

CRITICAL COMMENTARY ON THE GENDER-BIAS ROUTE OF SEXUAL HARASSMENT LAWS IN INDIA: EXAMINING THE PRO-FEMALE TILT & ITS CONSEQUENCES

(With specific reference to Section 354C and 354D of the Indian Penal Code)

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Abstract— With the recent outcry and public furor on the Delhi Rape Case, the Indian Government had constituted a Committee under Justice Verma to suggest guidelines for protection of women.

This paper is an attempt to analyze and evaluate the biased nature of these laws in India towards women and the scope of their misuse. It attempts to make a strong case for more specific laws that are gender neutral and laws that protect the victims rather than making them tools for vengeance.

It is important to have laws that proactively protect women and at the same time, not leave men open to harassment. Drafting & promulgating laws is a very serious business with far reaching consequences. They should focus attention on enforcement instead of merely enacting laws that allow privileged women to exploit a situation and make no impact at the grass root level

This paper with reference to the above analyzes laws added to the Indian Penal Code of 1860 by The Criminal Law (Amendment) Act, 2013 with specific reference to the offence of stalking and voyeurism, its nature, punishment and profound implications for men in India.

Index Terms— The Criminal Law(Amendment) Act, 2013, Misuse, Gender-biased, Stalking, Voyeurism

I. INTRODUCTION

According to Dicey, Rule of Law can guarantee equality before law. He attributed the following three meanings to the said doctrine:

- a. Supremacy of law
- b. Equality before law
- c. Judge-Made constitution [1]

The second attribute i.e. Equality before law is most pertinent to the topic in question. It means subjection of all classes to the ordinary law of the land administered by ordinary

law courts. This means that no one is above the law with the sole exception of the monarch who can do no wrong. [2]

Dicey's rule of law is adopted and incorporated in the Indian Constitution.

Any theory analyzing Laws on the basis of the Rule of Law must essentially answer three questions:

- a. Why are laws made?
- b. Why is the proposed law being made?
- c. Does the proposed law cover all persons that may be victims of the act against which the law is being made?

The first question is asked to get a general understanding as to the reason for the creation of laws. Any proposed law should conform to this very reasoning. The second question seeks to lay down the purpose of creating the proposed.(This purpose should conform to the reasoning of the first question) while the third question is asked to protect ALL possible victims of the illegal act.

The above questions may be answered in layman words by saying that, laws are created to protect our natural rights, liberty and property. Laws are made to protect us from the evils and violence in the society. Laws ensure a greater good for the citizenry. The laws in question in this paper are for protection of human kind from sexual abuse or violence. These laws in their current form do not protect all the possible victims. They are protecting only a singular gender i.e women from sexual abuse and do not provide for protection of those men facing similar kind of abuse.

The above answers clearly contradict Dicey's Rule of Law. The Protection from Sexual Abuse Laws in India solely provides security and remedies for the women. This clearly indicates that the ordinary law of the land cannot administer to all classes but just a particular section thereby contradicting Dicey's equality before law.

Women in most societies of the world and virtually among all classes have experienced an inferior status, exploitation, oppression, and subjugation. Since time immemorial, India has been a patriarchal society and women have been projected as a symbol of House maker while the Husband is considered to be the sole bread earner. Post the feminist movement this outlook has changed. However, while on one hand there has been an increase of opportunity as well as empowerment of women on the other hand the rate of crimes against women has also risen. Though the government has promulgated many laws to protect them, the implementation of these laws has been weak. This has come under heavy criticism by women activists forcing the government to come up with more stringent laws.

During the last decade, there have been strong social movements particularly against sexual atrocities faced by women in India. The Judiciary too has actively responded to these demands in terms of interpreting the law to protect the weaker gender. However, the question which arises with this 'activism' is how positively it directs the judicial system toward a safer and a more sound judicial structure which gives protection to each and every person in the society and not merely a certain class. While class based reservation has been a policy to life the weaker class however, a similar gender based reservation for protection is not only draconian but against the spirit of the constitution.

