

The Judicial Understanding of Rape against Dalit Women

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Abstract—*Women are not a homogenous category and thus experiences with rape and sexual violence are equally influenced by caste, race, ethnicity, nationality and class. There are very few scientific research endeavours that have been done on this issue with connection to sexual violence and oppressed community all over the world and if it has been done, it appears to be influenced by the myth about that particular community. It is now widely believed that rape is not only violence against a woman, but it is also a tool of terror at the level of caste, class and communal conflicts in everyday and extraordinary contexts. There were many nations where the rapes on the oppressed class were not even recognized and at some places where the sexual assault was recognized, procedural law gave the accused full chance to even prevent to testifying the sexual assault. The caste system of India also uses the sexual assault for the feudal hegemony on 'Dalits'. In rural India, targeting women's bodies through sexual violence, mutilation, and degradation have been common aspects of violence by powerful landed forces of the dominant castes against the landless poor, primarily from Dalit community. In such cases, Dalit women face double layers of oppression because firstly she is a woman and secondly she belongs to Dalit community (which is lowest in the social hierarchy). The Criminal Justice System of India also treats cases of sexual assaults with Dalit women with the "same lens" of the society. Justice in such cases remained notoriously elusive, with the perpetrators enjoying the benefit of power hierarchy of Indian society. There is a huge gap between crime and conviction in rape cases of Dalit women. There are series of cases from colonial period to present times when the criminal justice system in India protects the 'prominent structure' of the Indian society, which is caste. The judiciary plays a key role on maintaining the 'caste-system'.*

1. INTRODUCTION

In this paper, I look at how judges interpret rape as atrocity. Rape has been understood as a preferred form of violence against women. Dalit women have been stabilised targets of sexual violence—a manifestation of caste based patriarchy. Even today we witness the rising violence on Dalit women to keep the upper caste social order intact. This violent social 'order' to maintain the Brahmanical-Patriarchal structure of the society in the capitalist contexts of disenfranchisement makes Dalit women even more vulnerable. Anupama Rao (2003) argues that in contemporary India nuanced and systematic form of the caste violence has emerged. These new

forms of violence include *more sexual violence* on Dalit women (Rao 2003:11). Neo-liberalism with its broken promise of job security to the underprivileged citizens of the country has failed and given rise to fierce form of competition for land and other resources. The new form of the relation will emerge after the failure of the capitalism and result of the Brahmanical-Feudal-Capitalist nexus. When it is clear that the neo-liberal dream has now failed to provide to even basic job for livelihood to the masses then the struggle for livelihood will sharpen. If we talk especially about the list people of India who are extremely underprivileged; Dalits and their struggle for land and dignity is much more challenging. In case of Dalit women the fact that their labour outside the family is crucial for the survival of the family, leads to the lack of stringent control on their labour, mobility and sexuality and this renders them 'impure' or lacking in virtue'. In rural India where the struggle for land and dignity of Dalits is going on we witness extreme forms of sexual violence on women such as gang rapes (Rege1995: 30).

When we talk about judicial approach and the sexual violence on Dalit women, I will divide this paper into three sections. Section I will discuss the Pre-Colonial of approach of judicial system about sexual violence and 'lower caste' women. In the Section II, I will discuss the post independence approach of the judiciary. Finally, in concluding sections I shall critically analyse judicial responses of the courts citing a series of important cases- as to how the courts deal the matter of the sexual violence of Dalit women.

