

SEXUAL OFFENCES IN INDIA: SPECTRUM OF OPPORTUNITIES

WHAT WE HAVE VIS-À-VIS WHAT WE NEED

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ABSTRACT

The Indian criminal justice system is currently struggling with the slow pace of implementation mechanism for it lacks a comprehensive sentencing policy. What we need in the current scenario is a uniform sentencing guideline which can serve as a torch bearer to the judiciary for it can guide them while dispensing the judgment and the common people would be certain about the punishment which they can be made liable for in lieu of any offence. Sentencing policy for sexual offences under the Indian criminal justice system has been witnessing major changes for almost a decade. One change that has grabbed the attention of the masses is with respect to the punishments and certainty of it. Indian Penal Code, 1860 and various other sexually related laws are working to make it deterrent and eventually to curb the menace that is inflicting havoc on our society.

This paper shall be discussing the existing legislative framework regarding the sexual offences in Indian and shall also be testing the efficacy of a sentencing policy under the regime of sexual offences in Indian criminal justice system. The paper shall be discussing Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 and various other sexual offences as enunciated under Indian Penal Code, 1860 with a view to highlight the trends of sentencing followed in such conviction.

Keywords: Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, Indian Penal Code, 1860, Sentencing Policy.

“Sentencing” is the final stage of delivering Justice to the convict and victim. In India, punishment is given according to own applied thoughts of Judges and within statutory limit. For some offences, the maximum punishment is prescribed and for some, it is minimum. In some cases, Judges lower down the punishment using the retributive principle. However, on the same cases of similar facts Judges give death penalty setting as a deterrent for the others in the society. Some Judges tend to be lenient while others tend to be harsh. This has eventually led to improper convictions, due to irrelevant consideration and personal bias. This has also led the society to question what Judiciary should do in a particular state of affairs.ⁱ

In India neither the legislature nor the judiciary has issued structured sentencing guidelines. Several governmental committees have pointed to the need to adopt such guidelines in order to minimize uncertainty in awarding sentences. The higher courts, recognizing the absence of such guidelines, have provided judicial guidance in the form of principles and factors that courts must take into account while exercising discretion in sentencing.

Currently India does not have structured sentencing guidelines that have been issued either by the legislature or the judiciary. In March 2003, the Committee on Reforms of Criminal Justice System (the Malimath Committee), a body established by the Ministry of Home Affairs, issued a report that emphasized the need to introduce sentencing guidelines in order to minimize uncertainty in awarding sentences.ⁱⁱ

Though, IPC in Chapter III of Sec. 53 provides for broad gradation of punishment such as:

1. Death penalty, 2. Imprisonment for life, 3. Imprisonment, 4. Forfeiture of property and 5. Fine.

But again, it suffers from certain limitations. The problem is that the highest punishment considered is Death penalty while the second highest is imprisonment for life. No punishment is provided between them as provided in US such as “imprisonment for life without commutation or remission”.

However, the England Criminal Court Sentencing Act, 2000 provides for supervision during suspension, community sentences, community rehabilitation order, financial penalties and reparation orders, parenting orders for children,[1] confiscation order, curfew order, disqualification orders of public servant for criminal misappropriation, rehabilitating sexual

offender or drug addict etc. Also, Section 78 of the English Act imposes limits on imprisonment and detention of young offenders. Sections 79 & 80 provide for general restrictions on description and custody of sentences and length of sentences. Section 83 helps out persons who are not legally represented. Financial compensation for young offenders, the regular offenders, etc. is fixed under the statute.

Taking the US system into consideration, the two broad guidelines are given i.e. (1) the conduct associated with the offence and (2) the defendant's criminal history. Though the discretion has been provided but Judges need to adhere to certain standards while giving the decisions. If any sentence is given beyond the scope, written explanation is required to be provided to the Commission to check and review the decision-making process.