The Delhi Gang Rape in December 2013 shook the entire nation and brought to light the brutality of human kind and the lack of force of law to protect such innocent victims. 'Nirbhaya' also known as India's Daughter was mercilessly gang raped by 6 men inside a moving bus and lost her life after ferociously battling death on a hospital bed. On 13th March 2014 the Delhi High Court upheld the death sentence passed by the district court against these 6 men. This incident got national as well as international publicity and condemnation. Due to wide spread outcry and public furor Government constituted a Committee under Justice Verma to suggest guidelines for protection of women on the lines of which the Parliament crested the protection laws in the form of the Criminal Law (amendment) Bill, 2013 assented by the Hon'ble President of India Shri Pranab Mukherjee.

It must however be seen that it was under great pressure by women activists and groups, the government came up with gender biased as we call it and gender sensitive laws as the activists call it. Solutions can't be created simply to reduce the pressure from activists and other power groups. Legislations should not create an opening for its misuse so much so that the purpose for which a law is made is lost. The need of the hour is to have laws that are gender neutral which cater to the male victims as well, even if they are not a weaker section. A sound legislation should also provide for a concrete procedure for the accused to prove the truth to prevent injustice towards him irrespective of his gender as can be seen increasingly in the urban societies while in the rural societies there is no knowledge about such laws. An ideal law would help bring forth the truth and protect each and every victim of the

II. VOYEURISM

The term Voyeurism comes from the French word *voyeur*, which means "one who looks". A male voyeur is commonly labeled as "Peeping Tom", a term which originates from the Lady Godiva legend. The essence of voyeurism is "observing" but may also involve the making of a secret photograph or video of the subject during an intimate activity.

In India, Voyeurism has been made a punishable offence by the Criminal Amendment Act, 2013 by the addition of Section 345C which reads:

"Any man", who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine. [3]

Going by the letter of law, this provision clearly shows how voyeurism in India has been criminalized however; it is a gender biased crime which is punishable only if committed by a male accused. There is no provision for punishing a female for indulging in the said behavior as opposed to similar laws of other countries on the same crime.

At this juncture a comparative analysis may prove useful. By examining the voyeurism laws in India as against other countries, the application of the law in a gender neutral or an equitable manner can be seen while at the same time the inadequacies or Indian law are highlighted on this front.

Law in Australia

"A person who, for the purpose of obtaining sexual arousal or sexual gratification, observes a person who is engaged in a private act without the consent of the person being observed to being observed for that purpose, and knowing that the person being observed does not consent to being observed for that purpose, is guilty of an offence." [4]

Law in Canada

"Everyone commits an offence who, surreptitiously, observes - including by mechanical or electronic means - or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity; the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or the observation or recording is done for a sexual purpose." [5]

Law in Washington D.C.

"A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films another person without that person's knowledge and consent while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy; or the intimate areas of another person without that person's knowledge and consent and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place." [6]

It can be clearly seen that the laws in Australia, Canada and the United States want to deter Voyeurism just as India does. The critical difference being, the law in these three countries includes each and every person carrying out such act to be liable for punishment under the law. All versions of this law are to protect every person in society who is a victim of an illegal act of voyeurism. This person can be either men or women as the case may be. In India, however, ONLY men are termed as voyeurs and be punished for committing the act of voyeurism. The scenario of a woman committing the act of voyeurism thereby harming another woman or man is not even envisaged. Even the Justice Verma report which is the basis on which the Criminal Amendment Bill, 2013 has been proposed used the term "whoever" to refer to the offenders. The government having accepted a substantial part of its substance from this report should have taken the parameters of the offence of voyeurism as well so as to give full effect and protection to the society as a whole. It can be understood from the report by the Justice Verma Committee that such an offence can be perpetuated by either Males or Females to give blanket jacket to female offenders is unconstitutional and practically unjust to the other sex.

