

Review Research Paper

New Section 375 Indian Penal Code (IPC) Confusion and Controversies

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Abstract

The 2012 Delhi gang rape of a college student, infamously referred to as the Nirbhaya incident has forced the law makers of the country to sit up and make long-pending amendments to the sections of the Indian Penal Code (IPC) that deal with sexual violations. The result was that the Criminal Law Amendment Act was passed in 2013 in which the existing Section 375 of the IPC has been revamped and a new section substituted in its place.

This paper compares certain aspects (few) of the old Sec 375 IPC and new Sec 375 IPC. It also deals with the controversies and confusion arising out of the new IPC 375 and existing IPC 377. It neither reviews the whole criminal amendments Act 2013 nor does it review all aspects of IPC 375. This paper also deals with a situation (third person) where the new IPC 375 is silent.

Key Words: IPC 375 New, IPC 375 Old, IPC 377, Difficulties in interpretation

Introduction:

The 2012 Delhi gang rape of a college student, infamously referred to as the Nirbhaya incident has forced the law makers of the country to sit up and make long-pending amendments to the sections of the Indian Penal Code (IPC) that deal with sexual violations. The result was that the Criminal Law Amendment Act was passed in 2013 in which the existing Section 375 of the IPC has been revamped and a new section substituted in its place.

The Earlier Section 375 IPC:

As per the old section 375 IPC, rape has been defined as follows:

“A man is said to commit ‘rape’ who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:

- Firstly, against her will
- Secondly, without her consent
- Thirdly, with her consent, when her consent has been obtained by putting her or any other person in whom she is interested in fear of death or of hurt

- Fourthly, with her consent, when the man knows that he is not her husband and her consent is given because she believes he is another man to whom she is or believes herself to be lawfully married
- Fifthly, with her consent, when, at the time of giving consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent
- Sixthly, with or without her consent, when she is under 16 years of age.

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception: Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

Thus the salient features of the old section are:

- Man is the accused.
- Woman is the victim.
- Penetration [of penis into vulva] would constitute an offence

Other points of the said section of IPC are at present not important for the present paper and hence will not be discussed.

The New Section 375 IPC:

The Criminal Amendment Act 2013 has replaced the old section 375 of the IPC with the new section 375 IPC which reads as follows:

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“A man is said to commit “rape” if he—

- a) Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- b) Inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- c) Manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- d) Applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person;

Under the circumstances falling under any of the following seven descriptions:

- **First-** Against her will.
- **Secondly-** Without her consent
- **Thirdly-** With her consent when such consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.
- **Fourthly-** With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
- **Fifthly-** With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
- **Sixthly-** With or without her consent, when she is under eighteen years of age.
- **Seventhly-** When she is unable to communicate consent.

Explanation 1: For the purposes of this section, “vagina” shall also include *labia majora*.

Explanation 2: Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that, a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1- A medical procedure or intervention shall not constitute rape.

Exception 2- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

Comparison of the Old and New Sec 375 IPC:

A. Accused and the Victim:

In both the old and the new sections, it is the Man who is the accused and the Woman who is the victim. Both the sections are clear on this issue and there is no disagreement.

B. What constitutes an Offence?

In contrast to old IPC 375 the new one deals with

- a) Penetration
- b) Insertion
- c) Manipulation and
- d) Application

Therefore sub-section b, c, and d are new.

- As per Sec 375 (a), “... **penetrates his** penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person;

At this juncture we are talking about an action of an accused. In other words it is the accused who is penetrating his penis into the vagina of a victim.

- In sub section (b) (“... **inserts**, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; ...”)

It is insertion of any other object or part of the body other than penis in the vagina that constitutes the offence. Thus ‘penetration’ and ‘insertion’ constitute an offence under the relevant sub sections of Sec 375 IPC.

- A reading of subsection IPC 375 (c) (“...manipulates any part of the body of a woman so as to cause penetration...”) raises some questions.

Is this an independent clause? Or, is this subsection to be read with subsections (a) and (b)?

An issue that arises is whether this clause will apply when the penetration is executed along with provisions of sub-section (a) or when penetration has failed and therefore sub-section (a) cannot be applied but any or multiple parts of the woman have been manipulated?

Will this clause apply only with sub-section (a) and not with sub-section (b), i.e., either successful or failed attempts at penetration/insertion?

Will the subsection be applied with both subsections (a) and (b) irrespective of whether

the action mentioned in the respective subsection has been executed or not?