Therefore, in order to provide Criminal Justice System, it needs to address on a critical premise. For instance, casualties of assault, rape and so forth require injury guiding, psychiatric and rehabilitative administrations separated from legal aid. As recommended by the Law Commission, offenders should also be classified as casual offender, an offender who casually commits a crime, a habitual offender, a professionalⁱⁱⁱ offender or one who belongs to Mafia. Changes need to be made in IPC to take into consideration new and serious crimes such as cybercrime, hijacking, terrorism, pornography, domestic violence. These crimes need to be looked at stretch and laws should be reformed for meeting the above challenges. Fines imposed on the commitment of crime need to be revised, as value of money has increased 50 times compared to the year 1860 and it sets an ambiguous term for the one who is genuinely incapable of paying. 'Proof beyond reasonable doubt' should be amended with the proof which is enough to prove the truth. Participation of the accused should be increased to achieve the ultimate goal. The accused should be made to file a statement to the prosecution disclosing his stand.

Sexual harassment at workplace is not so far perceived as a lawfully unmistakable kind of disallowed act in umpteen quantities of nations over the world. In the beginning the court treated to sexual harassment as a criminal violation or a civil violation which we can say violation of privacy.

A discussion on the sexual harassment law in India would be incomplete without any account of the past. Although there were numerous incidents of sexual harassment prior to Vishaka, but were able to bring about little or no reform at all. The years 1980 and early 1990's saw a rise

in the sexual violence suffered by women but no significant changes were brought,^{iv} despite demands from various factions (primarily women). As suggested by Naina Kapur the Judicial attitude towards such incidents of violence^v against women was pathetic. In two different cases involving rape of two girls by police officers the Supreme Court had in a very demeaning and a derogatory manner instead of reassuring the victims of violence put the ^{vi}blame on the victim instead. During the 1980's sexual violence against women was recognized only in a few forms amongst which rape was considered to be most outrageous. Other forms included offenses of obscenity and offenses to outrage modesty of the women under sections 294,354 and 509 of the^{vii} Indian Penal Code. Until the Vishaka Judgement was delivered by the Supreme Court the acts of sexual violence towards women prejudices and stereotypical ^{viii}views were the rules rather than the exception.

The National Crime Records Bureau has recently published the figures of crimes against women. According to the figures 100 women are subjected to rape each day approximately. The most numbers are in the state of Madhya Pradesh. In M.P. there is a rise of 358% in rape against women during 2013-14 i.e., 14 crimes each day. On the other side Uttar Pradesh excels in murder and kidnapping of which 300 murders were due to love affairs.^{ix}

Section 354 of the IPC criminalises any act by a person that assaults or uses criminal force against a woman with the intention or knowledge that it will outrage her modesty. Such an act is punishable with either simple or rigorous imprisonment of up to 2 years, or a fine, or both. Indian courts have ruled that the essence of a woman's modesty is her sex, i.e. a woman possesses modesty by virtue of being a woman.

Section 354B of the IPC criminalises assault or use of criminal force against a woman with the intention of disrobing her, i.e. with the intention of depriving her of her clothing or forcing her to be naked. Such an act is punishable with either simple or rigorous imprisonment of 3 to 7 years and a fine. Aiding such a crime also carries the same punishment. While this may sound similar to outraging modesty, it isn't. It is considered an offence whether or not the man intended to outrage the modesty of the woman.

Section 354C of the IPC criminalises the act of voyeurism. It defines it as a man watching or capturing the image of a woman engaged in a private act in circumstances where she would

usually not expect to be observed by the perpetrator or by any other person on the orders of the perpetrator or the distribution of an image so captured by the perpetrator.

Section 354D of the IPC criminalises stalking of a woman by a man. It defines the Act to include continuous following or contacting a woman by a man or attempts to contact a woman to build a personal relationship with that women even when the woman has shown a clear lack of interest. It also includes acts of monitoring a woman's electronic communication, i.e. communication over emails, social media etc.

Section 375 of the IPC defines rape to include any or all of the following acts, by a man against a woman:

Penetration of a man's sexual organ (penis) into a woman's mouth, vagina, urethra or anus or making her do so with him or someone else; or

Inserting any object, not the penis, into a woman's vagina, urethra or anus or making her do so with him or someone else; or

Manipulating any body part of the woman to cause penetration into her vagina, urethra, anus or any other body part or making her do so with him or someone else; or

Applying his mouth to a woman's vagina, urethra or anus or making her do so with him or someone else.