Giving a plain reading to the meaning of voyeurism, it cannot be said that a woman cannot commit such an act. Therefore the need is to amend this much needed law in the Indian context to a gender neutral law to encompass EVERY person who commits the offence of voyeurism and not just

Traditionally and legally the burden of proof is on the prosecution, to prove that a crime has been committed and by the accused because of the established principle that a Person is **Innocent Until Proven Guilty**. It is the fundamental principle of procedural fairness in criminal law. It is considered fundamental because it is believed that it is better to allow an accused to go scot free than punish an innocent. The party who brings the case has the responsibility to produce before the judge all such necessary materials as evidence to prove Actus Reus and Mens Rea behind a crime. The same is incorporated in section 101 of The Indian Evidence Act [7] which in its essence says that the person that desires a Court to give judgment as to the existence of any legal right or liability depending on the existence of facts which he asserts must also prove that those facts exist. In the offences of stalking and voyeurism where it is more important for the burden of proof to lie on the prosecution, the onus of proving innocence in the new law is reversed i.e. the burden now lies on the accused. This reversal is completely in contravention of the fundamental principle of Innocent until Proven Guilty. In this context the principle will change to 'guilty until proven innocent'.

The essentials of a criminal trial are this: That the prosecution must prove the commission of a crime beyond a reasonable doubt. As a necessary corollary to this, it must be understood that the defense is only required to cast reasonable doubt on the prosecution's case in order to secure acquittal. Now, in respect of dangerous offences such as voyeurism and rape, it is understood that the burden of proof has been reversed in order to ensure a greater possibility of conviction. However, this cannot be allowed to negate the very basics of the trial itself. The standard of reasonable doubt exists for the protection of the accused. Implicit in it is the understanding that since it is the prosecution that brought the case, they must take full responsibility of proving it in such a way as to leave no reasonable doubt that the accused did in fact commit the crime which they charged him with.

The structure of the case depends entirely upon the charges that are framed by the prosecution. The accused may know that he never had any Mens Rea but it is tough for him to prove the absence of the same. Taking the example of a person being accused for stalking a woman through her Facebook profile, the accused may know he doesn't have any Mens Rea but there is no procedure, guidelines or standards with the help of which he can prove there wasn't any malicious intent. Secondly, no basic criteria has been laid to constitute a certain act as Stalking and hence, the prosecution has to merely assert that a supposed act amounts to the proposed crime and therefore nil

III. STALKING

responsibility is levied upon them to establish the accused as guilty. Now in the case of laws like voyeurism or stalking it is consent or the act of disinterest respectively which plays a decisive role in terming an accused guilty. Both these acts are related to the actions of the victim i.e. to show disinterest in case of being stalked and no consent of being viewed while carrying out an act of privacy. When these deciding factors are in the control of the victim then the onus to prove the presence of act also should be on them. Taking another example with reference to voyeurism if a woman gives consent to a man to see her carrying out a private act and later on files a frivolous complaint, there is no way for the accused to prove the presence of any consent. The fact that the woman filed a case in the first place implies that she is not accepting to giving of any consent. It is therefore very necessary for the burden to lie on the prosecution to prove the guilt and for there to be set guidelines for the accused to prove the absence of signs of disinterest or the presence of consent on the part of the woman.

With the current reversal of the burden of proof the only requirement from the side of the prosecution is to just bring the charge and the rest of the burden lies on the accused. This increases the scope of filing of frivolous complaints to harass the accused as the complainant would be aware that the entire onus will be on the latter leading to wrongful conviction. This is a violation of justice as it is a well established principle that no one can be convicted on the mere establishment of an allegation. Fundamentals are created before giving birth to any law so that there is uniformity in the making of laws.

India has been fundamentally an Agricultural Economy. Primary sector still employs more than 50 per cent of the Indian Population. Most of the population of India resides in Villages and Towns with no access to basic services let alone the knowledge of their legal rights. These, laws while aiming to protect women, also cumulatively protect the weaker section of these women that reside in rural areas. However, this purpose to protect and secure any and every woman is not fulfilled due to non-awareness and lack of means and access to the very existence of these legal rights. Without the knowledge of the fact that a crime such as Voyeurism or Stalking even exists how are these women proposed to be protected? Next, the Urban Population who has knowledge about such laws have the maximum scope to misuse the same to get professional benefits, monetary gains or merely to disregard the credibility of a certain male. This provision for the mere purpose of blackmailing and deriving non-merituous benefits can be increased on such a wide scale that if gone unchecked the same can be draconian. Henceforth, the main purpose to protect the supposed 'weaker section' is destroyed and on the contrary cases of frivolous and false convictions will indefinitely increase. These fundamentals have been followed since the time they came into being and to now create provisions which negate them will defeat the entire purpose of their existence.

