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‘EVOLVOLUTION OF RAPE LAWS AND THE NOTION OF INSTANT JUSTICE’

(By Bharti Mishra)

ABSTRACT

Since the Vedic Period women in India have been given the status of a deity, who is an image of righteousness, reverence and love. It is ironic that the present condition of women in India is in no way in accordance with this portrayal of women. In the last one or two decades there has been a steady increase in the cases of brutal rape of women, which leads to extreme sufferings and sometimes the loss of their lives of the victims. Even after making, amending and reforming rape laws over many years, the prime objective i.e. protection of women and their dignity is not achieved. The basic problem here is that in most of the cases relating to rape, justice has either been delayed or not been achieved. There are several reasons behind it. In many of the cases situation is such that even a complaint is not been launched by the victim of such offences due to various reason which highlights another grave setback in their fight for justice, these factors are discussed in this paper. The year 2019 witnessed the emergence of instant justice in Telangana rape case which brought up a plethora of questions which our justice and law redressal system need to ask. Now the question that arises here is that whether this method of instant justice and the executive taking decision making power which is in the hand of judiciary is correct or not? These articles gives deep insights of the legal provisions in India related to rape and the amends made thereto and also whether these rape laws capable enough to cure this social evil of rape from India. Moreover, there is a discussion on the growing trend of instant justice and to what extent it is correct and should be adopted.

INTRODUCTION

A sexual offence like rape is a persuasive problem all around the globe. Indian is on its way in becoming the rape capital of the world. It is believed that the persons who commit rape are not normal persons but they are psychologically sadistic persons who exhibit the tendency of committing rape. It is an assault not only for the women who is the victim but also for her family and society at large. There are a number of reasons where women victim fail to report the instances of rape with them. There are various reasons which in a way justify their behavior of not reporting the case. This may be due to the social stigma attached to such
offences, honour killing, and the victim being blamed or due to lack of faith in the justice system.

Now, the question arises that is our justice system too weak that a victim cannot approach it because she has lost faith in it? If the answer to this question is yes, then what are the steps that are taken to empower, amend or modify the justice delivery system?

In this paper I’ll be dealing that how the laws related to rape are have evolved in India and whether the adoption of instant justice system, that took place in the Hyderabad rape case can be justified.

**EVOLUTION OF LEGAL SYSTEM RELATED TO RAPE**

**THE INDIAN PENAL CODE (IPC), 1860**

A clear and formal definition of ‘rape’ was introduced in the Indian Penal code in 1860. Before 1860, there was no perfect codified version of all the laws.

According to section 375 of the IPC, a sexual intercourse with a woman, falls under category of Rape if:-

1) It is against her will

2) It is against or without her consent

3) It is done with her consent, but that consent is obtained by putting in fear of death or of hurt to her or any other person in whom she is interested.

4) There is consent, but the man knows that he is not her husband and that her consent is based on belief that he is another man to whom she remains or considers herself to be married.

5) The consent is given her but that consent is obtained during her unsoundness of mind or when she is intoxicated, that she is not in a condition to understand the nature and consequences of the consent that she is giving.

6) With her consent or without her consent when she is under eighteen years of age.
7) When she is not in a condition to communicate her consent.\(^1\)

Under Section 376\(^2\), there may be imprisonment up to 7 years for rape.

In the renowned case of R. v. Furroll\(^3\), in this case there was a girl child of six years old with whom rape was committed but she neither was injured nor she had any sort of injury on her private part. But after the incident took place it was found that she was suffering from the same disease (gonorrhea) from which the accused was suffering. After hearing to the contentions of the respondent and looking at the evidences of the case it was figured out by the court that the accused was guilty of the offence of committing rape and also it was held by the court that free consent here is different from the free consent under Indian Contract Act, 1872. As per criminal law in case of rape misrepresentation is not an essential ingredient.

**AMENDMENT IN CRIMINAL LAW, 1983**

The provisions of rape in IPC\(^4\) and CrPC\(^5\) remain unchanged for over a century until 1972. The case of Tuka Ram and Other v. State of Maharashtra\(^6\), was related to alleged rape, in 1972, of Mathura, a young Adivasi girl, by two policemen. The case came to hearing in Nagpur sessions court who acquitted the policeman as Mathura’s consent was voluntary. However, after appeal, Nagpur bench of the Bombay high court had set aside the session’s court judgment and held the policemen guilty for rape. Then the case went to the Supreme Court in 1979, where a 3-judge bench reversed the Bombay high court judgment ruling the policeman not guilty of rape.

A wave of protest started against the judgment of Supreme Court on the aforementioned, which led to the formation of a Feminist group in India called Forum Against Oppression of Women (FAOW). It resulted in the deliberation for reforms of Rape related Laws.

