



Criminal justice system and violence against women in changing legal paradigm in India

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Abstract

The article deals at length with violence as an instrument of perpetration of domination on women. The religion, social customs and practices have sanctioned tangent and intangent methods of violence for creating a patriarchal society. However in the modern times, the various international instruments, constitutional reforms and feminist movements have tried to minimise the violence against women but the gender competitiveness, enlightenment of women about their rights and women's presence in the public domain has led to the increase of violence against women in different forms ranging from intimidation, severe bodily injury, use of criminal force, kidnapping, human trafficking and rape. The criminal law amendments despite making law severe and swift in promoting a sense of security in women has not been able to mitigate the violence against women. The article says that, along with legal remedies, the issue requires the understanding of the gender situation differently. Men and women are not equal or unequal, rather they are made differently. Thus, the gender jurisprudence needs to deal with the situation with a deeper understanding.

Keywords: violence against women, criminal law amendment, gender jurisprudence

1. Introduction

Violence as an instrument of wielding power and to perpetrate domination is not a new phenomena. Specifically the weaker sections have been the target of violence of different nature and magnitude in most of the societies. There may be difference of degree, quantum and issues on which the crimes amongst the human beings have surfaced. The article concerned deals with the crime against women in India.

Violence has different manifestations and affects the behaviour of persons in different manners. It has been defined in Merriam - Webster Dictionary: "the use of physical force so as to injure, abuse, damage, or destroy", while the Oxford Living Dictionaries defines it as "Behaviour involving physical force intended to hurt, damage, or kill someone or something." Collins Dictionary states "Violence is behaviour which is intended to hurt, injure, or kill people." And Dictionary.com defines it as "an unjust or unwarranted exertion of force or power, as against rights or laws." However the common theme which runs through all the definitions is to perpetrate domination of one being over the other. The violence against women has been conventionally more often backed by religious beliefs, customs and practices and sometimes even obsolete laws. For Example : "the rule of thumb did not permit the Englishmen to beat their wives with a stick which is thicker than their thumb"^[1]

There has been from time to time the overhauling of criminal justice system to mitigate the violence against women by passing severe laws which could be attributed to maintain the neutrality and equilibrium of jurisprudence. The Indian Penal Code read with Criminal Procedure Code and other penalizing laws have created a different kind of gender jurisprudence in India. The concerned article evaluates the recent criminal amendments in 2013 and 2018, whether they have succeeded in installing the sense of security amongst the Indian female population. Equity

fairness and justice, which the men folk enjoyed for centuries was a dream for women till date. In the name of Personal Law, women's suppression and oppression continued without much resistance for a long period of time.

2. International Instruments and Protection of women

With the advent of democratic revolution across the world in latter part of 19th century, women started demanding their share in the socio-economic - political development. This quest for equity fairness and justice further gained momentum with the growing concerns for human rights in the second half of the 20th century. After United Nations came to existence, rights of weaker section of the population started getting realized through various declarations and international instruments. Specifically, Universal Declaration of Human Rights, 1948^[2] and subsequent international conventions which includes:

- Convention on the Political Rights of Women (1952)^[4]
- Declaration on the Elimination of All Forms of Discrimination against Women (1967)^[3]
- Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974)^[5]
- In 1975 international year of Women was declared to press for the rights of women.
- Convention on the Elimination of All Forms of Discrimination against Women (1979)^[6]
- Declaration on the Elimination of Violence against Women (1993)^[7]
- Inter-American Convention for the Prevention, Punishment and Elimination of Violence against Women (Belém do Pará Convention) (1995)^[8]
- Universal Declaration on Democracy (1997)^[9]
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999)^[10]

The United Nations Convention on the Elimination of All

Forms of Discrimination Against Women (CEDAW)(1979), now signed by over 180 countries all over the world, explicitly acknowledges that the generalized discrimination from which women continue to be subjected to, violates the principles of equal rights and of human dignity.” In order to install a sense of security amongst the women India ratified the other international instruments like

The Mexico Plan of Action (1975) ^[11],
The Nairobi Forward Looking Strategies (1985) ^[12],
The Beijing Declaration as well as the Platform for Action (1995) ^[13] and
The Outcome Document adopted by the UNGA Session on Gender Equality and Development & Peace for the 21st century, titled ‘Further actions and initiatives to implement the Beijing Declaration and the Platform for Action’.

