SECTION 376 E OF IPC

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INTRODUCTION

India is a land of rule of law where individual rights are given prime importance. Personal safety, right to freely move and express yourself, maintenance of peace and safe environment so that the society could live without fear are some of the tenets of democratic India. Rape is one offence that violates all these rights.

The incidence of 16/12/2012 caused upheaval in the conscience of our society and compelled the government to set up *Retd. CJI J.S. Verma* committee to come up with measures against such unfortunate incidents. To make IPC more efficient to tackle such cases, the parliament enacted Criminal law amendment act (2013). One of the important sections of the report as well as the actual act is section 376E.[1]The essential components of this section are presence of recidivism and the increased punishment because of it. There are various sections (enunciated in 376) covered under 376E and if an offender commits these offenses more than once, 376E can be invoked. The phrase "subsequent conviction" also plays an important role, and the parliament has not clarified the way it has to be used. In this paper, I will try to get behind the reasons of stringent sentencing prescribed under section 376E. I will also analyse it in the background of its enactment, the legislative intent, and the way in which it was interpreted in *Shakti mills rape* case. I will also unravel the phrase "subsequent conviction" and how was interpreted in the case and how it should have been interpreted.

Why Section 376E?

In the *Shakti Mills rape* case,[2] section 376E was challenged but it was on the point of constitutionality. The courts did not get into the section itself.[3]The incorporation of this section was based on the idea of recidivism. The Verma committee report[4] (herein referred to as the report) recommended this section by keeping close attention to thetype of punishment for rape needed in India. They expressly mentioned the need of this type of recidivist

[1] The Indian Penal Code, arti. 376E, *amended by* The Criminal Amendment Act, 2013.
[2] MOHD. SALIM MOHD. KUDUS ANSARI AND OTHERS VERSUS STATE OF MAHARASHTRA AND OTHERS, AIR 2019 BOM 356.
[3]Shruti Radhakrishnan, *'What Is Section 376E And How Does It Affect The Shakti Mills Gang Rape Case*?' *The HIndu* (2019),(14 April 2021) https://www.thehindu.com/news/national/the-hindu-explains-what-is-section-376e-and-how-does-it-affect-the-shakti-mills-gang-rape-case/article27413013.ece.
[4] Law Commission, *Amendments to Criminal law* (Law Com, 2013)

approach and cited 42nd law commission report[5] to corroborate their claim. According to them, criminalising any act was an efficient tool to prevent "anti-social activities" and to bring in "general deterrence" in Indian legal system. They also cited the case of *Mahesh v State of MP*[6] where it was said that the punishment should be in proportion to the offence committed so that the offender could not go scot free after the commission of heinous crime. One more case cited was *Munna Choubey v State of MP*,[7] where they endorsed the view that imposition of punishment should be based on reality of society and social order.

The report accepted that there are mitigating as well as aggravating factors that would lead to fluctuation in sentence and included the times of offence committed by the offender as an aggravating factor. They also brought out that the women should have liberty to live her life free of any fear and if the offenders do not **reform** themselves, they should be **removed** from the society.

Even during little parliamentary debate that the bill of 2013 saw,[8] it was based on safety and liberty of women and the deterrence theory. It must be given due regard that neither the report nor the parliament considered this recidivist sentence according to retributivist theory. The MPs though voiced their opinion to "punish the offender because the society mandates so" but they never meant it in the sense of retributivism. Another member termed the stringent punishment to repeated offender under 376E as a way to deter the same person committing the heinous crime.[9]

They agreed with the report that cited observation of J. Kennedy's that retributivism could do more harm than justice and contradict laws' own ends. The members also mentioned the case of *Shyam Narain v State of Delhi*[10] where the objective of sentencing theory in India was discussed at length. The words of judges that "An increasingly important aspect of punishment is deterrence. Sentences should be deterring in nature and prevent actual offender from further offences. It should also stop potential offenders from breaking the law in future" conveys to a certain extent objective of punishment that is envisaged in 376E.

[5]Law Commission report no. 84, (47th Law Commission 1972)
[6](1987) 3 SCC 80
[7] (2005) 2 SCC 710
[8] RS Deb 21 March 2013
[9]*COMMITTEE ON EMPOWERMENT OF WOMEN* (19th edn, Lok Sabha Secretariat 2013) (1 May 2021) https://eparlib.nic.in/bitstream/123456789/63976/1/15_Empowerment_of_Women_19.pdf.
[10] (2013) 7 SCC 77

The debates and the home secretary's response did not clarify as to what was the sentencing theory behind section 376E.[11]It seems as if it was **proportionality, deterrence, reformation and then incapacitation** if the need arises. Death penalty under this section has to be the last resort of incapacitation.