2. POSITION OF DALIT WOMEN IN THE INDIAN BRAHMANICAL-PATRIARCHAL SUB- STRUCTURE

There are innumerable instances from Tamilnadu¹ to Bihar², whenever people from marginal community have stood up for

¹ In Tamil Nadu for instance. Dalits organised themselves when a Dalit leader who organised a procession demanding higher wages was raped and killed by upper caste landlords.

their rights- wages, land and dignity; they have faced violence and extreme brutality by the upper caste landlords. It is now the accepted fact that violence against women is easy tool to suppress the community's respect and to demoralise the people. Caste and gender both are defined in terms of the 'manhood' and this reflects in the patterns of violence against Dalit women (Kannabiran 1991: 2131). When woman of any community is raped, it amounts to reducing the manhood of that particular community. This manhood interpretation of society sees women as the honour of the community (Kannabiran 1991: 2132). When a woman, especially belonging to the 'lower' strata of the society, humiliated and insulted; it is punishment for the whole community. There is an example of Chilakurti village of Nalgonda district Andhra Pradesh. In the year 1991, on the eve of the Independence Day, a 35-year-old Dalit woman was beaten by three upper caste men in the broad daylight and paraded naked on the streets of the village. The same community people shut their doors and nobody came for her rescue. When a man came to cover her body, he too was brutally beaten up. They had done all this because they were in suspicion that the woman had helped to elope a higher caste girl with a lower caste boy, however, she was denying. When she was being paraded naked, she shouted for the help of her community saying- 'do not close your eyes', 'are there no men amongst you?' When nobody from the community came up to help the woman and kept their doors locked, the motive of criminal success to teach lesson to the "lower" caste community was achieved (Kannabiran 1991: 2132). When now it is established that sexual violence is a tool of the terror to control the particular society and Dalit women are always targeted 'to control the community'. The problematic position in the society makes them more vulnerable. They face exploitation and are easy targets for the upper caste violence. The patriarchal exploitation against the women is also prevalent within community.

The constitution-legal provisions of India have enshrined number of factors to safeguard the rights and dignity of Dalit women. One however needs to critically analyse the efficacy and coverage of the same in practice. There are a set of provisions that were formulated for the welfare and for the control of crime against Dalit community. In 1955, The Protection of Civil Rights Act came into existence. The purpose of the Act is to prescribe the punishment for practise and preaching of untouchability. In 1989, The Scheduled Castes and The Scheduled Tribes (Prevention Of Atrocities) Act (hereinafter PoA Act) came into force to address the atrocities against the Scheduled Castes and the Scheduled Tribes (discussed detail in below) because the Indian Penal Code (IPC) was not able to address the crime against Scheduled Castes (SC) and Scheduled Tribe (ST) in a proper and holistic manner. The increasing crime against Dalit

2

<http://www.satp.org/satporgrp/countries/india/terroristoutfits/massacres.htm>

women shows that the constitution-legal provisions have not been effective due to the deep-rooted caste and gender biases within the enforcement agencies. There are series of the independent, commissions' reports, governments' findings and NGO submissions that expose the multiple cases of violence against Dalit women and resultant biased approach of the enforcement agencies. The UN rapporteur on violence against women has noted that "Dalit women face targeted violence even rape and murder by the state actors and powerful members of dominant castes, used to inflict political lessons and crush dissent with the community."³ National Federation of Dalit Women, Declaration on Gender and Racism, Racial Discrimination, Xenophobia and Related Intolerance, World Conference against Racism recognized that Dalit women are subject to caste and gender violence in order to crush the protest and dominate them. They are raped and mutilated to punish the whole community.⁴

3. HISTORICAL GENEALOGY OF JUDICIAL APPROACH: SEXUAL VIOLENCE AGAINST DALIT WOMEN

When the British were on the self proclaimed mission to 'civilise Indians', they did not alter the basic structure of the caste system in India. It means that the British also treated Dalits as second class citizens. This approach towards Dalit community was witnessed in their judicial narratives. We find the judgement of the rapes against Dalit women have multiple instances of biased approach and insensitivity of the judiciary.