Though India signed and ratified the CEDAW in 1980 and 1993, yet the criminal justice system has not been able to provide ample safeguard to its female population against rampant discrimination in their personal and public life resulting in extreme form of violence against them.

3. Religions creating an environment of patriarchy

The crime against women, specifically in India, requires understanding the contextual incidences of such nature wherein the violence is perpetrated. This further needs an evaluation of social, economic and political relations in which the men and women build up their relations. Sylvia Walby, a known sociologist, describes patriarchy as “a system of social structure and practices in which men dominate, oppress and exploit women.” Religion has been the main source of perpetuation of patriarchy, whether it is Hindu, Muslim or Christian. The customary practices embedded in all religions justified the subordination of women. The Manusmriti states women cannot live independently and should be under the custody of either her father, her husband or her son ^[14]. The Quran in verse 2:223 states that “and the men are a degree above them [women]” ^[15]. This shows man has dominion over his wife and there are also other verses which imply that a woman is inferior to man. Quran (4:24) and Quran (33:50) - “A man is permitted to take women as sex slaves outside of marriage”. Such types of references are frequent in the Quran. Similarly the Bible also mentions: “For the man is not of the woman; but the woman of the man. Neither was the man created for the woman; but the woman for the man.” (I Corinthians 11:8-9) ^[16]. If we read through the chapter of Corinthians in the Bible, we can see how the woman is treated as inferior to man.

When we read through the religious books, we find that there has always been an inequality among the genders, and man has been taught to consider himself superior to women. When we read through Robert Max Jackson ‘Down So Long—Why Is It So Hard’ ^[17], an article on gender inequality, it shows that men accepted that women were exploited by men and each person did what was meant for him. This was the reason why man and woman, though on the same plane are totally different and hence there is an inequality between the two. If we depart from religious beliefs and customary practices, this inequality originates from the different way of life that men and women are living. If we see the functioning of both the man and woman, we find that the differences of physical as well as

emotional nature should be tackled differently and it should not lead to a perception of inequality of either sex.

4. Law for the protection

The British legal system had deep impact over the Indian legal system, though; it never bothered to change the Personal Law of its subjects during its colonial rule. However, under the pressure from social reformers so many progressive laws were passed which protected women from being subjected to criminalisation and inhuman treatment. In 1829, sati was banned.

However, to this day we still hear of sati being glorified by some of the obscurantist and fundamentalist in parts of the country Widow Remarriage was made legally permissible in 1856. But socially, the chances for a widow to remarry even today are remote.

In 1870 female infanticide was banned. But female foeticide has brought the male female ratio to all time low.

The Child Marriage Restraint Act was passed in 1929.

In parts of Rajasthan and Gujarat group marriages of under ten still take place, the law is rarely applied to punish the facilitators under its grip. Even legally, women were discriminated as far as the laws related to marriage, divorce, maintenance, inheritance etc. were concerned ^[18].

With the dawn of independence, women were hopeful that they would get justice and equality denied by religion, tradition and unconcerned colonial rule. Though the framers of the Constitution wanted to give women their due justice by enforcing a secular law, a common civil code which did not discriminate between men and women. But their voice could not be heard by those who wanted to continue with patriarchal system of domination. And thus was drafted the Constitution of India, which promised equality, liberty and justice to all of its citizens. But women were denied all these rights in the name of Personal Law.

The Constitution of India guarantees every citizen certain Fundamental Rights;

“Equality before Law - Prohibition of Discrimination on Grounds of Religion, Race, Caste, Sex or Birth of Place, Equality of Opportunity in matters of Public Employment, Freedom of Speech And the Freedom of Religion”.

However, Article 25.1 of the Indian Constitution has been misused by the different communities to perpetrate male domination by suppressing the rights of women, which states: 'Subject to public order, morality and health and to other provisions of this Part, all persons are equally entitled to freedom of consciences and the right freely to profess, practice and propagate religion’ ^[19]

Here, Haksar points out, it is because of this Article that women could not have:

- Equal rights to property,
- Equal rights within the family, or
- The right to decide where she will reside after marriage.
- Some women are even deprived of the right to maintenance or to divorce or to adopt a child, and
- significant quote which sums up this awful state of affairs is "the Constitution does not see patriarchy as problematic; it perceives it as natural...Whereby women have a subordinate role to play in the society without asking for their rights”.

