

SEXUAL ASSAULT LAW REFORMS



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PART-1

NAINA KAPUR
SAKSHI

JASJIT PUREWAL
IFSHA

KIRTI SINGH
AIDWA

Part I

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A. THE HISTORY OF CHANGE OF LAWS RELATING TO RAPE AND SEXUAL ASSAULT

The attempt to change of laws relating to sexual assault began in the late 70s after the pronouncement by the Supreme Court in the Mathura rape case and the media coverage of several other cases of rape, mainly in police custody. Mathura's case was particularly shocking, though not unusual, where the Supreme Court of India in 1979, refused to believe that a poor village girl had been raped in the police station just because she did not have visible signs of injury and had not screamed and shouted. It was also significant that the Supreme Court chose to discredit Mathura's testimony because she had a relationship in the past with a boyfriend. Instead of focusing on the anguish of a helpless teenager brutally raped inside a police station, a situation where the police wielded absolute power over a poor female, the Court heaped further abuse on the girl by calling her 'lascivious'.

The extensive abuse of power by the police and persons in positions of authority made this a critical case to seek a change in law. The courts were clearly manned by judges with a traditional, patriarchal mindset and it was time that the Women's Movement demanded extensive changes in the law. The Law Commission of India in its report in 1980 on Rape and Sexual Assault had also suggested radical changes in the law. Demands of the Women's Movement included the following;

(a) Custodial rape or rape by persons manning custodial institutions and rape in certain other circumstances in which the complainant is particularly vulnerable should be considered an aggravated form of rape and a higher punishment should be awarded for this apart from punitive fines. A further demand in this category of rape, was that if sexual assault is proved and the complainant says that she did not consent, then the court would presume that the complainant did not consent. The Law Commission had also recommended these changes. Within the women's movement some felt that this presumption must exist for all cases of rape while others felt that it could be confined to cases of custodial rape and rape of a minor, of a pregnant woman, and in cases of gang rape. Some groups also wanted to broaden the category of aggravated / custodial rape to include within it, rape by men in positions of social and economic authority over the complainant. This would include caste rape, and revenge rape by employers, landlords etc.

(b) It was demanded that Section 155(4) of the Indian Evidence Act, which allowed evidence relating to the character and past sexual history of the complainant to be produced in court, be deleted. This evidence always fed into a prejudicial mind set in court where in effect, a woman's sexual past became the basis to judge her 'character' and became reason enough to doubt her evidence.

(c) The organisations also demanded that marital rape be included within the definition of rape.

(d) Changes in the law of procedure, recommended by the Law Commission in its 84th Report, were endorsed and included in the movement's demands for change. These changes in the Code of Criminal Procedure and the Indian Evidence Act were

primarily aimed at making the investigation procedures more sensitive to women and girls and facilitated the recording of the complainant's evidence in a sympathetic, non-hostile environment.

(e) The Law Commission and women's organisations also strongly urged that police personnel who did not record the complaint or investigate properly deserved punitive action.

While some of these suggestions were accepted by the government, other demands, such as deletion of Section 155(4) of the Indian Evidence Act, inclusion of marital rape within the offence of rape, changes in procedure and making police personnel accountable, were not accepted. The concept of custodial rape was introduced in the law and higher minimum and maximum punishments (ten years to life) were stipulated. The Indian Evidence Act was also amended to shift the burden of proof to the accused in cases of custodial rape after sexual intercourse had been proved. The law was changed to stipulate that all rape trials would be held in camera.

Subsequent years highlighted how even these limited changes did not produce the desired results. In spite of the fact that minimum and maximum punishment were prescribed by the law, sentences awarding less than the mandatory minimum continued to be the norm. Even after the amendments, rapists continued to be punished with three, four, and five year sentences.

Most importantly we realized how inadequate the law was to address the issue of sexual assault. The definition of rape did not even include within it, rape by insertion of objects into the vagina and anus, oral sexual intercourse and forced anal intercourse. Child sexual assault, which often did not include penetration by the penis into the vagina but included fingering, oral sex etc. was not considered rape by the law. Case law was indubitably bound in translating 'penetration' as penile. All other violations did not get included into the definition of rape, and children were the most poignant victims of this exclusion. The procedures were also wholly inadequate to deal with the interrogation of children and women.