So, how do these theories play out in 376E?

The proportionality (or the desert) and the incapacitation theory is not based on crime prevention but on addressing ethical issues of crime so that the offender could not commit the same offence again.[12] The fundamental principle of desert is to match the punishment with seriousness of criminal conduct.[13] It is more of focused on present behaviour than future prevention as against deterrence, incapacitation, and rehabilitation. It is based on blameworthiness, the sterner is the punishment, the greater would-be censure. It is especially useful to decide the quantum of punishment. The three requirements of desert theory are-

1. Desert parity- Equal conduct should attract equal punishment.
2. Ordinal proportionality- Punishment should be ranked in way that shows difference in blame worthiness.
3. Cardinal proportionality- the punishment should neither be deflated nor be inflated for any reason.[14]

Prima facie, it would seem that the desert theory is antagonistic to recidivist punishment as the three-component mentioned above do not take into account past behaviour of the offender. But, in a further "modified desert model,"[15] the focus shifts on preventing recidivism. Here, the offender future and past conduct plays a huge role in deciding punishment. It is used with predictive model (where you try to predict the behaviour of offender and try to deter him from future offense and the period of incarceration depends on the expectation of future offenses)where a greater emphasis is added on prior conduct than on present conduct.[16] In my opinion, this is intricately linked to the incapacitation of the offender. Youthfulness is a strong cause for recidivism. The idea is simple, the convict had

[11] RS (n 5)
[12]Andrew Von Hirsch, *'Commensurability And Crime Prevention: Evaluating Formal Sentencing Structures And Their Rationale*' (1983) 74 The Journal of Criminal Law and Criminology (1973) (16 April 2021) https://scholarlycommons.law.northwestern.edu/jclc/?utm_source=scholarlycommons.law.northwestern.edu%2Fjclc%2Fvol74%2Fiss1%2F3&utm_medium=PDF&utm_campaign=PDFCoverPages.
[13] Andrew (n 8) ¶213
[14]Andrew (n 8) ¶212
[15] Ibid
[16] Andrew (n 8) ¶239

full knowledge about the consequences and gravity of offense.[17] (here we disregard the question- whether convict had undergone trial for first offense, or the trial is simultaneous – this question would be analysed in second part of the essay). He/She undertakes that onus on themselves withintention. This should in all probability, increase the culpability of thecriminal and the blame would be much more than the first offense. This is the case when the convict has been given a chance of reformation.

The problem arises when the convict has no idea about the consequences. Both the trials are undergoing simultaneously like in *Shakti mills* case, and it becomes extremely difficult to trace blameworthiness of the offender. In this case, eminent theorists like Andrew Ashworth calls for a mixed approach,[18] where various ingredients of different principles could give us a better understanding. The convict, if indulges in the same offense again, the punishment accorded to them should increase. This is the basis of cumulative principle. As Lloyd Baker propounded in as early as 1863, this is a fair means of punishment and acts as deterrent and incapacitation.[19] But late cumulative theory proponents urged for a higher limit of any punishment, this should not pose a problem in the discussion of 376E. Since the sections talks only about committing same offense "again or second time" some of the complexities are automatically solved. This theory seems fit in any case- whether the trial takes place simultaneously or the crime is committed again after the convict has completed sentence. This is so because although quite a traditionalist view, rape has already been termed as worse than murder in some cases. The Public uproar, legal and social stand on such an offense would very well suggest that a convict deserves stern punishment. Cumulative strategy also has a contribution in preventing crimes when the offender is aware of grave punishment and effectiveness.[20]

Another theory that supplements desert theory for recidivism is progressive loss of mitigation.[21] The proportionality element necessarily needs a justification as to why should criminal record matter at all. This is based on harm principle and moral culpability. Andrew Von Hirsch adds the idea of lapse and tolerance in it.[22]Once the offender has been made aware of his wrongdoing, as the time passes, any tolerant attitude towards him should

[17] Andrew (n 8) ¶243
[18] Andrew (n 8) ¶236
[19]5th edn, Andrew Ashworth and Rory Kelly, Sentencing And Criminal Justice (Cambridge University Press 2010).
[20] Ashworth (n 14) ¶198
[21] Ashworth (n 14) ¶205
[22] Ashworth (n 14) ¶201

progressively mitigate. That is, there is a presumption that now he is fully aware of the consequences as time has elapsed and if he commits another offense of that nature, he has lost the chance of lower punishment and no tolerance should be shown this time.

The way to justify is based on harm done to the society. Theorists like Stocker LJ have played a crucial role in shaping of sentencing theories.[23] According to him, prior record shouldbe taken in account and that should be accompanied with gravity of offense. A recidivist premium approach also vouches for increase in punishment for second offense. Since the common people are a stakeholder and heinous crimes harm public at large, their values and opinion should also be taken into consideration.[24]In various jurisdictions like USA, there are sentencing guidelines called grids.[25] Two axes of this grid are seriousness of offense and the other is criminal history.