Law has been described as the —cutting edge of colonialism (Chanock 1985: 5). It was central to the —civilizing mission of the imperialism, of the nineteenth and early twentieth century (Darby 1987). From the very beginning, the British colonisers used to treat Indians with a sense of cultural superiority and pride. However, the law enacted for India was not similar with that of those enacted in Britain. For the first time in 1765, Warren Hastings adopted the policy of the non-interventionist approach and introduced the British model of justice systems. As a result British judges were brought in the Indian courts including the Nizamat Adalat (Kolsky 2010: 1095). Before the 1860's formulation of the IPC, colonial India had a mix Anglo-Muhammadan Criminal Justice System. In 1837, Thomas Macaulay proposed the IPC through the First Law Commission. In this proposed Penal Code the term rape was defined —as sexual intercourse by a man with a woman under one of five circumstances: against her will; without her consent while she is insensible; with her consent when it has been obtained by putting her in

³UN Special Rapporteur on Violence against Women, 2002. Cultural Practices in the Family that are Violent towards Women. UN Doc. E/CN.4/2002/83, para.53.

⁴ Cops raped 16 tribals in Bastar in November 2015, says NHRC report. <http://timesofindia.indiatimes.com/city/raipur/cops-raped-16-tribals-in-bastar-last-november-says-nhrc-report/articleshow/56397682.cms>

fear of death or hurt; with her consent when the man has tricked her into thinking he is her husband; or when the girl is under nine years of age (Kolsky 2010: 1099).

Discussing the first example of biased judicial response, the instance of 1907 of the Kathiawad Chief Court, in the case of *Emperor v. Prabhatsang*,⁵ we witness the verdict of acquittal of the accused of gang rape of 'low caste' woman on the basis of 'real resistance sign' of low caste mature woman not found. The court admitted that although there were evidences of sexual intercourse and other trifling injuries which show there was violence but despite that the accused was acquitted on the account of the feeling that not enough resistance was applied. The same court, in 1904, in a different case of the 'upper' caste girl victim -*King v. Patha Kala* (1904)⁶ took serious cognizance. The girl can't be willing party because the accused belongs to 'lower' caste. It means after enactment of the IPC the British were not ready to treat women belonging to two different castes in a similar manner. This shows the mismatch between practicing realities and commitment of treating all the cases uniformly while the British started judicial proceedings. Such practise reinforced Warren Hasting's policy of the non-interventionist approach of British in the country's social matter. Dalit women were not treated at par the upper caste women. They are believed to Dalit women to be 'polluted' and the upper caste women being pure. And these approaches of the court compel to demand more sticker evidences from the cases of lower caste women. The examples of these particular cases provide proof of discriminatory pattern of British judicial system. "Colonial manuals meditated at great length on the abstract question of whether Indian women of particular castes and classes could be raped and proposed various ways to determine when they were lying" (Kolsky 2010: 113). The courts' attitude also reflected in the medical jurisprudence. Caste and class were very important even in the medical examination of the victim (Gribble 1885: 238). The medical jurisprudence also directed to the practitioner that the women from different social strata should resist attacker in a different manner and demands the more resistance from laboring class (Kolsky 2010).⁷

The concept of the purity was fully endorsed by the colonial era. The Brahmanical-Feudal caste order looked at lower caste men's failure of not being able to control the sexuality of their women and it was as a major root cause of their immunity (Rege 1995: 34). The courts, not only demanded more resistance but also looked at the low caste women as false accusers because *they have nothing to lose* (because she being a 'polluted women'). Patna Chief Court once⁸ in the most draconian manner commented on Dalit

woman saying- even if all the sign of physical violence exists, how can anyone loose the modesty 'who has none'. "The High Court assumed that women of higher social status had more to lose by instituting a false complaint and were therefore less likely to do so" (Kolsky 2010:118). But conviction of the accused persons guaranteed without strong evidences because the "victim's higher status" compelled to believe her statements.⁹ The colonial judicial approach was not ready to challenge the Brahmanical caste-gender relationships which believe that Dalit women are not pure women because they crossed the boundary of the four walls.

