for rape

Punishments for rape is provided under section 376 :-

Para 1: Imprisonment for life or imprisonment for ten years and fine-Cognizable-Non-Bailable-Triable by court of session-Non-compoundable.

Para 2: Imprisonment for two years or fine or both-Non-Bailable -Cognizable-Bailable-Triable by Court of Session-Non-compoundable. (*Bare Act of Indian Penal Code 1860*)

Justice J.S Verma Committee Report

The conscience of a country like India was shaken up when the horrendous gang rape of a 23-years-old girl made headlines in almost all national newspapers in mid-Dec. in 2012. In response to public outcry over the brutal rape which later resulted in death, the government had to set up a three-member panel, headed by the former Chief Justice of India Mr. J.S Verma, with former Chief Justice of Himachal Pradesh Ms. Leila Seth and former Solicitor General Mr. Gopal Subramaniam as the other members. The committee, set up in response to the brutal gang rape which turned into murder, has in fact, outlined recommendations on how to tackle gender violence in the largely patriarchal society. The top 10 key recommendations put forward by the Verma Committee are as follows:

1. Make voyeurism, stalking and intentional touching an offence

Make voyeurism an offence punishable by a maximum jail term of three years; Make stalking an offence punishable by a maximum jail term of three years; Intentional touching, using obscene language or gestures should be treated as a sexual assault and offence.

2. Amend rape laws

Rape of a minor should carry a minimum jail term of 10 years; Gang rape should be defined in the Indian Penal Code and be punishable by at least 20

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years imprisonment; Death caused by rape should carry a minimum penalty of 20 years in jail; Make marital rape a criminal offence.

3. Review security laws in conflict zones

Due to the number of reports of sexual offences committed by the armed forces in India's conflict areas such as Kashmir and North East, the Armed Forces Special Powers Act-a controversial law that gives sweeping powers to and often confers immunity on security forces-must be reviewed. Special commissioners for women's security must be deployed in all areas of conflict; and they have full authority to take action in all cases of sexual violence against women by armed personnel.

4. Monitor illegal, patriarchal village councils

Put in place measures to monitor illegal villages' councils known as "Khap Panchayats" that sanctions so-called "honor killings" and impose oppressive diktats such as banning girls and women from using mobile phones, wearing Western clothes or venturing out unaccompanied.

5. Review medical examination of rape victims

Put in place medico-legal guidelines on how to perform a medical examination of a victim of sexual assault; Scrap the so-called "two finger" test- an outdated practice that examines the laxity of vagina to determine whether the victim is "habituated to sex".

6. Police reforms

Institute a Police Complaints Authority at district level to look into complaints against police officers who do not register complaints of gender crimes. Policemen who fail to register complaints or abort an investigation should be punished. All police stations should have CCTV; Increase the number the number of female police.

7. Electoral reform

Lawmakers who have been charged in a court of law with serious offences such as sexual offences or dowry crimes should be disqualified from contesting elections; sitting parliamentarians with criminal cases against them, including those of rape and others types of sexual assault, should voluntarily vacate their seats; there should be a code of conduct for political parties.

8. Through Gender sensitization education

The formal curriculum in Indian schools must be drastically revamped and sex education must be made an integral part of the curriculum.

9. Bill of rights

India institute a "Bill of Rights" for women, along the lines of similar bills in South Africa and New Zealand; which includes the rights to life, security, bodily integrity, democratic and civil rights and equality.

10. End to Human Trafficking

Define the offence of trafficking in the Indian Penal Code; Trafficking should be punishable with a jail term of not less than seven years and may extend to life imprisonment; Employing a trafficked person, for example as a domestic servant, should carry a jail term of not less than three years.

