



## The Crime of Rape in India: A Sin, A stigma

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### ABSTRACT:

India is passing through a very turbulent phase with regard to women security and cases of rapes, sexual assaults, acid attacks are on the hike on a daily basis. As far as the safety of women in the country is concerned, there are laws regarding the women, but males and authorities are bypassing them, that's why crimes have been committed in society. The Rape survivor has to go not only through the trial of the courts but also through public trial of people which attach a stigma too to the rape victim. Despite of several changes in the provisions of law and criminal procedure, only few perpetrators of such heinous crime are punished. In common language rape is described as sexual intercourse with a woman without her consent by force, fear or fraud. Our religious gurus, khap panchayats and fundamentalist organizations also add to their insecurity by making ruthless decisions and insecurity of women. The martyrdom of Nirbhaya has certainly heralded a new revolution for women's rights. The positive changes in the law and the Code of Criminal Procedure have given new dimensions to women's rights.

**KEYWORDS:** Rape, Victim, Amendment, provisions

## INTRODUCTION

The last ten years have seen a new light in the country for women's rights, when the martyrdom of Nirbhaya shook the whole nation. The whole country stood up against the atrocities on Damini, Gudiya and Kajal. One scene was very moving. During the agitation in Delhi, a young girl wrote on the plank in her hands, “□□□ □□□□ □□□□ □□ □□□□ □□□ □□□□” I felt that this girl showed a mirror to the entire male society through the plank. In India, new stories of harassment are written every day on the pages of female slavery in the name of archaic traditions such as feticide, child marriage, dowry, sati, devadasi and heartache towards widows.

India is passing through a very turbulent phase with regard to women security and cases of rapes, sexual assaults, acid attacks are on the hike on a daily basis. Crimes against women have become common phenomena which are reported daily in our newspapers. One of the biggest hurdle before Indian judicial system while giving justice to the rape victims that the idea of accused being innocent until proved guilty, which tends to reduce the number of convictions in case leads to increasing trauma towards victims.

Statistics available on the occasion of International Women's Day show that women are second to none in terms of men. Around 2.70 crore women earn in the country and run families on their own. As far as the safety of women in the country is concerned, there are laws regarding the women, but males and authorities are bypassing them, that's why crimes have been committed in society.

In 2009, according to CBI estimates, 30 lakh girls were trafficked, 90 percent of which were pushed into prostitution. The National Crime Bureau says that between 1971 and 2012, there has been an 880 per cent increase in cases of rape. 1.2 crores cases of female feticide have been reported; even 56% of women in rural areas do not go to school-college due to security reasons. Every year 9 thousand women sacrifice on dowry sacrifice. Women have been given the right to equality all over the world, but it is written law in only books. She is become a victim of oppression from childhood to old age.

The gap between the claims of development literacy in the country is increasing rather than decreasing. It is estimated that 50 lakh girls are not born every year in the country. Why is this society silent on the homicide of a girl child and the killing of a female fetus, which cites scriptures about cow slaughter? In states like Punjab-Haryana, not only in modern metros like Chandigarh, Delhi, the gap between men and women is increasing. According to the Indian Medical Association, 50 million female fetuses are aborted every year in the country.

According to the Amnesty International report, every 15 seconds in the world a woman is subjected to assault or some form of atrocity. Every year around 7 lakh women suffer the pain of rape. The sad part of the report is that 40 per cent of Indian women are victims of husband's torture. This figure is when only one in 50 percent cases of domestic violence sexual abuse reaches the police. A survey by an international body fighting for women's rights says that India is the fourth most dangerous country for women.