4. THE JUDICIAL REPOSES ON SEXUAL VIOLENCE ON DALIT WOMEN: POST INDEPENDENCE ERA

The continuous practice of treating Dalit women discriminately was challenged after large protests broke into several parts of the nation followed by the Supreme Court verdict of the Matura rape case (*Tukaram v. State of Maharashtra*). The victim, Mathura, lived with her brother and her parents had died. She was engaged to a boy and decided to go for a live-in-relationship. She was sexually active and was aged 14-16 years. The brother of the girl filed an FIR of kidnapping. Same day the girl was presented before the police station with brother, her partner and one more person. The accused head constable pulled the girl in police station and asked three men to wait outside. In the police station one accused raped and other molested the girl. In this case of *Tukaram v. State of Maharashtra*¹⁰ where a minor lower caste girl was raped and molested by two police men inside the police station, the session court declared the girl as a 'loose' character and 'shocking lair'. The High Court in this case convicted the accused persons but the Supreme Court acquitted them. When Supreme Court, in its judgement, speculated about the happenings in police station. The judges gave out the probable options and said that there could be a possibility of Mathura had invited the accused to satisfy their sexual desire. The Court set aside the verdict of the conviction on the on the ground of the absence of mark of injuries. The court was searching the sign of the resistance from the minor tribal girl against two policemen inside the police station which was not only unrealistic but draconian as well. There is a need to analyse this judgement in the light of the history of the girl and mindset of the members of the judiciary. The bench of three judges unanimously set out discriminatory judgement demeaning the character of a woman belonging to the underprivileged community. The main aspect of the judgement depended on the assumption of 'loose' character of a girl as she was sexually active without marriage, ready for live-in-relationship belong to the 'lower' caste. It meant she was an 'available girl' and gave the power to the policemen

⁵Emperor v. Prabhatsang (1907), 5 CrLJ

⁶King v. Patha Kala (1904), 1 CrLJ 900.

⁷ Kolsky: 2010 quoted Modi, *Modi's Medical Jurisprudence*, pp. 337-9.

⁸Musummat Chapa Pasin Vs Emperor (1928), 25 CrLJ 325

⁹Labh Singh Vs Emperor Emperor (1923), 24 CrLJ 877

¹⁰Tukaram Vs State of Maharashtra, AIR 1979 SC 185.

that they can rape an 'available girl' in the presence of her three male relatives.

There was a felt need of formulation of the special law which dealt with the offences against Dalit because the violence Dalit faced historically had discriminatory pattern. Seeing the nature of the crime against Dalits; in 1989, The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989 (PoA) was enacted to prevent the atrocities on Dalits. There are provisions of special courts and time-bound inquiry etc. The object of the PoA Act stated that "there has been an increase in the disturbing trend of commission of certain atrocities like making the schedule castes persons eat inedible substance like human excreta and attack and mass killing of helpless SCs and STs and rape of women belonging to the SCs and STs. The special legislation was commissioned to check and deter crime against them committed by non-SC ST has, therefore, become necessary"(Baxi 2014: 286). The object of the Act clearly stated that the Act also create measures to stop the sexual violence on the Dalit women and recognised rape as atrocities on Dalit women. "The PoA Act then led to a new modality of speaking about sexual violence and new apparatus to address the articulation of atrocities" (Baxi 2014: 288). The Act includes atrocities as outraging modesty, sexual exploitation, insult and intimidation. Sec 3 of the PoA Act listed the names of the atrocities but it does not interpret if the offences come under IPC excluded from the Act (Saxena 2004: 27-28).

Section 3(1)(xi) of the PoA Act says that if any person who is not belonging to SC-ST, assault or use force to dishonour or outrage the modesty of SC-ST woman, is amounts to atrocities there is definition and punishment provision of outraging modesty within IPC under section 354. In case of *Vidhyadharan v. State of Kerala*¹¹, Supreme Court held that the section of modesty applies to only those cases where accused know that he is outraging the modesty of a woman (sec 354). The courts are yet not ready to interpret rape as dishonour and humiliation for Dalit women.

