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A COMPARATIVE ANALYSIS OF RAPE LAWS IN INDIAN, CANADIAN AND AMERICAN LEGAL SYSTEMS

A murderer kills the body, but a rapist kills the soul

– Justice Krishna Iyer¹

Introduction:

Rape is a form of sexual assault that involves sexual penetration carried out against a person without consent. It is committed with coercion, physical force or abuse of authority. In majority of its cases, man is the perpetrator, with most of the victims being women. Internationally, the rates of rape vary from around 0.2 per 100000 in Azerbaijan² to 92.9 in Botswana³, recorded by the police in 2008. Most people who have been raped have suffered from lifelong trauma or even post-traumatic stress disorder. The victim is seriously injured and most cases may develop pregnancy or even a sexually transmitted disease. It leaves an emotional scar and may lead to serious physical problems for the victim.

History:

The term rape originates from the Latin word, *Rapere*. Since the 14th century, it has come to mean “to seize and take away by force”⁴. In Roman law, the carrying off of a woman with or without sexual intercourse amounted to “*raptus*”⁵.

¹ Rafiq V. State of U.P. [1981 AIR 559]

² "Rape at the National Level, number of police recorded offenses". United Nations.

³ Id

⁴ "Rape". *Merriam-Webster*.

⁵ Diana C. Moses, "Livy's Lucretia and the Validity of Coerced Consent in Roman Law," in *Consent and Coercion to Sex and Marriage in Ancient and Medieval Societies* (Dunbarton Oaks, 1993), p. 50; Gillian Clark, *Women in Late Antiquity: Pagan and Christian Life-styles*(Oxford University Press, 1993), p. 36.

In ancient Greece and Rome, rape, along with arson, treason and murder was a capital offence. Those committing it were often subjected to various bloody and brutal punishments. In 14th century England, the victim was often given a choice to execute the rapist herself or a chance to sever the testicles of the perpetrator⁶. However in practice, in late Medieval Europe, cases of rapes of marriageable women, wives, widows or people from the lower classes were rarely brought forward and mostly resulted in small monetary fines or marriage between the victim and the rapist and it was believed that a husband cannot rape his wife. However, as time passed, the gravity of the offence was taken into consideration and the importance of the consent of a woman increased resulting in improvements in the legal systems of various cultures and nations.

- **Indian Legal System:**

India is a country that worships women as goddesses. Yet we have not had strict measures to protect them. Rape is a stigma that has prevailed in India for a long time. In fact, it is one of the first offences included in the Indian Penal Code, 1860. Rape is a cognizable offence and is defined in Section 375 of the Indian Penal Code, 1860. The section also prescribes the punishment of this offence. Whenever a man to any extent penetrates his penis into the mouth, vagina or anus of a woman to any extent, without the consent of the woman, he is said to have committed the offence of rape. In other words, even the slightest touch of the penis to the vagina is considered to be rape. Also, the unruptured hymen of the woman does not prove the absence of rape. The rape laws have been through many amendments since then.

A. Criminal Law (second amendment) act, 1983:

This amendment was introduced after the high criticism drawn by the judgement of *Tukaram v State of Maharashtra*⁷. In this case, the trial court pronounced a not guilty verdict on the grounds that the victim has given tacit consent to the act. Also, the fact that the girl was considered to be of promiscuous character was used as a reason for the tacit consent. The Bombay High Court pointed out that there is a huge difference between express consent and passive submission to the act. Mere surrender to an act does not amount for express consent. However, this was overturned by the Supreme Court resulting in the acquittal of the accused. This

⁶ "The Medieval Blood Sanction and the Divine Beneficence of Pain: 1100–1450", Trisha Olson, *Journal of Law and Religion*, 22 JLREL 63 (2006)

⁷ [1979 AIR 185]

judgement was highly criticised by the civil society. The amendment included S. 376A to D in the Indian Penal Code, 1860⁸ and a new section, S. 114A was introduced in the Indian Evidence Act, 1872⁹. The section presumes the absence of consent in certain prosecutions if the victim says so. This is applied to custodial rapes too.

B. Criminal Law (amendment) act, 2013 (Nirbhaya Act):

After the horrific events of the Delhi gang rape in December 2012, this amendment widened the definition of rape and made its punishment more stringent. The definition of rape was amended by not restricting it to a mere peno-vaginal intercourse but the insertion of any object into the mouth, vagina or anus of a woman as a result of the use of an iron rod that was inserted in the vagina of the victim in the Delhi gang rape case.

The act expressly recognized certain offences that were indirectly dealt in other sections of the IPC.

The amendment expressly recognised offences that were dealt in sections of the IPC in an indirect way. New offences like acid attack, sexual harassment, voyeurism, stalking have been incorporated in the IPC.

The most important part of the amendment includes:

Rape- S. 375,376 and 376A to D:

The amendment further increased the scope of the definition of rape by adding forced oral sex as well as the insertion of any object in the mouth, vagina or anus of a woman without her consent.