Under the following circumstances:

Against her will;

Without her consent;

With her consent, if such consent is obtained by causing her fear of death or hurt for herself or for someone she knows;

With her consent, if she believes the man, she is engaging with sexually is her husband;

With her consent, where due to unsoundness of mind or intoxication, the woman is not able to fully understand the nature and consequences of the act she consents to;

With or without the consent of a woman who is below 18 years if age;

When the woman is unable to communicate consent.

Consent is defined as clear, voluntary communication that the woman gives for a certain sex act. Lack of physical injuries from the incident does not imply that consent was involved in the incident. Medical procedures or interventions do not constitute as rape.

Marital rape, i.e. rape by one spouse of another is also listed as an exception to the act of rape, as long as the woman is above 15 years of age. Rape by a husband of his wife constitutes as rape if they are living separately and has a punishment of 2 to 7 years jail term and a fine.

In October 2017, the Supreme Court stated that the act of sexual intercourse by a husband with his wife who is under the age of majority (18 years) would also be treated as rape. The apex court read down the exception, and the age of consent has been changed from 15 to 18 years.

Sex related offences are a universal phenomenon, which take place in every society in different circumstances and social settings. It may take the form of sexual violence, which sometimes cause severe and irreparable damage to the physical and mental health of the victims. Physical injury includes an increased risk of a range of sexual and reproductive health problems. Its impact on mental health can be equally serious as that of physical injury. Sexual offences, when they assume the form of sexual violence may lead to murder, suicide, acute depression, etc. of victims. It entirely disturbs the social wellbeing of the victims because of stigmatisation and the consequential loss of status in their families and the neighbourhood.^x Therefore, it is vital that measures are introduced to end India's tolerance of violence against women and girls. Policy and legal reform are needed to address the pervasive and damaging stereotypes surrounding rape. However, as the author has aptly put it, we must look beyond the natural human desire for retributive justice to seek comprehensive solutions, including sex-offender treatment programmes and restorative justice approaches that provide a true and lasting legacy of change.

ENDNOTES

ⁱ Available at <https://lexquest.in/need-for-sentencing-policy-in-india>

ⁱⁱ Available at <https://www.loc.gov/law/help/sentencing-guidelines/india.php>

ⁱⁱⁱ Training of Empanelled Layers in Jharkhand On Violence Against Women & Violence Against Child
http://jhalsa.org/pdfs/Reading_Materials/RM_19_09_2015/volume_4.pdf

^{iv} Gitanjali Ganguly, “Indian Feminism Issues of Sexuality and representation”, in *Popular Culture in a Globalised India*, ed.K.Moti Gokulsing et.al.(Routledge: 2009) 55

^v *Tukaram v. State of Maharashtra* AIR 1979 SC 185, *Prem Chand v. St. of Haryana* 1989 Supp (1) SCC 286, Also see Naina Kapur, “Sexual Harassment and Law Reform In India” (Expert Group Meeting on good practices in legislation on violence against women United Nations Office at Vienna, Austria May 26 to 28, 2008).

^{vi} *ibid*

^{vii} Pratiksha Baxi, Sexual Harassment, <http://www.india-seminar.com/2001/505/505%20pratiksha%20baxi.htm>

^{viii} Sandra Neuman, “The Issue of Sexual Violence against Women In Contemporary India” (Master's Thesis, Linnaeus University, 2013).

^{ix} Available at <https://www.indianbarassociation.org/crimes-against-women-a-legal-perspective/>

^x Available at

[http://mja.gov.in/Site/Upload/GR/Title%20NO.94\(As%20Per%20Workshop%20List%20title%20no94%20pdf\).pdf](http://mja.gov.in/Site/Upload/GR/Title%20NO.94(As%20Per%20Workshop%20List%20title%20no94%20pdf).pdf)