Because of the legally established male dominance the various crimes against women have become a routine matter

which includes bodily injuries of different kinds, mental harassment resulting in their deprivation in the public domain. It was a common practice that if a woman does not concede to the undue demands of her male counterpart, the violence has become imminent which includes stalking, molestation, and in extreme cases throwing acid or raping.

5. Incidences of violence against women and leading to the passing of the Criminal Law Amendment Act, 2013 and 2018

The recent amendments in the criminal system were sparked off due to the rarest of the rare cases which shook the conscious of the people, for example : Arushi murder case(where a 14 year old was found murdered in her home) ^[19], Nirbhaya case(where a teenager was brutally gangraped in a bus and a rod was inserted in her vagina, and then thrown on to the street) ^[20], Kathua case (where a 11 year old girl was raped and kept in a temple premises) ^[21] and Unnao case(a fifteen year old who was raped in 2017 and who tried to immolate herself in front of the Chief Minister's home) ^[22]. These incidences of inhuman kind created an anxiety in the minds of people and law maker to an extent that they did not hesitate to pass extreme forms of legislation to protect its female population, setting aside basic principles of natural justice, rule of law embedded in the common law.

To meet these exigencies, The Indian Penal Code after amendment in 2013 and 2018 provides ample provision for the protection of women:

5.1. Acid Attack

Section 326, IPC was a gender neutral law related to causing bodily injuries. After the 2013 amendment, there was incorporation of Section 326A and 326B wherein throwing of acid will be punished with imprisonment of either description for a term which shall not be less than 10 years and which may extend to imprisonment for life and also liable to fine.

The Supreme Court went a step further and in 2015 issued the direction for the regulation of acid to the States and UT, and also addressed the problem of compensation. The Apex Court also directed that the acid attack victims shall be paid compensation of at least Rs. 3 Lakh by the concerned State Government/UT as the aftercare and rehabilitation cost.(*laxmi vs union of india* 2014 SCC 4 427) ^[23]

As per Open Government Data (OGD) Platform India ^[24], cases of Acid Attack (S.326A IPC) & Attempt to Acid Attack (S.326B IPC) in 2016 was 225.

5.2. Assault or use of criminal force

Section 354 dealt with the Assault or use of criminal force to women with intent to outrage her modesty. The amendment lead to increasing the punishment to imprisonment of either description for a term of not less than 5 years, which may extend to seven years and shall also be liable to fine and also incorporated Section 354A which dealt with sexual harassment and its punishment, Section 354B which dealt with Assault or use of criminal force to women with intent to disrobe, Section 354C deals with Voyeurism and Section 354D which deals with stalking. The offences under these sections are now non-bailable offences and their punishments have also been enhanced.

As per Open Government Data (OGD) Platform India, in 2016 cases of

Assault On Women With Intent To Outrage Her Modesty(Sec. 354 IPC) = 39953

Assault On Women With Intent To Outrage Her Modesty - Sexual Harrassment (Sec. 354 A IPC) = 27422

Assault or Use of Criminal Force to Women With Intent to Disrobe (Sec. 354 B IPC) = 9789

Assault On Women With Intent To Outrage Her Modesty - Voyeurism (Sec.354C IPC) = 932

Assault On Women With Intent To Outrage Her Modesty - Stalking (Sec. 354 D IPC) = 7236

while in 2012 Assault on women with intent to outrage her modesty = 45351

5.3. Abduction or kidnapping

Section 366 is on Kidnapping, abducting or inducing a woman to compel her marriage, etc will be punished with imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine.and includes Section 366A for Procurement of minor girl with intent to force or seduced to illicit intercourse with another will be punished with imprisonment of upto 10 years and also liable to fine. And Section 366B deals Importation of girls from another country under the age of 21 years with the intent to force or seduced to illicit intercourse with another will be punished with imprisonment of upto 10 years and also liable to fine.

