2018 Criminal Law Ordinance: A Makeshift Legislation?

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Abstract

The Criminal Amendment Ordinance, 2018 came at a time when the country was mourning and expressing anger over the rape of minors in Kathua and Unnao. This ordinance has been put forth by the Centre at a time wherein more attention can be garnered towards the approach of the government to provide redressal to the victims and retain its position in the upcoming 2019 elections. This ordinance seems to be a closure for the rape victims but the reality is far from what it seems like. The 2018 ordinance as alleged in the PIL filed at the Delhi High Court doesn't address the questions which were left ambiguous in the 2013 amendment. The ordinance still doesn't seem to address the issue of rape being gender – neutral. The amendments if made would further create a classification of rape on the basis of its severity and create a lacuna in the law which would be used against the administration of justice. This paper aims to analyze the amendments in the ordinance and the non-effectiveness and laxityof the government to come up with an ordinance without conducting a thorough research and completely ignoring the suggestions of the Justice Verma Commission.

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Introduction

The Criminal Law (Amendment) Ordinance,2018 came to force on the 21st of April, 2018 which seems to be a timely response to the violence which happened to the minors in Unnao and Kathua. This new piece of legislation is not more but a band-aid legislation which seems to be garnering more attention towards the approach of the government to show that justice is being done.

The Criminal Law (Amendment) Ordinance, 2018 seeks to amend the Indian Penal Code, 1860 (hereafter referred to as IPC), Indian Evidence Act, 1872, Code of Criminal Procedure (hereafter referred to as the CrPC) and the Protection of Children from Sexual Offences Act (hereafter referred to as the POCSO).

The new amendment has addressed the issue relating to increase in the number of years of punishment for the rape of a minor and the procedural aspects related to the timely trials of the rape of a minor.

However, the said amendment bill, again, as the previous bills,has deliberately ignored the more pressing issues which have persisted since the inception of the rape laws in India. The effectiveness of the death penalty to act as a deterrent has also not been analyzed properly in the proposed amendment.

Research Methodology

The paper aims to criticize the proposed Criminal Law Amendment Bill. For the purpose of which the researchers have undertaken a Doctrinal research. The researchers have focused on the prevalent laws and have at the same time criticized the amendments on their being inconsistent and regressive in nature. The researchers have also taken a socio-legal approach as the paper draws a parallel between the societal notion of the justice system and what the law ought to be.

Objective

This paper aims at analyzing the amendments in the ordinance and the non-effectiveness and laxityof the government to come up with an ordinance without conducting a thorough research and completely ignoring the suggestions of the Justice Verma Commission on the said matters. It also focuses on the pressing issues prevalent in the society which have remained unaddressed in the said amendment bill.

Amendments Introduced by the Ordinance Along With Criticisms

1. Under Section 376 of the IPC, the maximum punishment for rape is now 10 years. Whereas girls who are victims and under the age of 16 years, the punishment has been

enhanced to a minimum of 20 years. This has been done by adding sub-section 3 to Section 376.

2. The ordinance prescribes a minimum punishment of 20 years for those convicted of raping minors under the age of 12 and the maximum punishment is death penalty. This has been done by adding Section 376AB after Section 376A IPC.
3. In cases of gang rape (where the victim is under 16 years), the minimum punishment is life imprisonment and fine. Section 376DA after Section 376D IPC state the same.
4. Apart from a mandatory imprisonment for life and fine, section 376DB states that death penalty can be provided in case of gang rape of a girl under 12 years of age.
5. Section 173(1A) CrPC provides that the time taken for the conclusion of the investigation is now 2 months rather than 3. However, this provision is applicable only if the victim is a girl. Advertently, the ordinance is not gender neutral.
6. The amendment is contradictory to the POCSO since it eliminates the concept of sexual abuse being gender neutral. This it does by enhancing the punishment in case a girl is raped and lower punishment being prescribed in cases of male child rapes.
7. No anticipatory bail shall be given in case the accused has raped a girl under 16 years of age.
8. Under section 439(1) CrPCit is now compulsory to give a notice of bail application to the Public Prosecutor.
9. It is now mandatory for the informant to be present while the bail hearing goes on of those who are alleged to have raped a girl under 16 years of age.Sub-section (1A) after Section 439(1) CrPC states the same.