Further, the minimum punishment for rape was increased from 7 years to 10 years of imprisonment that might extend to life imprisonment. Also, any rape committed by a public servant such as police officers, medical officers, army man or any other public servant results to imprisonment up to at least 10 years. In addition to this, the punishment for a rape resulting in the death or perpetual vegetative state of the victim is life imprisonment or even a death penalty.

Gang Rape has been prescribed punishment of at least 20 years of imprisonment.

⁸ Yamini Criminal Law (Amendment) Act, 2013: Sexual Offences. As retrieved from:
(<https://www.lawctopus.com/academike/criminal-law-amendment/>)

⁹ Id

The amendment also defines 'consent' to mean as an unequivocal agreement to engage in a particular sexual act; implying that mere absence of resistance does not indicate to absence of rape.

C. Criminal Law (amendment) act, 2018:

This amendment is also a result of barbaric activities that have shook the conscience of the entire nation. The demand to make rape laws more stringent began due to the occurrence of various child rape cases in the country. The infamous Kathua rape case and Unnao rape case triggered this demand and gave birth to the amendment of 2018.

One of the most important parts of the amendment was that the section dealt with 3 categories of punishment of rape, apart from the rape done by public servants, unlike the prior interpretation of the earlier definition that dealt with only 2 categories. Thus for the first time, death penalty has been included as a punishment for rape considering the gravity of the offence.

Other salient features of the act include:

1. In case of rape of a girl below the age of 12 years, the culprit faces a minimum punishment of 20 years of imprisonment instead of 10 years as in the previous laws. {S. 376 (1)}
2. In case of a gang rape of a girl below the age of 12 years, the minimum punishment has been increased to life imprisonment instead of 20 years as in the previous laws. Also, the maximum punishment can go to a death penalty. {S. 376 AB}
3. In case of rape of a girl between the ages of 12 to 16 years has been increased to 20 years from 10 years and can go upto imprisonment for life. {S. 376 (3)}
4. In case of gang rape of a girl between the ages of 12 to 16 years, the minimum punishment is life imprisonment that can extend to death penalty for the convicts. {S. 376 DA}
5. If the victim is aged between 16-18 years of age, the minimum punishment is 10 years and can extend to imprisonment for life.
6. All the repeat offenders will face life imprisonment or death penalty.

7. The accused is not eligible for anticipatory bail in offences of rape of children below the age of 16 years.
8. Also the case is to be tried in a fast track court and that any appeal against a sentence by the trial court must be disposed of within 6 months.
9. Clause (i) of S. 376 (2) has been omitted.

● **Canadian Legal System:**

Rape in the Criminal Code of Canada is an offence that is not explicitly defined. It comes under the category of sexual Assault. The definition of sexual assault is left for the courts to resolve and interpret. Sexual Assault, a gender specific crime in Canada with around 37 women per 1000¹⁰ are victimized as compared to only 5 men per 1000¹¹. According to the 2014 GSS, people in the ages of 15-24 have the highest rate of these crimes with around 71 cases per 1000¹². The second most vulnerable group is the people aged 25-34 with around 32 incidents per 1000.¹³ The study further states that in 52% of the reported cases¹⁴, the perpetrator is usually someone in regular contact of the victim like a friend, neighbour or acquaintance.

A. Sexual Assault is classified into 3 categories in the Criminal Code of Canada. It is dealt in the following sections:

1. Sexual assault level 1. (S. 271):

An assault committed in circumstances of a sexual nature such that the sexual integrity of the victim is violated. Level 1 involves minor physical injuries or no injuries to the victim.

2. Sexual assault level 2. (S. 272):

Sexual assault with a weapon, threats, or causing bodily harm.

3. Aggravated sexual assault (level 3) (S. 273(1)):

¹⁰ Statistics on Sexual Assault Department of Justice, Government of Canada. As retrieved from:(
https://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr06_vic2/p3_4.html)

¹¹ Id

¹² Id

¹³ Id

¹⁴ Id

Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.

B. Punishment for sexual assault:

1. S. 271: Anyone who commits sexual assault (level 1) is guilty of an indictable offence and is liable to a punishment for not more than 10 years to a minimum punishment of 1 year of imprisonment. Further, if the victim is under the age of 16 years, the accused shall be subjected to not more than 14 years of imprisonment to a minimum of 1 year of imprisonment.

2. S. 272(2): every person who commits sexual assault (level 2) as mentioned under sub section (1) is guilty of an indictable offence and is liable for

Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for a term of not exceeding 14 years and to a minimum punishment of 5 years in case of first offence and 7 years of imprisonment in case of second offence. And in other cases of similar nature, imprisonment for a term not exceeding 14 years is prescribed.

3. S. 273 (2): every person who commits an aggravated sexual assault (sexual assault of level 3) is guilty of an indictable offence and is liable for imprisonment for life and to a minimum punishment of 5 years in case of first offence and 7 years in case of second offence, provided there has been use of a restricted firearm in the commission of the offence or if the offence is committed in the benefit of an organisation or is associated with any criminal organisation.