Afghanistan, Congo and Pakistan are before us. The Indian Penal Code, the IT Act, the vulgar Formation of Women (Prevention) Act 1986 and the Domestic Violence Act 2005 have all the provisions for protection,

The Rape survivor has to go not only through the trial of the courts but also through public trial of people which attach a stigma too to the rape victim. Despite of several changes in the provisions of law and criminal procedure, only few perpetrators of such heinous crime are punished. Many times, victims are blamed for filing a “false” case only due to the fact that the case is not conclusively proved by the prosecution that rape has been committed. It is said to be one of the most controversial issues, and therefore, it is a challenge to the contemporary thinking which perhaps makes it the most under-reported crime. The crime of rape in Indian society has become a common behavior with cases being reported but many remaining unsolved for years.

### **THE CRIMINAL LAW AMENDMENT BILL, 1983**

Generally, rape means anything which is done by using force and without the consent. Meaning of rape, according to Oxford Dictionary, is “to have sex with female who don't want to have by force or by threatening them or using violence”. In common language rape is described as sexual intercourse with a woman without her consent by force, fear or fraud<sup>2</sup>. Rape is defines in Section 375 of Indian Penal Code. Various amendments were done with this definition in the past years. The first social reform was done after the famous case of *Tukaram vs. State of Maharastra*<sup>3</sup> which is commonly known as The *MATHURA RAPE CASE*. It was observed by Bombay High Court that mere surrender to another person's lust should not be treated as consent but it was upturned by the Supreme Court and acquitted all the accused which was criticized by the civil society.

The Criminal Law Amendment, 1983 has been made after the Mathura Rape Case. The main features of the criminal law amendment Act, 1983 are relating to definition of the offence of rape. Section 375 IPC provided six circumstances that can be said to be sufficient to constitute rape. The primary condition necessary for crime of rape is that there must be the commission of sexual intercourse between the man and the woman. Section 375 of Indian Penal Code said that a man has committed rape under certain circumstances which are provided in the section as followings:

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<sup>2</sup> Bhupinder Sharma v State of Himachal Pradesh AIR 2003 SC 4684

<sup>3</sup> AIR 1979 SC 185

1. Without the will of the concern woman ( in the time of intercourse)
2. Without the consent of the concern women.
3. If consent is there but it has been taken by threaten and fearing her.
4. If the girl gives consent because she thinks that this man is her legal husband though the man is very much aware of the fact that she is not his wife.
5. When the girl gives her consent but in that time her mental condition is not sound or at the time of intoxication.
6. When the age of the girl is 16 years of age then with or without consent of the girl if any intercourse has been there then it is considered as rape.

Before the amendment of 2013, sexual intercourse was taken to mean the penetration of the male genital organ into the female genital organ only. The courts interpreted the term sexual intercourse as “mere slightest or partial penetration of the male organ within the labia majora or the vulva or pudenda is sufficient to constitute ‘sexual intercourse’”<sup>4</sup>. The courts have stressed on the fact that the depth of the penetration is immaterial<sup>5</sup>. It is also laid down that there is no requirement for injuries to be present on the private part<sup>6</sup> of the woman to constitute rape. The hymen need not be ruptured<sup>7</sup>. Thus the essential condition of rape is only penetration and not ejaculation. Ejaculation without penetration will constitute as an attempt to rape and not rape actually<sup>8</sup>. These conditions were expressly mentioned by the Supreme Court in the case of “State of Uttar Pradesh v Babulnath”<sup>9</sup>. The court in this case while delving into the essential ingredients of rape made the observation that “To constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with the emission of semen and rupture of hymen. An important issue of widening the ambit of section 375 to include the any bodily penetration as rape was raised in the case of Smt Sudesh Jhaku v KCJ & Ors.<sup>10</sup> The petitioners wanted to increase the ambit of the definition to include penetration of any male body part into any orifice in the woman’s body.