Classifying Rapes

The new amendment has proposed to increase the number of the years of punishment for the rape of a girl under 16 years of age from the existing 7 years to 20 years. This though prima facie seems as a closure for the victims and the family, it at the same time discriminates between the rape of a girl under 16 and a girl above 16 years. The amendment though increases the number of years of punishment it creates a distinction between the rapes based not only on the simplified and aggravated forms but also based on the age of the victim.

In today's times, whereinwomen and girls are being preyed upon by these human vultures, it is disheartening to know that one of the victims would get her closure and the other will have to survive the long-drawn battle before she sees the light at the end of the tunnel. This discrimination has led many of the accused persons to not let the victim live after the violent

act has been committed due to the fear of being identified. There are many cases of the victims not reporting the crimes due to the familial pressure and the stigma attached to the rape victim.

Even if a victim does have the courage to go and file an FIR she is harassed by the police officers who feel they have the moral capacity to pronounce upthe rights and wrongs of the rapists as well as the rape victim. It is about time that the society and the public servants are sensitized towards this offence and treat the victim with honour and encourage her to not to back down from a fight.

Thus, it is important that the Legislature on its end doesn't treat and classify rapes but consider the rape of any women/girl as an offence against her right to her body and integrity.

Marital Rape

The issue of marital rape in India is an aspect of rape which cannot be ignored. The victims of rape though have a remedy under the IPC, marital rape on the account of it not being recognised as crime is not an offence per se and thus the victims of marital rape do not receive the justified and required remedy under the IPC.

The issue of Marital Rape also has not been addressed by the Legislature in the new amendment. This exemption of marital rape stems from a long out-dated notion of marriage which regarded wives as no more than the property of their husbands.[3]The patriarchal framework that administers the Indian families has constantly considered women as unimportant property of her significant other or guardian. Women are reduced to only a protest of sexual satisfaction of her better half with no will of her own over her sexuality. Marital rape is unreasonable: it is a woman's body being raped, as well as her affection and trust damaged into a state of instability and dread. Her human rights are relinquished at the holy institution of marriage. Also, such kind of a rape is more horrendous as the wife has to remain with her aggressor ordinarily.[4]

In order to get sexual pleasure, the husbands impose themselves upon the wives and dominate them. This patriarchal nature of the society has given rise to a number of crimes and the lack of a codified law has led many married women to suffer through this violence silently. Marital rape has been recognised as an offence even in the developing and underdeveloped countries such as Zimbabwe, Turkey, Cambodia, Liberia, Nepal, Mauritius, Ghana, Malaysia, Thailand, Rwanda, Suriname, Nicaragua, etc.It is about time that the laws in India are updated as to the changing requirements of the society.

[3]NimishbhiBharatbhai Desai v. State of Gujarat, 2018(1)RCR(Criminal)263.
[4]*Ibid.*

Indian Penal Code and POCSO

The proposed amendment though uses a time-bound trial approach, it gives a rise to a clash between the provisions of the IPC and the POCSO.The POCSO deals with the protection of children from sexual offences, harassment and pornography.The amendment to section 173(1A) of CrPC makes provisions for an investigation process to be completed within 2 months as against the 3-month window provided under the POCSO. This thus excludes the male rape victims from its purview.

Till now the word 'rape' has only been associated to the offence against the right of a female to her body. However, no law accepts and treats the same violent act against the body of a male as an offence and a crime. This has only been recognised as a crime if committed on a child under 18 years of age under the POCSO.However, crimes committed on adult males' go unnoticed and unreported as they do not have a remedy under the Indian laws. The Indian – society is also patriarchal in its nature in the sense that when a boy is sexually abused he is asked to stay quiet and face it like a man without complaining. These adult male victims, most of the times, out of shame do not report this crime and suffer in silence. There is a pressing need to recognise that male-rape is on the rise and that relevant laws need to be made for their protection.

Death Penalty under the Ordinance

Friedman in his Law in Changing Society [5]stated that –

"State of Criminal Law continues to be – as it should be – a decisive reflection of social consciousness of society."

Thus, the legal system should be dynamic enough and should adopt the corrective system or method of deterrence which would be based on the factual matrix rather than the opinion of the masses.