The additional provision in Act is humiliation. I am discussing here section 3(1) (x) of the Act and it is only for the word humiliation as a sexual violence on Dalit women. The courts are adamant to not define rape as humiliation for Dalit women. In the case of *Thulaseedharan v. Kerala* a girl went to the market with her mother and aunt. When she had to go for the natural call the accused gagged her mouth and raped. The court found him the guilty of rape but not convicted him under PoA Act.¹² It is general trend of the Indian judiciary. The logic behind this is, in order to implement this section, the accused should be fully aware about the caste of the victim and the offence should be done only for reason that the victim

belongs to the Dalit community.¹³ There must be racial prejudice.¹⁴ The main purpose of the discussing the case here is to point out the attitude of the Indian judiciary that the judiciary is not ready to accept rape with historically discriminatory community as humiliation of that particular community. And this attitude reflects in the judgement of rape cases of Dalit women. As long as the judiciary does not accept that a particular rape case it not merely brutality on the woman but it is necessarily the humiliation of that woman as well as community, it will not provide due attention and holistic remedy to the case. The court must consider Sharmila Rege's words-

"In almost all regional languages in India the word for 'rape' is equivalent to the phrase 'stealing the honour of' and since lower caste women by virtue of their double oppression have no honour o speak of the right to redressed is often denied (Rege 1995: 30)."

The Act also talks about sexual exploitation under sec 3(1) (xii). One of the interpretations of the Section 3(1) (xii) of the PoA Act criminalised the dominant practice, in which Dalit and Adivasi women as 'sexually available' (Baxi 2014: 294). If we read this section with the object of the Act it means the Act clearly says that this category will cover rape also. Case¹⁵ of the tribal girl was gang raped. A lower court convicted the accused persons for the gang raped and sexual exploitation. But the HC does not found the merit for the provision of sexual exploitation and not found suitable for the outraging modesty. Because she faced gang raped in the jungle when she went for collecting some stuff and there are no prior association.¹⁶ The courts clarified time to time that sexual exploitation cases there should be an assumption of prior association of the parties.¹⁷ It means that sexual exploitation is not possible by the stranger. The court is not ready to recognise even gang rape as sexual exploitation.¹⁸

In the case of *Gopalan v. State of Kerala*, The accused, lived in the neighbourhood of a mentally challenge girl. He used to go to her home when she was alone. He committed rape on her for several days. The parents of the girl came to know about her sexual exploitation in her seventh month of pregnancy. The parents lodged FIR. In this matter¹⁹ the High

¹³Devasia Vs State of Kerala,
<https://indiankanoon.org/doc/108860345/>

¹⁴Thulaseedharan Vs State of Kerala,
<https://indiankanoon.org/doc/99537434/>.

¹⁵Manu/Or/255/94

¹⁶Fanibhushan Behra Vs State Of Orissa,
<https://indiankanoon.org/doc/599029/>

¹⁷Of Bharatsingh Vs Harijan Kalyan Vibhag,
Manu /Mp/0180/1992.

¹⁸Deelip kumar jha Vs State Of Bihar,
Manu/JH/0099/2004.

¹⁹Gopalan S/O. Sankaran Vs State Of Kerala,
<https://indiankanoon.org/doc/1933425/>

¹¹ MANU/SC/0918/2003

¹²Thulaseedharan Vs Kerala,
<https://indiankanoon.org/doc/99537434/>.

Court's version was obvious and traditional. The court explained that the rape was not committed on her due to her caste. The court said that it was not the matter of sexual exploitation because the accused was not in position to dominate the will of girl. He was not capable to dominate her will using his authority. In the case of *Gujral Satyanarayana v. state of Andhra Pradesh*, the accused, belonging to the dominant caste, was in live-in relationship with a SC girl on the basis of promise to marry later he refused. It was clear case of the rape. The session court gave sentence under PoA Act but High Court, although upheld the suit under the Act, reduced the punishment to minimum. The High Court stated that the accused wanted to marry but the brother of the accused did not want. Even when the sexual exploitation of the girl was proven, the court was not ready to punish the accused. Such judgements in fact make the mockery of the judicial interpretation and implementation of the PoA Act wherein the court reduces the punishment of the sexual offender on account of excuse of the role of the brother. The example and debate above clearly show that the courts are not ready to recognise rape even issuance of the punishments of sexual offences of rape and gang rape humiliation and exploitation of Dalit women.