In these circumstances, the National Commission For Women organized a seminar in October 1992 on child rape pursuant to which the NCW set up a sub-committee to make recommendations on the law relating to child sexual assault. The sub-committee submitted its report in August 1993. While addressing that within the existing legal, social and political context, justice for rape victims seemed impossible, the sub-committee attempted to redraft the law relating to sexual assault in the Indian Penal Code. The committee realized that the entire law relating to sexual assault would have to be redrafted if child sexual assault had to be included as an empirical reality. The very definition of rape and molestation in the Indian Penal Code was defective and limited and needed to be changed for children as well as adults. The definition was archaic, since it saw molestation as sexual assault with the intention to "outrage the modesty of a woman". The sub-committee made the following critical recommendations;

(a) The committee redefined and expanded the definition of rape and included within it the gravest form of sexual assault, penetration into any orifice by the penis and penetration by an object or a part of the body into the vagina or anus.

(b) A lesser form of sexual assault was defined by the committee to include touching etc. for a sexual purpose. This section sought to replace the existing section relating to molestation (section 354) in the Indian Penal Code.

(c) The committee also redefined exhibitionism and "eve teasing" to include gestures, words and sounds with a sexual purpose.

(d) Making a child perform various sexual acts was included within the definition of sexual assault.

(e) The category of custodial rape was broadened to include other forms of aggravated sexual assault. Under this protracted sexual assault, which usually involved the minor being sexually assaulted over a period of time, was included. Similarly a category of sexual assault on a pregnant woman or on a female suffering from mental or physical disability was included. It was also suggested that sexual assault by a person in a position of trust, authority, guardianship or of economic or social dominance should be viewed as aggravated assault. Similarly, sexual assault during which grievous bodily harm, maiming etc. occurs or sexual assault which endangers the life of the victim was included therein. Punishment was a critical area, which needed to be addressed in consonance with the nature/gravity of the assault, and the age of the victim. The sub-committee therefore made requisite recommendations on punishment.

(f) The committee included marital rape/sexual assault in the definition of sexual assault by not excluding it in the present section of rape in the IPC.

(g) The sub-committee also reiterated the demand for deletion of section 155(4) of the Indian Evidence Act which allows evidence regarding the character and past sexual history of the complainant during the trial.

(h) Recommended procedural amendments included:

i. Interrogating the complainant only at a place of her choice and in the presence of her friend or family or whoever she felt comfortable with/or wanted with her.

ii. The interrogation be carried out only by a female police officer or by another woman social worker.

iii. Standardisation of the medical examination of the complainant and the accused. The committee gave the details of the nature of the facts that should be included in the medical examination.

iv. The committee suggested that any available doctor should be allowed to carry out the medical examination with the complainant's consent. In fact the committee made it mandatory for the doctor to examine the complainant if asked to do so.

v. It was recommended that if a police officer refused to register the complaint or investigate properly he should be punished.

(i) Finally the committee suggested that the procedure for recording evidence of a complainant in a case of sexual assault should be changed to make the court environment less hostile to both women and children so as to create an empathetic atmosphere in which they can give evidence without fear. It was recommended that the complainant be allowed to have a trusted person with her during in camera

proceedings. The committee also recommended that especially in the case of children, the complainant should not be forced to give her evidence in the presence of the accused.

(j) The committee redefined consent to mean the unequivocal voluntary agreement of the woman to engage in the sexual activity in question.

B. REDEFINING RAPE: A CASE IN POINT

In the history of legal reform, the fountainhead of change has often been one pivotal case, which has either through its human tragedy, or the absurdity of legalese and sometimes-innovative judicial interpretation, changed the course of law. Renu's¹ case may indeed prove to be one such case.

Child sexual abuse (CSA) continues to be a crime where social and judicial naiveté, excludes scores of Indian children from accessing justice and protection. Largely because the extent, the impact and the nature of the crime, elude social acceptance and understanding. Somewhere as an Asian milieu we are loathe to accept that many of the children we love, know and protect are vulnerable and victimized routinely by adults whom we may also trust. But even as we struggle with our own credulity, children's experience of child sexual abuse continues to be pervasive and ignored. The judicial process and legal framework being the least equipped to address it.