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\(^1\) Indian Penal Code § 375 (1860)

\(^2\) Indian Penal Code § 376 (1860)

\(^3\) R. v. Furroll, (1923), GLJ 1185

\(^4\) Indian Penal Code, 1860

\(^5\) Criminal Procedure Code, 1973

\(^6\) Tuka Ram and Other v. State of Maharashtra, (1979) 2 SCC 143 [2]
As the courts felt lack of adequate legal provisions in India, in giving justice in the Mathura case, the Government brought amendment to the rape laws. With the Criminal Law Amendment Act, 1983 the following changes were made in legal provisions related to Rape:

1) Section 114(a) of the Evidence Act, 1872 was inserted, which states that if a victim states that if the women victim didn’t consent to the sexual intercourse, then the court shall assume it to be true unless contested and proved otherwise.

2) Section 376 (A), 376 (B), 376 (C) and 376 (D) were added which made the rape under custody as well, a punishable offence.

3) The burden of proof was shifted to the accused, from the accuser, in the cases where the occurrence of intercourse was established.

4) Provisions related to trials in-camera and also no victim identity disclosures were added in the CrPC.

THE EVIDENCE ACT AMENDMENT, 2003

The ‘character assassination’ of the rape victim, was forbidden under the Criminal Procedure Code Amendment, Act 1983 when she files a complaint or sues the alleged rape. But, then to the cross-examination of the rape victim wasn’t clearly outlined. This was pointed out in a PIL filed in Supreme Court that the victim women do not feel comfortable about reporting sexual assault or rape, because “the intention of the defense in rape trials had become to humiliate and degrade the sexual integrity and personal space of the victim”.

After the recommendation made by the Law Commission, it was pointed out that this specific clause may deter rape victims from filing a case. So, section 155 (4) clause was deleted in 2003. Now, the cross-examination of a rape victim is prohibited. Under the Indian Evidence (Amendment) Act, 2003 clause 4 of the section 155 was deleted and specific provision was made under section 146 that in a rape case, it would not be allowed to ask questions about complainant’s character.

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7 CRIMINAL LAW (SECOND AMENDMENT) ACT, 1983 APPENDIX III
8 Indian Penal Code, 1860
10 Press release, dated 03rd Jan, 2003, by Ministry of Law & Justice
POCSO ACT, 2012

Under provisions in the IPC\textsuperscript{11}, sexual intercourse with a girl under 16 years of age will be termed as rape, with or without her consent. However, the procedure and the punishment clause were no different from a woman aged above 16 years.

Consequently, the parliament passed ‘Protection of Children Against Sexual Offences Bill (POCSO), 2011’ regarding child sexual abuse on May 2012. This Act made special provisions for children and assumes their age to be under 18 and also provides protection of children from the sexual assault, sexual harassment and pornography, with child-friendly mechanisms for reporting, recording of evidence, investigation and speedy trial of offences through designated Special Courts.

DELHI GANG RAPE CASE, 2012 AND CRIMINAL LAW AMENDMENT ACT, 2013

The “Nirbhaya Rape Case”\textsuperscript{12} became a turning point in anti-rape laws. The case led to widespread demand for stringent rape statutes in the country. The protester’s agenda was to hang the alleged accused of this case till death and to enact a much strict rape laws than the previously existing ones and also to include the provisions for capital punishment.

After the rape incident and the subsequent protect thereto, the Central Government appointed a 3-member judicial committee headed by Justice J. S. Verma, to suggest amendments in criminal law for dealing with sexual assault cases like Nirbhaya Case. The report, submitted by Justice J. S. Verma, indicated that the root cause behind crimes against women were failures on the part of the Government agencies and Police. It covered various offences like verbal sexual assault, harassment at work place, acid attack, child sexual assault cases, the need to review AFSPA in conflict areas and police reforms. Life imprisonment was recommended as maximum punishment for rape. Death penalty, as sought by several feminine activists, was not recommended in the report\textsuperscript{13}.

By following the recommendations given by the Justice Verma Committee, the Parliament enacted the Criminal Law (Amendment) Act, 2013\textsuperscript{14}. This amendment was a revolutionary in

\textsuperscript{11} Supra note 8
\textsuperscript{12} Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1 : (2017) 2 SCC (Cri) 673
\textsuperscript{13} Report of the committee on amendment to criminal law, 2013
\textsuperscript{14} The Criminal Law (Amendment) Act, 2013
case of rape laws. It made several major changes in the rape laws. Some of the provisions are:

1) Treatment of certain acts, mentioned in IPC, like Acid attack (section 326 A)\(^{15}\), Voyeurism (section 354 C)\(^{16}\) and Stalking (section 354 D)\(^{17}\), to be treated as offences.