'Adam-teasing' may sound like a joke to many, but it is serious business for a men's rights organization in light of the Gender-Biased Laws proposed by The Criminal Amendment Act, 2012. Article 14 has been considered the Soul of Indian Constitution which threads and weaves the other Articles into a wreath of oneness. However, when the legislature itself makes laws which are not in harmony with this Fundamental Right guaranteed to every single citizen of India under the garb of women empowerment, safety of woman and reasonable classification on the basis of some poorly performed statistical analysis, it is not only in violation of the law of the land but grossly unjust to an entire section or rather the whole of male population.

Stalking — physical or electronic via phone calls, text messages or emails — is now a criminal offence, punishable with one to three years in jail.

The provision is part of the law that came into force after President Pranab Mukherjee on February 3, 2013 signed an ordinance, which widened the scope and ambit of the laws dealing with sexual violence against women.

The ordinance included a number of recommendations of the Justice JS Verma panel, set up in the aftermath of the Delhi gang rape to suggest changes in the law for quicker trial and harsher punishment for offences against women. The panel said "offences such as stalking, voyeurism and eve-teasing are perceived as minor offences, but if not checked, these lead to a growing culture towards serious offences like rape".

Stalking no longer means just causing distress to someone by following the person or forcibly interacting with them. It now also includes unwanted telephone calls, sending derogatory SMSs or emails that "disturb the peace of mind of any individual". Those guilty of these offences will also have to pay hefty fines, and undergo imprisonment. The crime of stalking has been implemented in Section 354D of the said act and reads,

(1) Any man who—

1. follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or
2. monitors the use by a woman of the internet, email or any other form of electronic communication, commits the offence of stalking;

Provided that such conduct shall not amount to stalking if the man who pursued it proves that—

1. it was pursued for the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or
2. it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or

3. *in the particular circumstances such conduct was reasonable and justified.*

(2) Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.” [8]

The offence is no longer gender-neutral, only a man can commit the offence on a woman. The definition has been reworded and broken down into clauses, The exclusion clause and the following sentence has been removed "or watches or spies on a person in a manner that results in a fear of violence or serious alarm or distress in the mind of such person, or interferes with the mental peace of such person, commits the offence of stalking". Punishment for the offence has been changed; A man committing the offence of stalking would be liable for imprisonment up to three years for the first offence, and shall also be liable to fine and for any subsequent conviction would be liable for imprisonment up to five years and with fine. The said provision when read clause by clause clearly defies gender-neutrality and the scope of section 14 of the Indian constitution. According to the provision only a Male Accused can commit the said crime while a woman doing the same is NO CRIME. This is a clear case of discrimination and a definite bias against males. The impugned law by letter protects only women from being stalked by men. By implication, women may stalk men with impunity. The prohibited action is defined thus: "To follow a woman and contact, or attempt to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or monitor the use by a woman of the internet, email or any other form of electronic communication. It is of interest that over 60 countries has laws against stalking including Washington, Canada, Australia, Germany and Singapore have specific gender neutral laws which provides for stalking as a crime having the possibility of being committed by a male or a female.

This Draft Clause required a woman to prima facie establish some impact on her due to the stalking. Being on any form of social media primarily opens you up to the world. This means that, any content that you put up over the internet can be seen by all and vice versa. The present bill if followed will lead to each and every person looking at a woman, activities on a social networking site or her blogs, posts etc. being termed as a stalker and punished solely on the basis of a complaint. Networking sites like Facebook, Twitter, LinkedIn etc allow you to put content of your choice up on their sites. It is implied that such content that is put up by any person is open to the world to see. In such a case literally going by the present law even though the woman has with her own choice made content available to the world, can easily pin point anyone seeing her

content made public and term the latter as a stalker. Therefore it should be made mandatory to see whether the women is being personally affected or whether an apprehension is created in her mind that the action of the accused is such that it can cause a degree of harm or fear of violence in her. Looking into the apprehension of harm or injury or actual causing thereof is a pre-requisite for instituting a criminal proceeding This will help to establish a legal ground to file a complaint and protect misuse of the law or frivolous complaints from being filed. It does not require too much thinking to imagine the abuse and sheer misuse of this particular portion in the provision on stalking.