As per Open Government Data (OGD) Platform India - data.gov.in, in 2016 cases of Kidnapping & Abduction of Women (Sec.363 IPC) = 21365

Kidnapping & Abduction of Women in order to Murder (Sec.364 IPC) = 120

Kidnapping & Abduction of Women for Ransom (Sec.364A IPC) = 87

Kidnapping & Abduction to Compel Women for Marriage (Sec.366 IPC) = 33796

Other Kidnapping & Abduction (Female) (Sec. 363A, 365, 366A, 366B, 367, 368 & 369) = 11176 while in 2012 it was for kidnapping & abduction = 38262

5.4. Human Trafficking

Section 370 was amended to stop trafficking of women and other persons totally.

As per Open Government Data (OGD) Platform India - data.gov.in, in 2016 cases of Human Trafficking (Sec. 370 & 370A IPC) (Female) = 1183

Section 372 states that Selling minors under the age of 18 years for purposes of prostitution, etc..shall be punished with imprisonment of either description for a term which may extend to 10 years and shall be liable to fine.

5.5. Rape

Bodily injury with mental agony through rape is the worst type of harassment of a woman, and hard to solve. There is continuous changes in perceiving the types of crime which can be related to rape, and needs to be addressed constantly. Section 375 & 376 Rape in any manner, and under any circumstances as described will be punished with rigorous imprisonment of either description for a term not less than 7 years which may extend to imprisonment for life and also liable to fine.

Section 376A: causing death or vegetative state of the victim : will be punished with rigorous imprisonment of up to 20 years which may extend to imprisonment for life and

also liable to fine.

Section 376B: Sexual intercourse by husband upon his wife during separation will be punished with imprisonment of either description for a term which shall not be less than 2 years and which may extend to 7 years and also liable to fine.

Section 376C: Sexual intercourse by a person in authority will be punished with imprisonment of either description for a term which shall not be less than 5 years and which may extend to 10 years and also liable to fine.

Section 376D: Gang Rape will be punished with rigorous imprisonment of either description for a term which shall not be less than 20 years and which may extend to life which shall mean imprisonment for the remainder of that person's natural life and also liable to fine.

Section 376 E: punishment for repeat offenders will be punished with imprisonment for life which will mean for the remainder of his life and also liable to fine.

As per Open Government Data (OGD) Platform India - data.gov.in, in 2016 cases of Rape (Total) = 39068

Gang Rape (Sec. 376D IPC) = 2171

Custodial Rape@ (Sec. 376C IPC) = 16

Attempt to Commit Rape (Sec. 376/511 IPC) = 5732

and in 2012, Rape = 24923

The law is trying to plug all kinds of loopholes but the cases are ever increasing. The data of National Crime Records Bureau has shown that there has been a big jump from 2,487 in 1997 to 24,206 in 2011 which is an increase of 873%^[25]

6. Points to Ponder

The reasons are many, the first is that the violence against women was accepted as a way of life and the reporting of the crime was to bring stigma to the victim. Thus the victim was always hesitant to report the perpetration of crime. Secondly, the legal literacy of the people in general, especially women has increased. Thirdly the society is undergoing a serious social turmoil wherein the behaviour of the people is also changing. Fourthly, women participation in the public domain has also increased. Their movement from four walls to public domain is on the rise. Fifthly, the family system is also fast changing from joint family to unitary family wherein the isolation of women in fast urbanisation has created a unique situation where women are more prone to such crimes. Sixthly, the economic rivalry coupled with quest for more power in the public domain, the women have used this justice system to settle their scores. Seventhly the technology has further enabled the criminal justice system to act judiciously against such crimes. Last but not the least, the cultural blend of western way of life and the conservative attitude of the people in India at large, has created an impasse wherein there is a frequent tension between the do's and don'ts of the personal conducts of individuals who are not able to decide what is morally correct or legally wrong. It's a new era wherein the intergender behaviour requires an in depth analysis. The mindless changes or amendments in the criminal justice system would ultimately render the whole society criminalised. There is a need for ushering in an era of new jurisprudence which would have an in depth analysis of human behaviour, human needs and addressing the new way of life. Just presenting women as victim and man as perpetrator of crime will not help the society to embark

upon the humanity to touch new frontiers which are ever expanding with the advancement in natural sciences and humanities.

Hence it is obvious that changing the laws has not helped in curbing the offences against women, as we are not actually addressing the root cause of the crime, but just addressing the redressal.

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