2) Addition of a separate clause as section 354A\(^{18}\), for sexual harassment. Sexual harassment has been defined as coercion or using force of a sexual nature, or the unwelcome or inappropriate promise of rewards in exchange for sexual favours. Before the amendment there was no separate punishment for it. Now a person accused, will get imprisonment up to 3 years.

3) The act of disrobing a woman by force has also been made an offence under section 354 B of IPC.

4) The ambit of rape in section 375 has been widened, by making certain non-penetrative acts like oral sex, insertion of an object or any other body part into a woman’s vagina, urethra or anus, offence, amounting to rape.

5) The punishment for rape has been fixed at least seven years, which may extend up to life imprisonment.

6) In case the rape accused is public servant, provision is for imprisonment of at least ten years.

7) In case, the rape victim is dead, or the victim becomes vegetative, the punishment for life imprisonment or death has been prescribed.

8) Punishment of at least 20 years has been prescribed for gang rape.

9) ‘Consent’, has been defined as an unequivocal agreement to engage in a sexual act. Further, the absence of resistance cannot be understood as consent.

\(^{15}\) Indian Penal Code § 326 (A) (1860)  
\(^{16}\) Indian Penal Code § 354 (C) (1860)  
\(^{17}\) Indian Penal Code § 354 (D) (1860)  
\(^{18}\) Indian Penal Code § 354 (A) (1860)
CRIMINAL LAW (AMENDMENT) ACT, 2018

The criminal law (amendment) Act, 2018 was passed after two major rape cases shook the country. In Kathua rape case\(^\text{19}\), an 8-year-old girl, Asifa was abducted, gang raped and murdered by 7 men. In Unnao rape\(^\text{20}\) case, a 17 year old women was raped by an MLA in UP. Both of these cases drew media attention again, like the 2012 Nirbhaya case\(^\text{21}\) and demands were raised for hanging the accused and for formulating stricter rape laws.

Consequently, the Criminal Law (Amendment) Act, 2018 was enacted. The significant modifications brought by this Act were\(^\text{22}\):

1) Section 376 (1)\(^\text{23}\) has been amended with revision of 7 years punishment to a minimum ten years’ rigorous imprisonment, extendable to imprisonment for life.
2) Section 376 (3)\(^\text{24}\) has been inserted with the provision for minimum of twenty years imprisonment extendable to life imprisonment for rape of a woman under sixteen years of age.
3) Section 376(AB)\(^\text{25}\) has been inserted with provision imprisonment of a minimum of twenty years’, extendable to life imprisonment, for rape of a woman under twelve years of age. The offender can also be punished with death penalty.
4) Section 376 (DA)\(^\text{26}\) and (DB)\(^\text{27}\) has been inserted with provision of life imprisonment for gang rape of a woman under sixteen years and twelve years. However, for gang rape of a woman under twelve years of age, death penalty may be given.
5) Section 438 of CrPC has been amended to make provision for prohibition of anticipatory bail, by a High Court or a Court of Session, to a person accused of raping a woman under 16 years of age.
6) Provision in CrPC has been made for speedy trial and investigation of rape cases. The time limit for completing investigation and disposing of appeal are two months and six months, respectively.

\(^{19}\) Mohd. Akhtar vs The State Of Jammu And Kashmir (2018) 2 SCC (Cri) 786.
\(^{20}\) https://indianexpress.com/article/india/unnao-rape-case-bjp-mla-kuldeep-singh-sengar-arrested-5137445/ (last visited 27\textsuperscript{th} August,2020, at 15:34 p.m.)
\(^{21}\) Supra Note 12
\(^{22}\) The Criminal law (Amendment Act), 2018
\(^{23}\) Indian Penal Code § 376 (1) (1860)
\(^{24}\) Indian Penal Code § 376 (3) (1860)
\(^{25}\) Indian Penal Code § 376 (AB) (1860)
\(^{26}\) Indian Penal Code § 376 (DA) (1860)
\(^{27}\) Indian Penal Code § 376 (DB) (1860)
7) A sub-section has been inserted in CrPC, for mandating presence of informant or a person authorized by him during hearing of bail application of the accused.

8) Sections 146 and 53a of Evidence Act and Section 42 of POCSO act have also been amended to align them with amends IPC and CrPC.

**HYDERABAD RAPE CASE, 2019 AND INSTANT JUSTICE**

In 2019, we got to see another example of failure of socio-legal systems and law enforcement agencies, as far as safety of women is concerned. In November 2019, a brutal gang rape and murder case of a 26-year-old veterinary, near Hyderabad, caught a lot of media attention because of large scale public protests.