¹ For the sake of this document, the name of the original complainant in the cases described has been changed to protect the innocent

In 1994 "X", an undersecretary in the Home Ministry, was charged with sexually abusing his youngest daughter Renu. She was eight years old at that time. The abuse which started when she was about five has many bizarre elements to it including the presence of four accomplices, all colleagues of X in the Home Ministry, who spent afternoons in a hotel indulging in various sexual acts whilst X abused Renu. X began the abuse at his home, at night when his wife and other two daughters were asleep and used threats, violence and fear to keep Renu from telling anyone. He then took her to the office during working hours, where he continued the abuse in the lunch hour whilst his colleagues indulged in a sexual orgy with each other in a nearby hotel.

These facts were revealed by Renu to her elder sister in June 1994 while they were visiting their aunt in Ranikhet and the father was not present. S, Renu's mother immediately returned home and filed a complaint in the Crime's Against Women's Cell in Nanakpura. X disappeared and the investigations were discontinued due to his non-appearance. S informed the Home Ministry asking for a CBI enquiry, through various letters, which were ignored by the Ministry. In April 1995 S returned to the CAWC under a new DCP and with the help of an NGO, 'Sakshi', the case was pursued.

Once charge-sheeted, the Session Judge found X liable to be charged with Sections 354/377/506 ("outraging the modesty of a woman" and "carnal intercourse against the order of nature) and the other four defendants, two of whom were women employees

of the Home Ministry, charged with Sections 109 (aiding and abetting) read with Section 354 and 377.

RENU'S EXPERIENCE OF CSA

Both at home and in the hotel, X inserted his finger into Renu's vagina and anus repeatedly. Alongside this he forced her to perform oral intercourse on him. Physical effects of the abuse were found in Renu's vagina where the medical examination of the eight-year-old revealed, "introits lax" or a loosening of the vaginal muscles. Emotionally she was withdrawn, stayed largely by herself and did not interact with other children, hardly spoke and never smiled or showed signs of childish play or happiness. Psychologically, apart from being withdrawn, she displayed an obsessive desire to bathe which she did for hours after returning from the office as well as in the mornings. She also brushed her teeth repeatedly.

Sakshi counselors found Renu to be a slight, diffident child who was much smaller physically than her biological age. She did not engage in any conversation and displayed fear and mistrust towards all adults. It was only after many sessions with the counselor drawing and painting (her favourite self-expression) that she slowly began to open up and talk about herself. Her details about the abuse were drawn graphically and she preferred to write rather than articulate the events through speech. She was very scared of her father and repeatedly begged the counselor to never tell him or let her face him again. She showed visible signs of fear around men and did not like any physical contact with women either. After six months of therapy

her mother and Nana visited Sakshi and both broke down as they told the counselor that her teachers had noticed a big change in Renu because she had started to play with other children and was beginning to sing. Renu learnt to sing after eight years of living. Not because she suddenly discovered music but because the protracted trauma of her life suddenly came to an end- she was suddenly allowed to speak and cry for help. Renu learnt to sing not because she would forget what her father did, but because someone assured her that her father had wronged her, her pain and fear were real and she had a right to trust adults who could protect rather than violate her.

THE LAW

Renu's trauma found scant understanding in the law. Legally Renu was not raped because her vagina was never penetrated by her father's penis. All other violations of her various orifices, which were as or more painful, and equally or more humiliating, did not deserve to be understood as rape of her body. Instead the learned Additional Sessions Judge ruled that "Both the acts, i.e. insertion of finger in the anus and the vagina and putting the male organ into the mouth of the prosecutrix are acts which are against the order of nature. In order to constitute an offense of rape, there has to be the use of the male organ, which must find place in the vagina of the prosecutrix. The word, penetration does not connote penetration by a foreign object." Hence section 377.

For the judge or perhaps in the eyes of law, the object of penetration takes precedence to the physical trauma/damage to the complainant as well as the nature

of the relationship between the abuser and the abused. The age of a minor also manages to underscore legal myopia of the fact that a penis inside a very young child may in effect lead to death. Section 377 in effect suggests that what we are ruling against is the nature of the sexual act, not the morality and violation of a father and daughter relationship, not the crime of sexual violation of a minor, but how a sexual act must be performed for it to constitute 'sex'. Meanwhile Section 354 which refers to "outraging the modesty of a woman" has been added, not perhaps because the judge cannot see the absurdity of such a section in the case of Renu but because he knows that 377 is not enough. Adding this section in effect magnifies the legal confusion over what he understands as child sexual abuse.