Clearly, the Criminal Law Ordinance, 2018 is nothing but a knee-jerk reaction to the Kathua and Unnao Rape Case. While, it remains undisputed that stricter anti-rape laws are required in the country the ordinance fails to achieve the said objective in many ways. One main point of concern is the prescription of death penalty in cases of girls under twelve being raped. It must be the intent of the legislature to deter the perpetrator from commission of such a gruesome act and the ordinance hopes that the thought of death penalty as a punishment may deter them. However, there are many points of concern here and this hypothesis of the executive is highly flawed.

[5]WOLFGANG FRIEDMANN, LAW IN A CHANGING SOCIETY 165 (1st ed. 1959).

Abolishment of death penalty by the United Nations and other countries

The United Nations has time and again submitted that death penalty or chemical castration would be a regressive step in the justice system.

Article 6 of the International Covenant on Civil and Political Rights which provides –

"In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of commission of crime and not contrary to the provisions of the present Covenant….".

It has also been observed that death penalty will not be imposed on persons below 18 years and observes that –

"Nothing in this Article should be invoked to delay or prevent the abolition of capital punishment…."

Article 7 of the Covenant provides that –

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment in particular, no one shall be subjected without his free consent to medical or scientific experimentation."

The entire International Bill of Rights including the Committee Against Torture (CAT) and the Committee on the Rights of the Child (CRC) call for abolishing death penalty.

Out of the four resolutions working on abolishing death penalty, the first resolution dated 18th December 2007 stressed on the need to progressively restrict the use of death penalty and reduce the number of offences for which it may be imposed as it is considered to be a part of the International customary law.

Recommendations in the Justice Verma Commission Report

The Committee after meticulous research concluded that it is not the gravity of punishment that needs attention at the moment but the execution of the same that acts as a deterrent. It was suggested under the 2012 Bill, that the minimum sentence should be 10 years and maximum punishment be life imprisonment.

In the case of *DhananjoyChatterjee v. State of W.B.*,[6] the Supreme Court opined that: *"…shockingly large number of criminals go unpunished thereby increasingly encouraging the criminals and in the ultimate, making justice suffer by weakening the system's creditability. The imposition of appropriate punishment is the manner in which the court responds to the society's cry for justice against the criminal. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of*

[6]AIR 1995 SCW 510.

the crime. The court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment".

State of Karnataka v. Puttaraja[7], the Supreme Court held that:

"The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be."

Justice Stewart in *Furman v. Georgia,*[8] seminally noted that:

"The penalty of death differs from all other forms of criminal punishment, not in degree, but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity".

Nonetheless, majority of researchers and other stakeholders have submitted that the seeking of death penalty would be a regressive step in the field of sentencing and reformation. Rape does deserve severe punishment, it is a reprehensible crime and violates the integrity of the victim. It is often accompanied by physical injury and mental to say the least. Nonetheless, there is still heavy scope for the victim to recover. The punishment of death penalty in all cases would not be justified. Moreover, death penalty does not act as a deterrent infact the question is how many rapists will leave their victims alive after knowing that the consequence of this act could be death penalty? The criminal justice system of India has been regressive and slow which means it takes years to execute a punishment. It is suggested that the law must focus on the execution of punishment rather than merely enhancing it every now and then.

Conclusion

The Criminal Law Ordinance thus seems to be a band-aid legislation which prima facie only seems to provide a closure to the victims but a thorough research points out the lacunae in the new amendment. The ordinance again seems to stick to the traditional concepts of females being the victims and does not accommodate sexual assaults on boys. The persistent issues of marital rape, the effectivenessof death penalty, etc. have again not been addressed. The ordinance was passed at a time when the country was enraged and mourning the rapes of minor girls in Unnao and Kathua. The ordinance thus seems to have only come into force to

[7]2004 SC 433.
[8]408 U.S. 238 (1972).

appease the masses and prove to be legislation which does not create a substantive change in laws which are required to be dynamic in nature. It is about time that along with the society the laws are progressive and justice is truly served.

Till the time we do not reach to the grassroot level, are not progressive in our approach, recognize the increase in newoffense such as male-rape, do not bring in reforms in the education, merely bringing in an amendment in ordinance is not going to fetch the expected results.