5. CONCLUSION

The above discussion with regards to the pre-independence to the contemporary scenario, it clearly shows that the court is not ready to accept the sexual women as atrocities against the community. Now when it is the established debate that the sexual violence on women as tool to terrorise the particular community and when it come to the lower strata of the society then it is more vulnerable for them. The judicial interpretation/implementation of PoA Act almost refuse to recognize the sexual violence as atrocities on Dalit women (Baxi 2014: 332). The trend of carrying colonial legacy always shows in the judicial reasoning when we discussed the pre-independence rape cases. We found out that there was a trend treating Dalit women as a suspicious victim because they have 'nothing to lose'. The same attitude is also prevalent today as we analyse the judgements and comments by the courts. When the judges hear the cases with a mindset that victim may be alleging the accused only for the compensation which is provided through the Act. At many instances we observed through the judicial responses the judges believed that lower communities have become the mother of false charges (Baxi: 313). The HC Judge felt that the sole moto of these cases is the compensation and extortion from the accused (Baxi 2014: 314). The courts are repeating the statements of colonial times that assert, if woman belongs to the Dalit community, the court will need evidence of more resistance and surprisingly the even today it has been observed that the courts say "it is not possible for a single man to commit sexual intercourse

with a healthy woman against her will".²⁰ As it is already being established that, rape is not a lustful act but a tool of violence against women. The Court, even today, stands with the colonial interpretation that gang rape of the Dalit women is a misguided youth act and full of lust.²¹

The courts expect hyper technicalities. They can acquit the accused of the stripping, parading and beating the woman publically because the Caste certificate is not available and the inquiry was not done by the DSP rank police officer.²² Supreme Court washed its hand by saying that there is fault in the High Court judgment but there is no appeal against this judgement therefore, we cannot do anything. It means the Supreme court does the same wrong with with it is criticising the wrong. Sometimes the court does not impose the PoA Act because the prosecutor has not given much emphasis on that provision.²³ Even in some cases²⁴ court made the excuses that in the FIR, the victim did not say that she was raped because she was SC woman. While there are well settled SC verdicts that the FIR is only first information report and nothing more; the High Court make FIR as one of the ground to not imposing the PoA Act 1989.

The court expect the lower starta people, the most illiterate, poor people of the society that their case should adhere to the legalities and comply with the technicalities. I, therefore, argue that the courts have been incorrect in their approach to deal with cases of the Dalits. As we know that there whole criminal system is biased against Dalit. When the cases reach Supreme Court and High Court level, the courts should not search for the lacuna as of technicalities but should take the initiative that help of these cases. The court should give message to the whole criminal justice system of being robust and holistic in the way they approach atrocities against Dalits. Unfortunately, we know that in reality we have of the expensive and hyper-technical. How much seriously the investigating agency taking the cases of the Dalits and the much prosecution (government) gives the effort to these cases.

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²¹Hanamath Vs state of Karnataka. <https://indiankanoon.org/doc/1155371/>

²²Kailas And Others V State Of Maharashtra, <https://indiankanoon.org/doc/1632114/>, Manu/Sc/0011/2011, Manoj Kumar Giri Vs State Of Jharkhand and Anr. 2004 Crilj 3434.

²³State Of Karnataka Vs Gangadharappa, <https://indiankanoon.org/doc/173694764/>.

²⁴Nayyu @ Nayaz Vs State Of Karnataka, <https://indiankanoon.org/doc/57572591/>

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