It is also important to note that there is also an exception to section 375 which is known as Marital Rape. Marital Rape is defined as non consensual sex with wife who is above the age of 15 years. Any coercive or non consensual sex with a wife over the age of 15 years will not be considered as rape according to section 375. Husband gets the immunity from getting convicted for marital rape because assumption arises that after marriage husband gets a lifelong consent for sexual intercourse with his wife. This is a very problematic situation according to me because this is in contravention to the statute that states that the

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<sup>4</sup> Madan Gopal Kakkad vs Naval Dubey (1992) 3 SCC 204

<sup>5</sup> Wahid Khan v State of Madhya Pradesh (2010) 2 SCC 9

<sup>6</sup> Fateh Chand vs State of Haryana, (2009)15 SCC 543

<sup>7</sup> Guddu vs State of Mp,(2007)14 SCC 454, 2006

<sup>8</sup> Ramkripal Shyamlal Charmakar vs State of Madhya Pradesh(2007) 11 SCC 265

<sup>9</sup> (1994) 6 SCC 29

<sup>10</sup> (1998) Cr LJ 2428

minimum age for marriage of a woman should be 18 years. So a man cannot marry a female who is of 15 years of age and between 15 to 18 years.<sup>11</sup>

### **AMENDMENT IN LAWS AFTER THE DELHI RAPE CASE**

The Criminal Law Amendment Act of 2013 was brought into effect after the horrific Delhi Gang Rape case which shocked the whole nation with the brutality of the act committed. There was various protests and agitations which forced the legislature to contemplate the changing of the prevalent rape laws. The basic idea was to broaden the ambit and definition of the term rape and make them more stringent and introduce harsher punishments. Late Justice J.S.Verma, Gopal Subramaniam and Ex-Justice Leila Seth comprised the very famous 'Justice Verma Committee' which was formed to collect suggestions and give recommendations for the legislature to make a law to combat rape and other crimes against women<sup>12</sup>.

The offence rape was now amended and broader meaning was given which was comprehensive enough to include every kind of penetration whether it is in any body part of the woman or girl. This was said to be the most important change because earlier section 375 of the IPC only accepted the Penile Vaginal penetration as rape. It would be considered as the most efficient tool in widening the ambit of the term rape which was being demanded earlier on the basis of the recommendations given by the fifth law commission report. Some suggestions about registering complaints and medical examination was also included. The report categorically mentioned, "Any officer, who fails to register a case of rape reported to him, or attempts to abort its investigation, commits an offence which shall be punishable as prescribed"<sup>13</sup>

An extensive recommendation was given by committee regarding avoiding marital rape as well as rapes committed via commission of void marriages. This was very important because Marital Rape is a loophole that is very explicit on the face of it. The Code of Criminal Procedure also underwent a similar overhauling attributed to the new law and had previously gone through the same process after the judgment in the Supreme Court decision in the "Gurmit Singh Case"<sup>14</sup>.

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<sup>11</sup> Satwik Singh, WB NUJUS, <https://www.lawctopus.com/academike/comparison-critical-analysis-rape-laws-criminal-law-amendment-2013/>

<sup>12</sup> [http://en.wikipedia.org/wiki/J.\\_S.\\_Verma](http://en.wikipedia.org/wiki/J._S._Verma)

<sup>13</sup> Report of the Committee on Amendments to Criminal Law Pg 416; last accessed 3 August 2014

<sup>14</sup> State of Punjab v. Gurmit Singh, AIR 1996 SC 1393

The Justice Verma committees report also recommended many essential things which can take a important role to gender equality and social transformation. It includes many things; these are as follows:

1. Police reforms
2. Educational reforms
3. Special training for boys
4. Special training for the officers who are in criminal justice system
5. Establishment of rape crisis centers.

A new crime that was introduced was ‘voyeurism’ which means the recording or viewing images, movies or any such media material without the permission of the person portrayed or screened in them would result in penal punishment. . A ‘voyeur’ is defined as “a person who derives sexual gratification from the covert observation of others as they undress or engage in sexual activities.<sup>15</sup>” Voyeurism is a criminal act which creates apprehension for society and is infringement of expectations of privacy that all citizens have about their body which they do not wish to expose it to others<sup>16</sup>.