However, this rape case came out to be a historic turning point in punishing the rape accused. Telangana Police Department killed four accused persons in an encounter. Telugu speaking states have quite a history of extrajudicial killings. This case has not been new. This incident is similar to a case in 2008, where three men accused of an acid attack were also shot down in Andhra Pradesh. This encounter opened a Pandora’s box of questions and doubts. The biggest of them would be, whether the encounter was a right way to punish the accused and whether this example of instant justice is a right way to follow?

Instant justice means taking laws into one’s own hand and being the judge, jury and the executioner to bring justice. The police encounter in the Hyderabad case is an example of police deciding the fate of the rape accused. Chief Justice S.A. Bobde after the encounter of the suspect of the Hyderabad case said that “justice can never be instant and when it becomes revenge it loses its character.” The bigger question is why people are resorting to instant justice? Most probably because:

1) The people have lost faith in the judiciary. Due to low conviction rate and delay in trials, like the Nirbhaya case, dragging along for over decades, belief in the legal system has diminished. Though, finally justice was done in Nirbhaya Case, by awarding death penalty to the convicts in 2020, but it took a long eight years in such a high profile case with media


attention world over. People believe in the saying of William Penn that “Delayed justice is justice denied”. The more the case drags along, the less possibility of conviction there is.

2) Due to less number of judges and huge backlog of cases, the judiciary is not able to deliver efficiently as it is supposed to.

3) Rape cases against powerful people tend to be mostly biased in their side leading to very meager conviction rate.

4) With strict laws in place, it should deter the rapists from committing sexual assaults, but their tendency of committing such heinous acts has not dwindled. People believe as long as there is no death penalty to the accused, the number of rape cases will remain high. The offence of rape is punishable by death in many countries today like China, Afghanistan, United Arab Emirates, Egypt, Bangladesh, Iran, Saudi Arabia, Pakistan, and North Korea\(^30\). But, in our country capital punishment for rape is rare.

5) The idea of instant justice suits people, as it seems to be the most viable way to punish the accused instead of waiting for acquittal of rapists after a long judicial process in which not only the victim but the whole family and relatives suffers.

The Hyderabad encounter drew a lot of criticism as well. Some jurists and journalists apprehended what if, the four men killed by the police were innocent men, arrested in hurry to show fast action under pressure and the real rapists are still roaming free. Amnesty International India stated that the “alleged extrajudicial execution” had posed disturbing questions and advocated for an independent investigation of the case\(^31\). People also expressed that the encounter was done to distract people from the government's failures to safeguard women's rights.

Whether or not the encounter was right, but this should not be a regular practice of doing justice, bypassing our legal redressal system. This may lead to a dangerous trend like mob lynching. People may perceive that mob violence is also a way of instant justice mechanism.

\(^{30}\) https://www.scoopwhoop.com/inothernews/punishing-rape-globally/ (last visited on 04\(^{th}\) September, 2020 at 23:10p.m.)

\(^{31}\) https://scroll.in/latest/946025/amnesty-says-telangana-encounter-sets-grossly-wrong-precedent-calls-for-independent-inquiry (last visited 09th September, 2020 at 21:19 p.m.)
Tehseen S. Poonawalla vs Union of India and Others case argued the main principle of carrying out lynching which appears to be the case of instant justice. Taking law into one’s own hand maybe can deter violence and sexual assaults but it has its own drawbacks as well. If instant justice is going to be a social practice or the guiding principle of the law enforcement agencies of this country then, chaos would prevail in place of an established legal system. The mistaken belief and justification, for giving free hand to the law enforcing agencies to do justice on the pretext of delay or inefficiency in judiciary, is misconceived and may prove to be disastrous for society.

CONCLUSION

Justice in rape cases of Indian women had a long and arduous journey of law reforms but somehow the resultant objective could not be achieved. In addition to reform in the legal system, social reform is also essential. We have to dig deep into the question of what is causing or influencing the psychology of sexual assaulters and make us remember our men about Indian tradition of worshiping women. The statute of our country has now enough legal provisions for dealing with atrocities against women including rape. The enforcement of these laws needs to be ensured. We must accept that media trials, public protests and history of long drawn courtroom battles do have an impact on psychology of people working in law enforcement agencies as well as the general public. This acts as a catalyst, under some conditions, for taking law in own hands for instant justice. Incidents like encounters near Hyderabad send a strong message to the Government and our legal system that if they can’t provide justice, people may choose the wrong path of belief system that ‘when justice fails, instant justice steps in’. But, the instant justice is certainly not a right antidote for dealing with social ailments including sexual assaults. With efficient implementation of present stringent laws related to crime against women, the belief in a legal way of justice delivery system needs to be established.

32 Poonawalla vs Union of India and Others SCC (2018) 6 SC72