Legislature has been tasked with making laws and prescribing policies. If the legislature deems it necessary that a repeated rape offender needs to be punished harshly, their view should be respected. This is also the reason for "three-strikes rule" of USA. Though it also had roots in deterrence and retribution that has been rejected in India as a whole.

Stanley Yeo puts forth another substantial defence of recidivism and increased punishment.[26] According to him, when an offender is convicted for the first offense, a special type of relation is established between him and the state. He has an obligation to reform himself and organise his life to suit a civil society. He is shifting the focus from the act to the offender. The offender actions are "their own" and must take culpability for the same if they have not reformed themselves after first time. After a chance of reformation, it is expected that the person would have changed a bit and would not try to commit a heinous crime once again. He makes an extremely important proposition that the criminal history would matter only after the chance for reformation has been given i.e., the person has already been convicted. The existing malice, arrogance, and abusive nature of the offender warrants that he should be incapacitated and removed from the society. This is for the safety of people around him and such measures should be undertaken to ensure the incapacitation should increase with every punishment. On the same note, in the case of *State of Karnataka v Krishnappa*,[27] the judges

[23] Ashworth (n 14) ¶203
[24] Ashworth (n 14) ¶204
[25] Ashworth (n 14) ¶213
[26] Lee Youngjae, '*Recidivism as Omission; A Relational Approach*' (2008) 87 Tex. L. Rev. 571 (24 April 2021) http://ir.lawnet.fordham.edu/faculty_scholarship/444.
[27](2000) 4 SCC 75

held three main factors for sentencing an offender- conduct of offender, circumstances of victim and gravity of criminal act. If we take the theory that Yeo proposes, conduct of offender and gravity of criminal act increases on recidivism. The Halliday report that emerged as a criticism to three strikes rule also mentioned that incapacitation should be used with other theories for better dispensation of law. The recidivist offenders are punished harshly based on some future contingency and valid reasons has to be produced for this incarceration.[28]

DEATH PENALTY IN 376E

The section prescribes "death-penalty" for repeated offenders. This has to be used only in rarest of rare case,[29] but the legislators have decreased the discretion of judges in the offences enunciated in 376E. There are critics who argue that when no death has taken place, how can death penalty be given. This is a valid argument but in my opinion the offence under 376E must be rarest of rare case. This can be explained in various terms-

Firstly, section 376AB and section 376DB already envisage death penalty first time. If these two offenses are committed twice and covered under 376E, I do not see any problem if the judges must award death sentence.

Secondly, it is extremely hard to construe the life of rape victim. The physical wound might heal but the psychological and societal scar can persist after many years. The courts have time and again said that the offense is on par with murder because of the persistent suffering. This view can be problematic and patriarchal but given the way our society works; this should not be too far from the reality. As already mentioned before, the sentencing theory should consider ground realities.

Thirdly, the sound sentencing reason behind 376E mentioned previously would justify the use of death penalty.

Fourthly, the words used in 376E is "or death" so it does not mandate that in every case the penalty has to be given. The judges retain a lot of discretion in giving someone death penalty and on sound reasoning they can deny it.

Fifthly, however problematic, if our legislators have decided to tackle such heinous crimes by taking help of legislations like POCSO where death penalty is present, some legislative

[28] Ashworth (n 14) ¶85
[29] Bacchan Singh v State of Punjab, AIR 1980 SC 898

deference should be shown. However, any law such should fall under limitations of *Bacchan Singh*.

Interestingly, the report did not advocate for death penalty for section 376E. To support their views, they cited *Furman v Georgia*[30] and *Bacchan Singh*[31] to bring out the essence that death penalty in this context would be retributive and disproportionate. Leading criminal law theorists like Andrew von Hirsh have shown that there is no empirical evidence of death penalty as deterrent.[32] But in my opinion, the theories I mentioned earlier including deterrence that support such stringent punishment for recidivism under 376E would warrant a death penalty as the last resort. The repeated rape offense must be analysed in the backdrop of various theories and not merely any-one. When a person undergoing trial or convicted knows the seriousness of the offence and punishment that comes with it, he surely will think many times over before giving into the temptation. And if he decided to take risk of committing that offense, as Prof. Yeo suggests, he should be incapacitavted in such a way to never let him be in position to commit the crime.

SUBSEQUENT CONVICTION

This brings out a serious criticism in the manner "subsequent conviction" was interpreted in the case. In the essay, it should be noted that I have given emphasis on the importance of reformation. To this end,376E should only be invoked when the offender has been given a second chance either by convicting him or him being under trial and aware of consequences.