Judicial Activism and Vishaka Case Vishaka V. State of Rajasthan

Sexual harassment of women at workplace results in violation of the fundamental rights of 'gender

equality' and right to life of the victim. It is a clean violation of the rights under Articles 14, 15, 19(1)(g) or 21 of the constitution. Such violations attract the remedy under article 32 for the enforcement of these fundamental rights of women. One of the finest examples of judicial activism in defense of the freedom 'to practice any profession, or to carry on human rights, more specifically defense of Article 19(1) (g) any occupation, trade or business'.- the Vishaka case led three-judge Supreme Court Bench presided over by the Hon'ble Chief Justice of India, His Lordship Mr. Justice J.S Verma, as the then was to lay down the law under article 142 of the Constitution. It was recognition of the fact that the existing legal regime was not adequately protective of human rights, that civil and penal law in India does not adequately protect women from sexual harassment in the work place. The Hon'ble Supreme Court laid down the guidelines of model law to deal with sexual harassment. (*Law Domestic Enquiry for Private and Public sector Employees P.k. Basu Majumdar, pg. no 22*)

Comment on Justice Verma Committee Report

Many of arguments made in the Report had been voiced by the Indian women's movement. Sudha Sundaraman observed; "Women across the country have spoken out on this concern. Take just one issue we have fought against-the general refusal of the police to register cases and their overall gender insensitivity, which translates into the low conviction rate". The Justice Verma Committee also voiced the concern that "systematic or isolated sexual violence, in the process of internal Security duties, is being legitimized by the Armed Forces Special Powers Act, which is in force in large parts of our country" and recommends wide-ranging measures to address this reality. (Mainstream 9 Feb 2013, Article written by Pamela Philipose)

Constitutional Provisions

There are following constitutional provisions given below:

1. Due Process and the Justice System

Due process should specifically exclude avoidable adjournment delays implicit in the justice system. After the Damini case, the Supreme Court has directed all Sessions Courts to conduct rape, trials on daily basis, stop frivolous adjournments and complete the process within two months.

2. Equality for Women

Article 13 of the Constitution of India mandates that "laws inconsistent with or in derogation of the fundamental rights" are void. Therefore any custom or usage (as, for example, with Khap Panchayats) that infringes on fundamental rights is void. Article 14 secures the right to equality before law and, Article 15(3) allows the state to make special provision for women and children; male and female are equal in the eyes of the law, with equal rights. But gender equality is not practiced, not even felt culturally or socially.

The DAMINI case has triggered a nationwide demand for security for women in India's male-dominated society. The demand is for governments and government agencies to provide this much-

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needed security and ensure exemplary punishment for rapists.

Society and Rape

It was during the re-emergence of people's movements in the 1970s and 1980s that women's groups in cities like Hyderabad, Delhi and Bombay protested against the harassment women faced on roads and in buses. The term raised then-"eve teasing"-sounds quaint if not sexiest today. As women's organizations discovered to their shock, the country's rape laws, dating from colonial times, had not been revised for more than a century. (*Economic & Political weekly December 29, 2012*) During 1984 anti-Sikh riots in Delhi and elsewhere, Sikh women were raped and murdered in broad daylight by rampaging mobs. In 1973, a Bombay hospital nurse, Aruna Shaubag was raped and strangled; she continues to survive in a permanent ventilator state. (*Economic & Political weekly December 29, 2012, Article by S.G Vombatkere*). There are number of cases happening in the society where the fathers who ravish their own daughters. This is such depraved misdemeanor that it deserves the most extreme punishment. The act against human nature and all social norms, an act so sordid where the protector turns devilish aggressor who can a girl trust if not her own father, brothers, uncles, grandparents, gurus and so-called god men? (*Outlook feb 18, 2013 Article by Anjolie Ela Menon*)

Conclusion and Suggestion

In our view, a death penalty for rapists in India is a truly terrible idea. With tens of thousand of rapes each year but only two executions in the past 15 years, arbitrary and discriminatory enforcement of the death penalty would be a certainty, not least because inefficient, misogynistic, and corrupt police and prosecutors would be put in charge of this lethal lottery. (*Economic & Political Weekly 18- 26 Jan, 2013*) Death sentence for rapist has become familiar theme in Parliament whenever the matter comes for discussion in the wake of large scale rape to the extent of one rape every 29 minutes taking place in the country (*Lalita Panicker, Without Conviction : Penalty Rhetoric Mars Rape Law Review. Times of India, December 5, 2002 p.10*). Public opinion also favors such step in view of alarming number of cases of rape taking place every year. The Government should adopt stringent punishment to deter the rapist criminals and stop the rape crimes in society.

I as author of the paper fully support the recommendations forwarded by the Justice Verma Committee report and the law regarding sexual harassment should be amended.

And, hope if the recommendations are strictly construed by the law makers and implemented by executive and judiciary certainly girls and women of the country may feel secure.

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