OFFENCE OF RAPE UNDER THE INDIAN PENAL CODE

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> Rape is nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear.
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> *Susan Brownmillar*

Criminal law of a country reflects socio-politico-moral values in the society, therefore, nature and content of criminal law is to be studied in the backdrop of its prevailing social values and political ideologies. The unprecedented increase in the incidences of rape is a stigma on our Constitution, which dictates a fundamental duty on every citizen to honour and protect the dignity of women[1]. Rape is as old as Adam but that is no reason why this offence against women should continue. As crime against women in a society is viewed as the test of the culture and civilization of the country, it is high time to evaluate the rape law in India.

The criminal law for India was introduced by the British rulers in the name of Indian Penal Code hereinafter called the IPC, and was drafted by the first Indian Law Commission, with Lord Macaulay at its helm, and later revised by a select committee headed by Sir Barnes Peacokc, before being passed. In Macaulay's draft the provisions were called "clauses". but in the code the word used was "Section".

In his draft, Macaulay devoted clauses 254 to 362 to chapter XVII, titled 'On Offences Against the Human Body.[1] Of these, clauses 359-360 dealt with offence of rape. In the final version of the Penal Code, sections 375-376 deal with rape. Due to rearrangement of provisions of the code, chapters were renumbered and the chapter on offences against human body was numbered XVI.[2]

The offence of rape and the punishment for it has undergone several amendments in the later years. The present paper endeavours to evaluate the socio-politico-moral values prevailing in IPC relating to rape. In order to study the rape law in its proper perspective, it is imperative to study the criminal and penal policy in England and the perception of Lord Macaulay that influenced the substantive law relating to rape in India.

FROM OFFENCE AGAINST PROPERTY TO OFFENCE AGAINST HUMAN BODY: THE TRANSFORMATION OF RAPE LAW

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1 Art. 51A provides - It shall be duty of every citizen of India...(e)...to renounce practices derogatory to the dignity of women.

2 Vasudha Dhagamwar, *LAW POWER & JUSTICE, PROTECTION OF PERSONAL RIGHTS UNDER THE INDIAN PENAL CODE* (N.M. Tripathi Pvt Ltd., 1974) at 114.

In ancient law, many sexual acts were punishable, though only some involved violence against women. However these crimes were not punished to secure the freedom or security of women as individuals. Until modern times, the law did not protect a women's decision to take a lover other than with the husband's approval, and very often punished her for it. The historic price of women's protection by man against man was the imposition of chastity and monogamy. Crimes committed against her body became a crime against the male estate.[3] Rape entered the law through the backdoor, as it were, a property crime of man against man. Women, of course, were viewed as the property. In the ancient codes, the legal treatment of rape depended on the victim's relationship with a man. Rape of virgins was a serious economic matter, with unmistakable characters of a crime against property.

The common law protected a male as opposed to female interests. In early English law, by a proceeding analogous to appeal of felony, the rape of a virgin was punishable by castration and blinding. But the law gave the victim the right to nullify the sentence by wedding the rapist, thereby relieving the victim's family of the damaged goods.[4] Rape of women other than virgins did not implicate the King's peace and was a matter for the local feudal courts or private vengeance.[5]

The Statutes of Westminster put forward by Edward I at the close of the thirteenth century showed an advance in legal thinking as the Crown began to take an active interest in all kinds of rape prosecutions, not just those concerning sexually exploited virgins.[6] Before the passing of this Act, a victim had to institute a civil suit for a rape trial to take place. As the women, proceeded to prosecute the alleged rapist for rape, she was called "Prosecutrix". Presently, it is the State, and not the women who prosecutes the rapist yet the word prosecutrix continues to appear with regularity where it is used interchangeably with 'complainant' and 'alleged victim'. To give the new law teeth, Edward I decreed that if a raped woman or her kin failed to institute a private suit within forty days, the right to prosecute automatically passed to the Crown. This bold concept, applicable only to virgins in previous reigns, was a giant step forward for the law and for women. It meant that rape was no longer just a family misfortune and a threat to land and property, but an issue of public safety concern.[7]

By Blackstone's time the law protected all women against rape, but not out of any respect to sexual autonomy. Blackstone dealt with rape in between the crimes of 'Stealding an heiress' and sodomy, and regarded rape as somewhat

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3 Susan Brownmiller, *AGAINST OUR WILL* (Penguin Books 1976) at 17.