Any man or woman who knows the details of this case can experience the horror and pain of Renu's sexual violation. The law on the other hand can only experience its own confusion. It is too busy unraveling which kind of sexual act is 'normal' as opposed to 'unnatural'. The trauma of the child and the question of whether there can be ANY judicial remedy to equate the impact of this experience on Renu's life are beyond the ambit of the court.

This in face of the fact that Section 376 (2) f) IPC was introduced to cover child sexual abuse. But trapped in the limited definition of what constitutes a 'sexual act' and therefore a 'sexual violation', case law limited the use of the word penetration to mean contact between the penis and vagina. Section 377 IPC was in fact a dated law, framed to control homosexuality. Statistically research shows that in nearly 70

percent of child sexual abuse cases the penis is not used for penetration because either the damage will kill the child and /or reveal the identity of the abuser. For all these children the law offers us two choices-: a section against homosexuality or a crime which is labeled “outraging the modesty of a woman” with a maximum sentence of two years. We need to explain to our children when they undergo sexually violent, violative, humiliating and traumatic experiences it is only their ‘modesty’ which is being damaged, not their body or sexual integrity. That at best we can understand what happens to them to be like consensual sex between two men.

JUDICIAL PROCEDURE

Five years have passed since the law came into Renu’s life as her guardian. X and the four others roam free on bail, causing unimaginable fear and insecurity in the hearts of mother and children. Renu, despite many assurances to the contrary by her counselors and police personnel, has had to repeat her story over and over again before many strangers; men in uniform, the CBI, magistrates and finally the Court. The child has relived the horror and shame repeatedly. She was subjected to a nine-day evidentiary process (recorded in ninety-five pages) where seven lawyers for the five accused grilled the child for long hours. She was forced to face the father who carried memories of acute fear and pain and after a long procedural struggle through the High Court, a screen was allowed to protect the child from facing the offenders directly. Her support counselor was objected to by the defense lawyers and a special court order had to be procured to allow a support person to help the child feel

emotionally settled. After 96 pages of recorded evidence in 1997, the defense is now raising a demand to re-examine Renu.

Basically the judicial process amplified the lack of space that a child has within our world of rights. Child sensitive procedures have never been addressed and find no room in judicial guidelines. Justice is a world of adults, largely men, in a courtroom where an abused child must give sexual details of an experience for which she often has neither the words nor the nerve for articulation. All rights are articulated from the context of the accused even when their victim is a child and in this case a daughter. And any or all interventions to make the atmosphere child sensitive are met with mistrust and legal dogma.

ATTEMPTED RECOURSE

The complainant's mother filed a criminal revision before the Delhi High Court and on 23.5.95 the Hon'ble High Court rejected the same as a case of rape, a view upheld by the Supreme Court of India on 2/12/96. At the same time, the Supreme Court in *Sakshi vs. the U.O.I* has been asked to consider the legal implications of such a narrow interpretation of rape on the equality rights of children who have undergone the experience of child sexual abuse in contexts similar to that of Renu.

C. FROM THE SUPREME COURT TO THE LAW COMMISSION OF INDIA

The Supreme Court pre-determined the outcome of Renu's case: repeated finger/anal, finger/vagina and penile/oral penetration of a daughter by her father cannot be viewed as rape. At trial, the only charges which remained against the

accused were that of committing an unnatural offense (s.377) and “criminal force with intent to outrage a woman’s modesty” (s.354). Clearly an impact-based approach to sexual abuse was wholly absent.

The court’s perception contradicted women and children’s fundamental rights of equality (article 14) and life with dignity (article 21) under the Constitution of India so Sakshi opted to file a writ petition in the Supreme Court of India. Renu’s case became illustrative of what was problematic with the law on rape, especially where it was used to negate the experiential reality of children and sexual abuse.