Another very important change which was the much required in the procedure provided under Section 114A of the Indian Evidence Act was amended. This was done to maintain that despite there being the lack of consent given by the women, there was often a character assassination of the women at the court trials which was very unfortunate. Section 53A of the Indian Evidence Act was also introduced provides that in a trial of sexual assault or rape, the evidence could not be admissible in the court of law which is relating to the victim’s previous sexual experience or even for a matter of fact her ‘character’.<sup>17</sup> On instances of rape or sexual assault cases the evidence concerning consent is often derived on the basis of the past conduct of the woman which seems rather frivolous as at the instance of the abuse she might not have consented thus constituting the criminal act. In earlier cases prostitutes could be raped and their right would not be protected as the victim’s previous sexual experience and “promiscuous character” would always malign the proceedings and create a bias in the judiciary’s mind. The sole reason for this inclusion of this amendment was to prevent the breach of privacy of the victim’s sexual history by preventing it to be included as a piece of evidence in court. The new law protected defamation of the woman and rights of the woman to live with dignity<sup>18</sup>. Lastly and very importantly, Sexual Harassment at Workplace (under section 354 of the IPC in addition to the Sexual Harassment at Workplace Act, 2013) was also introduced and an enhanced definition of rape provided for in the amended law.

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<sup>15</sup> Oxford English Dictionary, available at <http://bit.ly/YN2ZvI> accessed on 2 August 2014

<sup>16</sup> Lance Rothenberg, Rethinking Privacy: Peeping Toms, Video Voyeurs, and the failure of criminal law to recognize a reasonable expectation of privacy in the public space, *American University Law Review*, 49, 1127,(1999)

<sup>17</sup> Satwik Singh, WB NUJUS, <https://www.lawctopus.com/academike/comparison-critical-analysis-rape-laws-criminal-law-amendment-2013/>

<sup>18</sup><http://cis-india.org/internet-governance/blog/the-criminal-law-amendment-bill-2013> accessed on 2 August 2014



## **CRIMINAL LAW AMENDMENT ACT, 2018**

The infamous Kathua rape case and the Unnao rape case shook the conscience of the entire nation which triggered the demand of for making anti-rape laws had been more stringent and gave birth to The Criminal Law Amendment Act, 2018. An 8-year-old girl was raped in Kathua, a district of Jammu and Kashmir. It has been alleged that she was kept in a Shrine for several days and raped continuously and later murdered. The Unnao rape case was another shock to the nation where a teenage girl accused an MLA of raping her in the year 2017. She tried to set herself on fire in front of the MLA's residence in Unnao, northern Uttar Pradesh.<sup>19</sup>

Parliament was not in session, therefore the President had promulgated the Criminal Law Amendment Ordinance on 21 April 2018. The Criminal Law (Amendment) Bill was then tabled before the Parliament which replaced the Ordinance. The Bill was passed by the Parliament on 6th August 2018. Then, the President gave assent to the Bill and thus, the Criminal Law (Amendment) Act, 2018 came into force.<sup>20</sup>

The Criminal Law (Amendment) Ordinance, 2018 brought amendments in four major Acts i.e Indian Penal Code, 1860, the Code of Criminal Procedure, 1973, the Protection of Children from Sexual Offences Act, 2012, the Evidence Act, 1872

The Indian Penal Code, 1860

Before the amendment, Section 376 dealt with punishment for the rape of women in two circumstances.

- Section 376(1) dealt with punishment for rape of a woman in all the circumstances except those mentioned in Section 376(2). The punishment in such cases was rigorous imprisonment of a minimum seven years which may be extended to imprisonment for life. The punishment under this section has now been amended.
- Section 376(2) dealt with punishment for the rape of a woman done by police officers, public servants, member of the armed forces, etc. This punishment has not been amended and is a minimum ten years rigorous imprisonment which may be extended to imprisonment for life.

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<sup>19</sup> Saumya Sinha, October 24, 2018, <https://blog.ipleaders.in/criminal-law-amendment-act-2018/>

<sup>20</sup> Ibid.