C. Amendments:

1. Bill C-127:

This bill is said to be *an act to amend the criminal code in relation to sexual offences and other offences against the person.*

In this act, the laws relating to rape, attempted rape and indecent assault were expunged from the criminal code and a trilogy of sexual assault offences was introduced.

Sexual assault: - S.271, level 1

Sexual assault with a weapon, threats to a third party or bodily harm: - S.272, level 2

Aggravated sexual assault: - S. 273, level 3

- **Legal system of the United States of America:**

There is no uniform legal definition of rape in the US Federal Law. With around 127,258 reported cases of rape according to the 2018 Uniform Crime Report¹⁵, the incidents of rape remain extremely high in the US. Despite such high numbers, the Department of Justice estimates that around 34.8% cases are reported to the authorities¹⁶. In around 72% of the cases the perpetrator was a known person of the victim, such as a friend, current or former partner or even a relative¹⁷. According to the FBI statistics of 2018, only 33.4% cases resulted in the arrest of the perpetrator¹⁸.

A. Rape is grouped with all forms of non-consensual sexual acts under chapter 109a of the United States Code (18 U.S.C. §§ 2241-2248). While definitions vary according to the states, it is defined by the Department of Justice as, “Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.” This definition was amended in 2012. The old definition described rape as, “the carnal knowledge of a female forcibly and against her will”. Effective from 2013, the new definition is gender neutral and considers the forceful penetration of not only the body parts of the perpetrator but other foreign objects as well.

B. Punishment for rape:

¹⁵ 2018 Crime in the United States, "Table 25", Criminal Justice Information Services Division, United States Federal Bureau of Investigation.

¹⁶ Id

¹⁷ US Bureau of Justice statistics

¹⁸ Langton, Lynn; Truman, Jennifer L. (14 September 2014). "Criminal Victimization, 2013". p. 7.

The United States Code does not explicitly define the punishment for rape. It specifies punishments under chapter 109a of the US Code (18 U.S.C. § 2244).

1. In case of Aggravated Sexual assault (§ 2241), the guilty person shall be fined and imprisoned for any term of years or life.
2. In case of sexual abuse (§ 2242), the guilty person shall be imprisoned for any term of years or life and shall be subjected to a fine.
3. In case of sexual abuse of a minor or ward (§ 2243), the person committing the crime shall be fined and imprisoned for not more than 15 years of imprisonment.
4. In case of any other circumstances (§ 2244), the guilty person shall be fined under this title and imprisoned for not more than 2 years.

Conclusion:

In toto, the paper strives to highlight a comparative analysis between the rape laws of India and that of Canada and the U.S.A. The Indian laws with respect to rape in the recent years have taken a deterrent and stringent approach aftermath of the insufferable and heinous incidents that the women of the country have been a victim of. The imposition of punishment has been strongly raised so as to keep the offenders from committing the crime. By the Criminal Law (Amendment) Act, 2013 and the Criminal Law (amendment) act, 2018 have played a trump card by itemising acts of sexual assault; be it oral or penal intercourse, rape at work places; rape by police officers, public servant or even a member of the armed forces; rape by management or on the staff of a jail, a hospital; even a relative, guardian or a teacher (fiduciary relationship). It also classifies the gravity of the punishment based on the age of the girl/woman, pregnancy, her mental or physical stability or even mental capacity to give consent. The Indian legal system has mindfully recognized, created, and protected the essential rights of women by widening the scope of rape laws and imposing stringent punishments towards the accused. Still the question of implementation or interpretation of the rape laws through efficient and fast track measures to give justice to the victims and act as a deterrent lies in hands of the Court.

In Canada, a common legal system, the rape laws are categorised into three phases that determine the gravity of the crime, consequently, the punishment varies according to the gravity. Rape as an offence as mentioned earlier has been not mentioned exclusively but categorised under sexual assault itself, making the law not specific, ambiguous and unsettled. The phases ascend the gravity of the crime, thereby increasing nothing but the imposition of punishment. Neither has been the rape law shaped efficiently nor are the circumstances such as psychological, emotional and physical damage to the victim been taken into consideration.

The rape laws in USA, similarly like the Canadian Criminal Code, have been categorised under sexual abuse itself rendering the scope too ambiguous and uncertain. Unlike the systematized classification of the rape laws in India, the U.S.A, a common and federal law system has failed to deliver efficient and scrupulous law points on an extremely heinous and unforgivable crime that mankind suffers from. Nonetheless, effective from the Amendment brought in 2013, the laws dealing with sexual assault/abuse in the U.S.A have been made gender neutral. This step implemented has seen the recognition and acclimatization of the stigma that even men can be subjected to rape and sexual abuse. It is one of the celebrated amendments brought in by the laws of the U.S.A which other countries too should adhere to. Whereas, the rape laws in India and Canada are still gender specific and there is now a pressing need for the same to be incorporated while dealing with the laws related to rape.