4 Donald. A. Dripps, "Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent", (1972) *COL. L. R.* 1780 at 1782.

5 *Ibid.*

6 *Supra* note 2 at 29

7 *Ibid.*

more serious than abducting an heiress, but rather less odious than consensual sodomy.[8] From Blackstone's period, offence of rape became a crime against human body rather than offence against the property of male, but this does not mean that the English legal system recognized the sexual autonomy of women. The law instead struck a balance between the interests of males-in possession and their predatory counterparts. If a woman broke a man's possession, his interest in her lapsed. Thus the common law procedural rules requiring prompt complaint, resistance to the utmost, corroboration, and good reputation worked a compromise between competing male interest. The law assured the male-in-possession that if another male forcibly invaded his interest, the predator would receive the maximum penalty. In the words of Susan Brownmiller,[9] "laws of rape continued to evolve, they never shook of their initial concept – that the violation was first and foremost a violation of male's right of possession based on male requirements of virginity, chastity and consent to private access as the female bargain in the marriage contract".

RAPE LAW IN LORD MACAULAY'S DRAFT

Macaulary devoted clauses 359 and 360 to the offence of rape. The first of these defined the offence and the second specified the punishment for it.

Clause 359[10] provided: "A man is said to commit rape who, except in the cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:"

Firstly, against her will; secondly, without her consent while she is insensible; thirdly with her consent when her consent has been obtained by putting her in fear of death or of hurt; fourthly with her consent, when the man knows her consent is given because she believes that he is a different man to whom she is, or believes herself to be married and fifthly with or without her consent when she is under nine years of age.

The exception provided that sexual intercourse by a man with his wife is in no case rape.

Clause 360 provided that the punishment for rape should not be more than 14 years and not less than 2 years, with or without an additional fine.

Three conclusions emerge after reading clause 359.

1. The age of consent in the fifth sub-clause was very low.
2. Only a married women could claim that her consent had been given under false impression, If she was un married, she had no right to give her consent to any person who so ever, and the fact that she gave it was sufficient to acquit the man. The message is clear; the tie

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8 *Supra* note 3.

9 *Supra* note 2 at 377.

10 *Supra* note 1 at 124.

between marriage and sexuality is unmistakable. The law protects chaste married women. Any sexual activity beyond the private sphere of marriage is not worthy of legal protection.

3. There is an unmistakable preference for the rights of husband over his wife against the wife's rights to herself. This is why the wife was not entitled to accuse her husband of rape, whatever be the circumstances. As unless a woman was married she had no right to give her consent, it can be said that Victorian morality[11] was very much in evidence in clause 359. An unmarried or widowed woman who gave her consent was obviously without character and therefore could not be raped by deception.

RAPE LAW UNDER THE INDIAN PENAL CODE, 1860

After three readings of the Act XIV of 1860, Indian Penal Code came into force. As pointed out earlier in Macaulay's draft the provisions were called 'clauses' but in the form in which the code was passed, the word used was sections. Due to re-arrangement of the provisions of the code, the chapter "On Offences Against the Human Body" was numbered XVI. The sections for rape are sec. 375, which defines rape, and sec. 376 which prescribes punishment for rape.

Section 375 reads as follows:

A man is said to commit rape who, except in the cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:

(i) against her will.
(ii) without her consent.
(iii) with her consent when her consent has been obtained by putting her in fear of death or hurt.
(iv) with her consent, when the man knows her consent is given because she believes that he is a different man to whom she is, or believes herself to be married.
(v) With or without her own consent when she is nine years of age.

Exception: Sexual intercourse by a man with his own wife, the wife not being under ten years of age, is not rape.

Section 376: "Whoever commits rape shall be punished with transportation for life or with imprisonment of either description for a term, which may extend to 10 years and shall also be liable to fine".

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[11] The most important conscious element in Victorian culture was its Evangelical religion. Evangclicalism provided a crucial influence on the definition of home and family. Women were projected as custodians of morality and spirituality.

Section 375 of the final version differed little from clause 359. The only important amendment was of the exception to this section. The select Committee did not give their reasons for making this change.[12] The punishment in sec. 376 also differs from clause 360, wherein the words "transportation for life" were provided to indicate the deterrent nature of punishment as punishment for rape.

INDIAN PENAL CODE AS AMENDED IN 1891

The amendment of 1891 brought in an important change in the age of consent and also added one explanation. In sec. 375, age of consent, was raised to 12 years and marital rape was recognised in cases of wife under the age of 12 years.