It is a matter of serious concern how the requirements in the original provision proposed with respect to fear or injury to a women were completely done away with in the Bill that has been passed by the Lok Sabha. These new provisions require the attention of activists and citizens of this country.

Also looking into the procedural and implementation aspect of this provision there is major ambiguity in terms of it being worded. It can clearly be seen that for a women to attract a charge of stalking it is important for the act of the stalker to cause fear of violence or serious distress in the mind of such women. Clause 3 being omitted from the bill, no standard or guidelines exists on the basis of which the complaint can be filed.

As per the rule of law, the burden of proof to prove the accused guilt is usually on the prosecution. However, the said provision merely establishes the fact that a mere complaint by a supposed woman will be enough to convict a person guilty of the supposed crime. The amount of misuse of this law in the present context in case of urban areas cannot be quantified. There is no specific procedure established by law for the female petitioner to provide for evidence for establishing the said crime due to the ambiguity in words as stated above. The subjective nature of the terms stated above raises questions as to will the decision be taken on a case basis depending on the quantum of fear the female in question cans sustain? Such an implication seems absurd. Lastly I would like to question as to what do we call a law under which only a man can be charged for a crime that both men and women are perfectly capable of? What do you call a law that assumes a man guilty before the allegation against him is proved? What do you call a law under which a case can be filed by any woman without any evidence, the charge would be non-bailable, and burden of proof will be on the accused? The answer remains 'arbitrary', 'unfair', 'gender-biased' or simply in violation of Article 14 of the constitution. It goes against the basic structure of the constitution when the very fundamental right of Equality is denied to one-half of the population by the legislature on the basis of their gender.

In the wake of Nirbhaya Tragedy while the Indian Legislatures want to empower women, women protection and women safety, gender biased laws seems to be a draconian step in a Twenty First Century Developing Nation aiming to be a super-power. While efforts to protect women should be

enhanced and more advanced in terms of frequent police-patrolling, stringent convictions, greater safety precautions and regulations and easy-to-reach helpline services and women-centric shelters, laws which do not even allow a female to be considered as a probable suspect for commission of a crime seems a little outdated and probably incumbent. In a country like India where the Indian judiciary is at its peak in terms of judicial activism the legislature showing such a narrow mentality, bowing down to pressure from women's groups and a so-called feminist movement only shows its weakness.

IV. CONCLUSION

The constitution of our country is the prime and fundamental law of the land. As under article 14 the government has a mandate to make laws equally applicable to all persons with no distinction on the basis of caste, creed, religion, age or sex. This concept initially found sanction in the Second Doctrine of Dicey's conception of Rule of law, namely equality before law. Considering the current circumstances in India, the need to give effect to this doctrine has become more pressing and more urgent. The essence of any law created is that it should lead to justice. Laws are made to confer rights or impose liabilities. You have to look at the rights liabilities and not the person. When a law is framed in such a way that it is applicable only to a certain class of persons and not available to another class whereby there is scope for injustice it becomes necessary to rectify the same.

With reference to the two amendments in question, the point above becomes clear. Voyeurism and stalking which are sections 345C and 354D in the Criminal Amendment Bill respectively, start with the words "Any Men". Throwing light on these 2 words a question needs to be asked 'why men'?

Laws are not debates where we look into the category of persons or sex or is a victim in most of the cases. Laws are given a mandate of being applicable to every person equally in a particular society without any injustice being caused to others. These two laws specifically portray and convict only men as stalkers or voyeurs. Giving the law a plain reading, it can be understood that women can carry out such acts with impunity. The law also suggests that only men are capable of committing such wrongs. These laws apart from being anti-male also assume that men can never be victims of such crime hence such acts against men are not even defined. Stalking a man would never implicate a woman as such an act by a woman is not constituted as an offence. If an act is not declared as a wrong, how can one seek a remedy against the same? This is a question which Indian Legislature needs to analyze, answer and keep in mind while making laws for protection of rights.

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