Thus, this exercise of getting into the background and principles of sentencing theory is quite essential also because the high court in the *Shakti mills rape* case erred on the point of subsequent conviction because it failed to grasp the true intent behind the enactment of section. The section was constitutional but as already mentioned, do not clarify on the issue of what is subsequent conviction and what should be the process to carry it out. In the present case, the offenders had already committed two offenses under 376 and were caught later. The trial took place simultaneously and in a gap of 3 days, both the sentences were delivered. The problematic part was thatthe judges took sentence delivered a day before as first conviction and allowed prosecution under section 376E for the second sentence. They did not get into the question interpretation of subsequent conviction. After analysing the punishment theory

[30](1972) 408 U.S. 238
[31] Singh (n 25)
[32] Andrew (n 14)

prevalent in India, legislative intent, the report as well as numerous precedents I do not think the court interpreted subsequent conviction correctly.

They discussed criminal law principles like proportionality in very brief. In para 40, they claimed that for a law to be struck down on proportionality ground, it must be barbaric and blatantly disproportionate punishment to the act. The court expressly mentions that the objective of these laws is deterrence in para 110. They also mention that it is to "caution them to not tread on the same path again."

This falls in line with the objective of parliament when incorporating the section in 2013 amendment. Enhanced punishment and strict sentencing would lead to decline in such crimes. This was welcomed by various other members.

It seems nice till we really start reading the case carefully. Though the courts have time and again mentioned sentencing theory with respect to rape law, they have never been consistent.[33] Even in this case they mention deterrence and proportionality, but the retributive resonance never gets out of the picture. They contradicted themselves a little later by saying that the increased punishment has often failed to act as deterrent.[34] It seems as if they are subconsciously denying what they have urged a few paras above. This is because, in my opinion, they wanted to hand harsh punishment to the offenders.

They forced themselves to use section 376E. This was because, in my opinion, the court was influenced by "aggravating and extenuating behaviour, background of the offender and the benefits to the society by punishing him harsher." This has been stated as few reasons for punishing rapeoffenders in 47th law commission report of 1972.[35] They went a step ahead and considered unnecessary factors.In this case, they have been skewed towards deterrence and retribution when it comes to rape law. The notion of "society's cry for justice" is the driving force behind it which they bring up again and again.

One important factor due to which sentencing is unnecessarily harsh and disparatehere is – consideringmyths and stereotypes.[36] This is another point where I agree that the courts often err and hand harsher punishment than needed. In *Shakti mills rape* case, the judges seem to take extremely patriarchal view on various occasions. They consider "rape graver than

[33] 1st ednMrinal Satish, *Discretion, Discrimination And The Rule Of Law* (Cambridge University Press 2017).
[34] Para 90.
[35] Law Commission report no. 84, (47th Law Commission 1972)
[36] Mrinal (n 28) ¶ 8

murder," "victim's modesty is outraged, and soul is destroyed" and "destructions of chastity."[37]The judges would never accept that they have been retributivist and patriarchal but under the pressure from the public, ground realities and the wish to grant exemplary punishment drove them to interpret subsequent conviction in a wrong manner. Succinctly put, they had a purpose in mind (to punish the offenders harshly) and reasoned their way to it.

CONCLUSION

The increased punishment for recidivism stands the test of legislative intent and in my opinion, there are valid arguments present to back the sentence prescribed under section 376E. The criticism against it is also fair, and the need of death penalty has been debated for decades now. That is something that cannot be solved so easily because of various factors and ideologies at play. But I support the intent with which section 376E was brought forth. I am although not in support of court's interpretation of subsequent conviction.

It should have been interpreted in the way USA's three strike rule is interpreted.[38]The offender should be "adjudged" convicted or gone under "trial." The procedural right in these cases like 1 month notice prior before introduction of recidivism should also be incorporated.[39]There should be conviction- judicial determination of the guilt of the accused[40] and then the offender should be made aware of the sentence. Fairly speaking, he should at least get a "chance" before taking his liberty or worst, his life away.

[37] Mrinal (n 28)
[38]'21 U.S. Code § 962 - Second Or Subsequent Offenses' (*LII / Legal Information Institute*) (20 April 2021) https://www.law.cornell.edu/uscode/text/21/962.
[39]Stephen herbert, 'Habitual Offender Law - Sentences For Second And Subsequent Offenses - R.S. 15:529.1' (*Felony Attorney*, 2018) (15 April 2021) https://www.stephendhebert.com/index.php/Uncategorised/habitual-offender-law-sentences-for-second-and-subsequent-offenses-r-s-15-529-1.html.
[40] Sushil Kumar Bose v The Emperor, AIR 1943 Cal 489