One explanation was also added in this section which made mere as *penetration as sufficient to constitute the sexual intercourse necessary to the offence of rape.*

The reason for increase in age of consent was in the backdrop of one infamous case that compelled the conscious members of Imperial Legislative Council to raise it from 10 years to 12 years. A husband named Hari Maiti raped his young wife of 10 years. The girl died and the man was tried and convicted in Calcutta, and the Bill that was introduced in the old Imperial Legislative Council by Sir Andrew Scobble was the result of it.[13]

By this age of consent Bill 1891, for the first time an explanation was given to rape which provided penetration as sufficient to constitute rape. This gives an impression that only vaginal penetration by potentially impregnating penis is a rape, which is the worse eventuality that can fall on a woman. This merely reflects a "self interest". It reveals a male pre-occupation with the risk of their respectable women getting pregnant rather than a concern for the physical and psychological trauma during and after rape that the victim suffers.

AMENDMENT OF 1925

With the amendment of 1925, the age of consent was again increased, for married women it was 13 years and above and for other women it was 14 years. The definition of punishment in sec. 376 was also enlarged which provided transportation for life or imprisonment of either description for a term which may extend to 10 years and fine *unless the women raped was his own wife and was not under 12 years of age, and in the later case he was to be punished with imprisonment of either description for a term which may extend to 2 years or with fine or with both.*

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[12] Ibid.

[13] *Legislative Assembly Debate*, 1925 at 754-755.

AMENDMENT OF 1949

The 1949, amendment increased the age of consent for a wife to 15 years and for a woman, who is not a wife to 16 years. This change was brought because of the development of science and technology. Social awareness was created which developed the opinion of law makers that the age of marriage is to be increased and consequently the age of consent should also be increased.

AMENDMENT OF 1955

After independence in 1955 the Parliament repealed the punishment of transportation from Indian Penal Code and thus from section 376, the punishment of transportation was replaced by imprisonment for life.

THE CRIMINAL LAW (AMENDMENT) ACT, 1983

The Criminal Law (Amendment) Act, 1983 replaced the heading "of rape" occurring immediately before section 375 by "Sexual offences"[14]

Section 375 inserted a new clause "fifthly", besides addition of words "or any person in whom she is interested" in clause "thirdly"

The gist of section 375 today is, that it is unlawful for a man to have sexual intercourse with his own wife when she is below the age of fifteen or with any girl below the age of sixteen, or with any other woman above sixteen without her free consent, against her will or with consent obtained under certain unlawful circumstances. In the backdrop of the above discussion it becomes

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[14] Section 375 provides: A man is said to commit 'rape' who, except in the case hereinafter excepted, has sexual intercourse with woman under circumstances falling under any of the six following descriptions:

First: Against her will.

Secondly: Without her consent.

Thirdly: With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death, or of hurt.

Fourthly: With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly: 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.

Sixth: With or without her consent, when she is under 16 years of age.

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception : sexual intercourse by a man with his own wife not being under fifteen years of age, is not rape.

imperative to understand that, what socio-moral values are transmitted into the words of the statute?

MARITAL RAPE EXCEPTION CLAUSE

The exclusion of married women raped by their husbands from the definition of rape reflects the legislature's view of a wife as being her husband's private property rather than an autonomous self-determining person. Consequently husbands are provided with a license to impose themselves on their wives whenever they choose, irrespective of their wishes. It is clear from the exception to section 375 read with section 376-A IPC,[15] that a man cannot be guilty of raping his own wife when she is above fifteen years of age, on account of the matrimonial consent she has given which she cannot retract unless the parties are judicially separated or separated under any custom or usage, or unless the court has issued an injunction forbidding the husband to interfere with his wife.

When husband causes any physical injury to his wife, he is punishable under appropriate offence and the fact that he is the husband of the victim is not an extenuating circumstance recognised by law; then there is no reason why concession should be made in the matter of offence of rape where the wife happens to be above 15 years.

It is pertinent to recall that, the English law, through judicial interpretation has abolished the doctrine of husbands immunity for marital rape,[16] The House of Lords speaking through Lord Keith of Kinkel held that, the rule that a husband cannot be criminally held liable for raping his wife if he has sexual intercourse with her without her consent no longer forms part of the Law of England.

VAGINAL PENETRATION: REFLECTION OF MALE 'SELF INTEREST'

The legal definition of rape focuses only on vaginal penetration and ignores oral and anal penetration, and relegates them to acts of indecent assault. By giving much importance to vaginal penetration, the lawmakers mainly men, see vaginal penetration by the potentially impregnating penis as the worse eventuality that can befall on a woman. This merely reflects the 'self interest'. While the penis may remain the rapist's favorite weapon, it is not in fact his

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15 Section 376-A: Intercourse by a man with his wife during separation.-Whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usages without her consent shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

16 *R.* v. *R.* (1991) All ER 481.

only tool. Sticks, bottles or even fingers are often substituted for the natural thing. By viewing the penis as the primary rape weapon, the statutory conception of rape reveals male pre-occupation with the risk of their respectable women getting pregnant rather than concern for the physical and psychological trauma during and after rape the victim suffers. Penetration is not only sufficient but necessary to constitute the sexual intercourse required for this offence.[17] This provision is in accordance with the English law, under which some penetration is essential to constitute the carnal knowledge, which is an essential element of the offence of rape. The definition of "rape" in section 375 of the Indian Penal Code being entirely on the basis of common law, the law as to the meaning of sexual intercourse and "penetration" has been no different from that in England.