A technical approach to rape led to scientific outcomes with little or no consideration given to the sexual reality of women and children in abusive situations. With the rising incidence of child sexual abuse and in the absence of any legal amendments, Sakshi called for judicial interpretation of rape. For the purposes of the writ, subject to amendments in the law, an interpretation was needed to address sexual abuse in terms that captured some part of that reality. In that context, Sakshi’s writ asked the court to interpret the existing section on rape (s.375IPC) by:

- “..... declaring... that “sexual intercourse” as contained in section 375 of the Indian Penal Code shall include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vaginal and finger/anal penetration and object/vaginal penetration;”
- directing law enforcement agencies “to register all such cases found to befalling within the broadened interpretation of “sexual intercourse” as offenses under sections 375...” etc. of the Indian Penal Code, 1860 (that is, as rape).

The writ was filed in January 1997. After two to three hearings before the Supreme Court, Sakshi filed three precise issues for consideration. The first two focused on judicial interpretation of sections 375/377/354 IPC while the third addressed the need

for law reform. Based on the issues presented, the Supreme Court directed the Law Commission of India (LCI) to consider whether the rape section could be interpreted to plug existing loopholes or otherwise to suggest an amendment to the law.

The LCI opted for the latter task. At this point Sakshi, along with IFSHA and AIDWA participated in two significant discussions on amendments to the law of rape (on 7.09.00 and 17.09.00 respectively). Prior to the meeting, the LCI forwarded their own proposed draft which was then compared with an initial draft prepared by Sakshi/IFSHA/AIDWA as representative organisations (R.O.'s). The R.O. draft was based on an earlier draft of the NCW sub-committee on Child Rape (1993) and the Law Commission proved to be open and receptive to several of these suggestions. Most significant was the LCI's own conceptual shift from "rape" to "sexual assault" in any proposed amendment, a view consistent with the larger trend in sexual assault laws around the world. Unfortunately some outstanding areas were left to be considered in the subsequent draft proposed by the LCI which were responded to. While some of these were incorporated into a final draft forwarded to the Ministry of Law, Company Affairs and Justice on 25.3.00, a full copy of the R.O. responses was not attached to the final submission.

Below is a summary of areas of key areas of agreement between the LCI and R.O.'s and those areas which persist as outstanding issues in the LCI proposal. As the final draft has already been forwarded to government, comments/suggestions/ideas are invited on those areas which require further clarification to be submitted to the government.

I. Key areas of Agreement:

a. Changes in the Indian Penal Code

1. Changing the language of sexual offenses from rape to sexual assault so as to cover various forms of sexual assault beyond penile/vaginal penetration.

2. Punishment of sexual abuse of young persons in a position of dependency to others.
3. Criminalising sexual harassment
4. Deletion of section 377 IPC (Unnatural Offenses)

b. Changes in Criminal Procedure Code:

1. Sensitive procedures for recording of statement of female sexual assault complainants
2. Presence of relative/friend or social worker of complainants choice to be allowed for recording of statement of male under 16 or of a woman complainant
3. Specific procedure for medical examination of a complainant and of an accused

c. Changes in the Evidence Act:

1. Character Evidence of a woman's removed (deletion of 155(4))
2. Cross-Examination on a complainant's previous sexual history, character or conduct, not permissible

II. Key Areas of Disagreement:

1. *PROCEDURE/TREATMENT OF CHILD SEXUAL ABUSE CASES:*

R.O. Recommendation:

- a. To ensure children are not subjected to the trauma of adult yardsticks in the process of a criminal trial for child sexual abuse, the R.O.'s suggested amendments in the existing law ought to consider the following:

- Ensure an appropriate and safe environment in which a child can depose.

- Record a child's statement (in the presence of a child support person) at the earliest possible time. For this purpose, permitting use of a videotaped interview of the child's statement.
- Allow a child to testify via closed circuit television or from behind a screen to obtain a full and candid account of the acts complained of
- The cross-examination of a minor should only be carried out by the judge based on written questions submitted by the defense upon perusal of the testimony of the minor with sufficient breaks should be given as and when required by the child."
- Establishing special courts to address sexual assault with specially trained personnel

Law Commission Response: The said suggestions were viewed largely as "impractical" by the Law Commission in its present report. However, in response to the first suggestion, the Law Commission has, suggested the following proviso to the section 273 of the Criminal Procedure Code:

"Provided that where the evidence of a person below sixteen years who is alleged to have been subjected to sexual assault or any other sexual offense, is to be recorded, the court may, take appropriate measures to ensure that such person is not confronted by the accused while at the same time ensuring the rights of cross-examination of the accused."