After the amendment, Section 376 deals with three categories of punishment for rape, apart from rape of women by police officers, public servants, member of the armed forces, etc.

- Punishment for the rape of a woman to be a minimum ten years rigorous imprisonment which may extend to imprisonment for life. {Section 376(1)}. Thus, the quantum of punishment has increased from a minimum of seven years to a minimum of ten years.
- Punishment for rape on a woman less than sixteen years of age has been added by the amendment. Punishment in such cases has to be rigorous imprisonment of a minimum twenty years which may extend to life imprisonment. {Section 376 (3)}
- Punishment for rape on a woman less than twelve years of age has also been added by the amendment. The punishment in such cases is defined as a minimum twenty years rigorous imprisonment which may extend to imprisonment for life. The offender in such cases can also be punished with death penalty. {Section 376AB}

Thus, for the first time, death penalty has been introduced for the offence of rape considering the gravity of the offence.

- Moreover, Section 376DA and 376DB have been added by the amendment which deals with punishment for gang rape on a woman less than sixteen years and twelve years respectively. The punishment in such cases has to be invariably imprisonment of life. However, for gang rape on a woman less than twelve years of age death penalty can also be awarded.
- Clause (i) of Section 376(2) has been omitted.

The Code of Criminal Procedure, 1973

There have been simultaneous amendments in the Cr.P.C to meet the ends of justice in such cases of rape.

- If a person is accused of rape on a woman of under sixteen years of age, he shall not be granted anticipatory bail under Section 438 by a High Court or a Court of Session.
- The amendment has provided for speedy trial and investigation.
  - The investigation has to be mandatorily completed within two months.
  - The appeal in rape cases has to be disposed within six months.
- Moreover, the amendment has also made two changes in Section 439 of the Code.
  - A proviso has been inserted which states that the High Court or the Session Court has to give notice to the public prosecutor within 15 days of which it receives the bail application of an accused of raping a girl under 16 years of age.



- A sub-section has been inserted which makes the presence of informant or a person authorized by him mandatory during the hearing of bail application of the accused in such cases.

#### The Protection of Children from Sexual Offences Act, 2012

- Section 42 of the Act which deals with alternative punishment has been amended to include Sections 376AB, 376DA, and 376DB.

#### The Evidence Act, 1872

- Section 53A and Section 146 have been amended to make the provision of the Act to be in consonance with the amendments in other Acts.

### **CONCLUSION:**

There is a law, but society will be fully aware only then the honor of the woman will be protected. The second aspect is that women will be empowered only if they are literate, self-reliant and self-dependent. But they are inadequate in the face of growing problems. The media has left no stone unturned in revealing incidents of havoc but it is limited to the metros. At times, the electronic media in the news competition makes it sensational, which further aggravates the suffering of women.

The situation will make a difference when there is a change in thinking. Right now the male dominated mindset prevails in society. Our religious gurus, khap panchayats and fundamentalist organizations also add to their insecurity by making ruthless decisions and insecurity of women. The martyrdom of Nirbhaya has certainly heralded a new revolution for women's rights. These positive changes in the law and the Code of Criminal Procedure have given new dimensions to women's rights.

It is need of the hour to change the thinking and mentality of people along with judicial awakening. Even after all the measures, if the crime against women does not stop, because we have to take action on two fronts. Social changes and reforms in the law, we will have to impart lessons of equality to students at the school level, which will gradually create a sense of equality at the level of society.

The responsibility of protecting women should not be confined to the police authorities but it is duty of the general public also. Changes must be made not only in the laws as well as in the mindset of the people so that rape victims would no longer be victimized.<sup>21</sup> After the incident of rapes, laws might have been become stringent although the enforcement of same would be done but still lacks at ground level therefore numbers of cases are increasing day by day. The Criminal Law (Amendment) Act, 2018 has brought significant changes in the criminal law of India. However, these amendments need to be supplemented with other significant changes in the criminal justice system of India for overall effective results.

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