Various High Courts have held that even slightest penetration is sufficient to constitute the offence of rape. In *Nth* v. *The Crown*,[18] the appellant had been found guilty of rape of a female child of six or seven years of age and sentenced under section 376 Indian Penal Code to rigorous imprisonment for seven years. The medical evidence was that the hymen of the child was not ruptured but that a partial penetration had taken place as indicated by stains of blood on both the legs from the vagina down to the ankles, and congestion of the orifice of the vagina. The appellant counsel argued that the case falls under section 354, Indian Penal Code, because the hymen was not ruptured. The Lahore High Court referred to and relied upon a Bombay High Court judgement in *Reg* v. *Feirol* and it was held that to constitute penetration it must be proved that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little. Also In re Anthony[19] case, the Madras High Court held that while there must be penetration in the technical sense, the slightest penetration would be sufficient, and completed act of sexual intercourse is not at all necessary.

The Supreme Court, in *Madan Gopal Kakkad* v. *Naval Dubey*[20] relying upon the interpretation to the explanation given by various High Court, held that even vulva penetration is sufficient for a conviction of rape.

The Delhi High Court in *Smt. Sudesh Jhaku* v. *K.C.J.*[21] held that words 'sexual intercourse' and 'penetration' means act of inserting penis into female organs of generation, Penetration of a bodily orifices or other part of body or by any other object does not fall within the meaning of words 'sexual

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17 *Supra* note 13.

18 AIR 1929 Lah. 536.

19 AIR 1960 Mad. 308.

20 (1992) 3 SCC 204. The Respondent had admitted that he without forcibly and completely penetrating his penis into the vagina of the victim, a minor of 8 years, had slightly penetrated within the labia Majora or vulva or pudenda without rupturing the hymen and thereby satisfied his lust after emission of semens.

21 1998 Cr. L.J. 2438.

intercourse' and 'penetration which means penetration is not only sufficient but necessary to constitute the offence of rape. The Supreme Court, taking cognizance of the issues raised by ''Sakshi'', a women's organization sought the Law Commission's opinion.[22] On that point Sakshi, through senior advocate Fali S. Nariman, submitted that the expression 'sexual intercourse' as contained in sec. 375 of the IPC should include all forms of penetration such as penile/vaginal penile/oral, penile/anal, finger/vaginal, finger/anal and object/vaginal penetration. A realistic interpretation of sections 375 and 376 of the Penal Code therefore is the need of the day.

CONCLUSION

After studying the rape law from Macaulay draft of I.P.C. to the present amendments in it, it is clear that the value incorporated in the rape law by Lord Macaulay is inherited till today. This Anglo-Saxon concept of rape is a legacy of the English law. With great respect to Lord Macaulay and his learned colleagues who drafted the memorable code, it must be said that they travelled unconsciously but inevitably along the track of principles to which they were accustomed in their own society where in those days women had very little rights. It reflects a patriarchal society governed by male patriarchy from the time of Adam and then by Paterfamilias of Rome, in which the father, was the domestic judge. We still bear traces of masculine priority in respect of the concept of rape. This Anglo Saxon concept of rape laid down in sec. 375 of IPC should wither away and replaced by a need to recognize sexual autonomy of women. What is meant by sexual autonomy? It is the freedom to refuse to have sex with any one for any reason. The dignity of some is to be protected by enlarging the definition of rape and including in it not only penal penetration of vagina but also penetration by bodily orifices by penis or other part of the body or by any other object and also include in its definition the concept of marital rape. Wives should no longer be treated as husband's property but autonomous self-determining persons. Even the Fifteenth Law Commission of India in its 172nd Report on Rape laws in March, 2000 has recommended changes for widening the scope of the offence in section 375 by including all forms of penetration such as penile/vaginal penile/oral, penile/anal, finger/vaginal, finger/anal and object/vaginal penetration and making it gender neutral. It is high time that the Parliament should initiate steps for amending the Rape law, which would be more in consonance with modern Human rights and feminist jurisprudence.

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[22] *Sakshi* v. *Union of India,* 1999 Cri. L.J. 5025.