C. Could a Man be the Victim?

Another newer phrase seen in the new Sec 375 IPC is: 'makes her to do with him or any other person'. This phrase is scripted in all subsections of IPC 375 i.e., (a), (b), (c), and (d). Therefore, now there are three component of the section:

- i. Accused himself penetrates or insert or does an act as per the section
- ii. Accused compels the victim to do the same with him
- iii. Accused compels the victim to do the action with 'any other person'

The law makers have specifically refrained from using the word man and instead used the words 'any other person'. The gender of other person is not specified and the phrase is kept open. Does it impliedly mean the other person could be man, woman or otherwise. (All included).

Cavity/Orifice Confusion:

The new section 375 IPC talks about the following four orifices i.e. (vagina, mouth, urethra, and anus) in sub-sections (a), (b), (c) and (d). Thus logically the following combinations can be possible:

As per sub-section (a), the penetration could be:

- i. penile-vaginal
- ii. penile-oral
- iii. penile-urethral
- iv. penile-anal

Hence, it is clear that (ii), (iii) and (iv) were not there in the old IPC 375. Traditionally penile-oral intercourse was called as 'Fellatio' and penile-anal penetration as 'anal intercourse' or 'sodomy'. Penile-urethral penetration in a true sense may not be possible but still it was deemed to be part of penile-vulval penetration and thus constituted rape as per the old definition. Now whether this new subsection of the IPC 375 eliminates the need for the relevant older sections of IPC dealing with unnatural offences (Sec 377) is not clear.

As per sub-section (d), application of mouth to various orifices raises the following possibilities:

- i. oro-vaginal contact
- ii. oro-anal contact
- iii. oro-urethral contact

In none of these combinations, there is penetration and the action indicated is 'applies his mouth'. Oral manipulation of the female genitals has been conventionally referred to as 'cunnilingus'; oro-urethral thus becomes a part

of cunnilingus and oro-anal manipulation has been termed as 'rimming'. In none of these there is a penetration.

What shall constitute an Offence under this Section is not Clear in the Script Law. (?????)

The 'Other Person':

Now see the twist in the tale-

As we have seen earlier, a new component of the new section 375 is the 'other person'. Could this 'other person' be a man or woman? Let us consider the following example. A man (accused) compels a woman (victim) to manipulate and insert the finger of another man into his (the other man's) anus. Would this constitute rape? The same logic applies to other orifices as well.

The new section 375 IPC is silent on role of the 'other person', thus raising many possibilities.

What would be the status of such 'other person'? Would that 'other person' be called - an accused, his accomplice (abettor) or a victim himself/herself? Is it necessary to prove that the 'other person' has a common interest along with accused man in committing a crime?

Does it apply even when such person is a woman? If this person is considered an accused in whatever way does he/she require having 'mens rea' which is an essential component of criminal law? If he/she is an accused, does she fall in the same category of offence as an original accused or lesser than that? If lesser, under what section(s) of the IPC?

To understand and interpret vague wordings of the law, there are few derivatives from case laws which we shall now try to see.

A benignant provision must receive a benignant construction, and even if two interpretations are permissible, that which furthers the beneficial object should be preferred. [2] Normally the Court should stick to the literal meaning of an expression in the absence of any alternative meaning.

However, it can go beyond the strict grammatical construction when a new and ambiguous provision is to be construed. [3]

A construction which frustrates the objects of the legislation and leads to a manifest absurdity should not be preferred. [4]

Courts must interpret words and their meanings so that public good is promoted and misuse of power is interdicted. [5] When two constructions are possible in a criminal trial the one which is beneficial to the accused will have to be adopted. [6]

Though there are case laws to interpret the law and use them for administration of justice, in our three tier system it is left with the learned Judges of the Sessions Courts and the High Courts to use them the way they deem fit.

Sec 377 IPC: [7]

It deals with unnatural sexual offences. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

The ambit of Section 377 extends to any sexual union involving penile insertion. Thus, even consensual heterosexual acts such as fellatio and anal penetration may be punishable under this law. The various possibilities of the offence include intercourse between man and man, man and woman (anal) – Sodomy, or it could be intercourse between man and animal (penile-vaginal, penile nasal, penile-anal) – Bestiality. Now there can be a situation where a man would be charged under IPC 375 (a) as well as IPC 377 when he has anal and oral intercourse with a woman.

Which of the two sections would be sustained in the court; and would it be at the whims and fancies of the presiding officer of the Court or otherwise is a matter to be discussed.

As the new law continues to refer to a man as the accused and penetration as an essential component to constitute an offence it does not include female homosexuality where sexual gratification is obtained by various means.

Conclusion:

Obviously, law has been made in hurry. Though there are few case laws to interpret the script of the law, it is going to create multiple subjective interpretations of the law. It would require many explanations and would create multi-tier appeals. It would probably take many years to settle down the uniform interpretation and application of law. It would be **better if the law can be amended in light of the above and made unequivocal**. The overlapping of few of the clauses with existing IPC 377 requires to be suitably dealt with.

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