The proposed amendment is based on considerations of "an accused's rights to natural justice" according to the Law Commission but fails to take into account the larger substantive equality rights of a child which are subject to harm, prejudice and disadvantage under the existing process of criminal trials for child sexual abuse. It projects the rights of an accused as paramount and fails to give any consideration to the social context of children who face child sexual abuse which is now well-documented in India and the rest of the world. At the same time, the said proposal

fails to address existing rules and procedures which are harmful to the interests of a child witnesses in such cases.

b. R.O. recommendations: On presumptions of age (which often work against young persons who are sexually abused) bail (especially in cases of family sexual abuse, time bound hearings (given the tender age of children involved), the presence of support persons, punishment and aggravated sexual assault have not been addressed by the existing report.

L.C. Response: These have been largely viewed as “impractical” or to be left to judicial discretion.

2. PUNISHMENT

a. R.O. Recommendation: It was suggested that the proviso to sections 376(1) and (2) which confer discretion on the court to award a sentence less than the minimum punishment should be amended, so that the Court in exercising discretion to lower a punishment, should not reduce the same to less than a minimum of 5 years or 7 years respectively. The R.O.’s were especially concerned by the low sentencing outcomes in trials affecting sexually abused children.

L.C. Response: “Though the representatives of Sakshi and other women’s organisations have suggested that we should delete the second proviso to section 376(1) and the proviso to section 376 (2) (which confer a discretion upon the court to

award a sentence less than the minimum punishment prescribed by the sub-sections), we are not satisfied that there are any good reasons for doing so. Any number of situations may arise, which it is not possible to foresee and which may necessitate the awarding of lesser punishment.... Nor is there justification in the criticism that such discretion once conferred is liable to be abused or that it will always be misused to help the accused.”

b.

R.O. Recommendation: The expansion of aggravated sexual assault was recommended so as to include additional special categories (Pregnant Women/ Persons with Disabilities/ where grievous bodily harm is caused of sexual violation stated to be as under:

i. “sexual assault on a woman who is pregnant” irrespective of knowledge

L. C. Response: The L.C. has retained the existing provision as “sexual assault on a woman **knowing** her to be pregnant”

Comment: No explanation has been given as to why the element of “knowledge” has been retained especially given that human rights offenses are now universally viewed in terms of the impact of an offense rather than in terms of the intent of a perpetrator. The proposed changes by the L.C. retains emphasis on the intention of an abuser

over and above the impact on a pregnant complainant which is the same irrespective of the intent.

ii. "sexual assault on a person who suffers from a mental or physical disability"

L.C. Response:

iii. The Law Commission has not dealt with this proposal. At most it has stated, "while committing sexual assault causes grievous bodily harm, maims, disfigures or endangers the life of the woman or minor."

3. CONSENT

R.O. Recommendation: For the purposes of sexual assault, it was proposed that "consent" be defined in the statute as "unequivocal voluntary agreement" by a person to engage in the sexual activity in question.

L.C. Response: "We are however of the opinion that no such definition is called for at this stage, for the reason that the said expression has already been interpreted and pronounced upon by the courts in India in a good number of cases"

4. DELETION OF S.354/509 IPC

R.O. Recommendation: With the expanded definition of sexual assault, outdated Sections 354 ("criminal force with intent to outrage the modesty of a woman") and 509 IPC (insulting the modesty of a woman") ought to be deleted.

Law Commission Response: has retained both sections without giving any reasons.

5. Marital Rape

R.O Recommendation: In view of increasingly visible rights of women, in terms of equality security of person, life with dignity, freedom from cruel and inhuman treatment and discrimination as is provided for under the Constitution of India and several International laws and instruments, it was recommended that married men should no longer be entitled to claim exemption from sexual abuse of a spouse on the basis of marriage.

L.C Response: “We are not satisfied that this Exception should be recommended to be deleted since that may amount to excessive interference with the marital relationship.”