

## **Critical Analysis of Rape Laws in India and Judicial Opinion**

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“ You can tell the condition of a nation by looking at the status of its women ”

-Jawaharlal Nehru

### **INTRODUCTION**

Sexual offences like rape constitute an altogether different kind of crime which is the result of perverse mind. Those who commit such crimes are usually psychologically sadistic persons exhibiting that tendency in committing rape. Rape is a crime of violence, often regarded by the woman as a life-threatening act in which fear and humiliation are her dominant emotions. It is an assault on the woman, her family as well as community. Sexual violence, particularly rape is a global problem that does not spare any socioeconomic group or culture, especially among adolescents and young adults. Sexual assault is a neglected public health issue in most of the developing countries.

The word ‘*rape*’ has come from Latin word ‘*rapio*’ which means ‘*to seize*’. The offence of rape in its simplest term is “the ravishment of a woman, without her consent, by force, fear or fraud”, or as “carnal knowledge of a woman, by force against her will”. Basically, Rape is the carnal knowledge of any woman above the age of particular years, against her will; or of a woman child, under that age, with or against her will.

According to section 375 of The Indian Penal Code :-

“ 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 six following descriptions:—

- First— Against her will.
- Secondly —Without her consent.
- Thirdly— With her consent, when her 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 sixteen years of age.  
Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

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(Exception) —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.] STATE AMENDMENT

(Manipur) —(a) in clause sixthly, for the word “sixteen” substitute the word “fourteen”; and (b) in the Exception, for the word “fifteen” substitute the word “thirteen”. [Vide Act 30 of 1950, sec. 3 (w.e.f. 16-4-1950) (made earlier than Act 43 of 1983)]. ”

Rape is a pervasive problem in societies around the world. India is well on its way to being the rape capital of the world. For women across India, fear is a constant companion and rape is the stranger they may have to confront at every corner, any road, any public place, at any hour. Rape is a growing problem in today's society and it is becoming increasingly difficult to ignore the startling statistics about this crime. This is becoming the fastest growing crime in India. According to latest data of 2018, India stands third in the world when it comes to rape cases. <sup>1</sup>

Delhi is a place where these incidents have found to be occurring in a lopsided manner when compared to other parts of India. That is why Delhi leading to be called the rape capital of India. Delhi city accounts for the largest number of incidences of rape in the country. According to a recent report of January 2018, New Delhi had more than five rape cases reported on an average every day last year, and in most incidents the accused was known to the victim, according to Delhi Police data.

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<sup>1</sup> <https://timesofindia.indiatimes.com/india/countries-with-the-most-rape-cases/articleshow/63897729.cms>

In 2017, 2,049 rape cases were reported as opposed to 2,064 in 2016. As many as 3,273 molestation cases were reported last year in comparison to 4,035 in 2016, according to the statistics shared by Delhi Police.<sup>2</sup> Though the number of cases been reported has been declined, but still the capital is not safe for women.

Delhi police attributes that "poor civic amenities, sub-human living conditions, inadequate Housing facilities and mushrooming of jhuggi jhopri clusters are few of the sociological factors contributing to the increased tendencies in general and incidents of rape in particular.

Delhi Police Annual Report (2007) suggests that this heinous form of crime against women in Delhi is associated with issues related to poverty, including low levels of education and, in many areas, poor housing, unstable marriages or female-headed households, poor, heavily populated areas, where there is a high incidence of rape (Society for Development Studies 2009) summarizes the factors which, are responsible for the unsafe situation in Delhi. The most important factors were lack of social protection and inadequate functioning of police and private security agencies in the city respectively, women being looked upon as a sex object and the lack of sensitivity to gender issues in the city.

## RAPE LAWS IN INDIA

The anti-rape law has been encoded in the Indian penal code. Section 375 of Indian Penal Code defines what constitute to rape. Section 376 of the Indian Penal Code on the other hand enumerates the punishment of rape. The explanation given in section 375 of the Indian Penal Code; it is stated that "penetration" is enough to commit the "sexual intercourse" which is essential for the crime of rape. Full penetration is not required in case of rape; "if any part of the organ of male goes within the labium of the pudendum of the woman, no matter how little it amounts to rape".

"The one and only **essential ingredients** is to consider whether it is rape or not is whether the male organ entered into the person of the woman". According to the existing law it is not important that "hymen" should be "ruptured".

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<sup>2</sup> <https://www.indiatoday.in/pti-feed/story/over-five-rapes-cases-reported-every-day-in-2017-1143516-2018-01-11>

In the famous case **R. Vs. Furroll**<sup>3</sup> a six year old child was raped but she was not injured or hurt also her private part was not injured. But after that incident she was suffering from “gonorrhoea” which the accused also suffered. In this case it was held that the accused is the guilty of committing rape. So to prove that a particular intercourse is raped or not absent of consent is essential. If there is consent then it is not a rape. But it is essential that consent must be free consent. Here the meaning of the term free consent is different from the Indian contract act, 1872. According to the criminal law in case of rape misrepresentation is not an essential ingredient.

The most important and controversy question comes i.e. if a man rape a prostitute then whether he can immune from getting punishment because of the fact that the woman is a prostitute? Or whether the term of his punishment being reduced because the girl is a prostitute?

In this regard The Supreme Court gave a judgement in the case of *Premchand v. State of Haryana*<sup>4</sup>, which was heavily criticised among the public. In this case the Supreme Court reduced the minimum punishment of 100 years for rape to 5 years considering the conduct of the raped girl. The judgement result to various criticism and movement by various women organisation. After that a review petition was filed. But it is failed still the Supreme Court tried to justify their action by saying that-

*“we have neither characterised the victim, Suman Rani, as a woman of questionable character and easy virtue nor made any reference to her character or reputation in any part of our judgement but used the expression “conduct” in the lexicographical meaning for the limited purpose of showing as to how Suman Rani had behaved or conducted herself in not telling anyone for 5 days about the sexual assault perpetrated on her.”*

In the end the Supreme Court observed-

*“...we would like to express that this court is second to none in upholding the decency and dignity of womanhood and we have not expressed any view in our judgement that character, reputation or status of raped victim is a relevant factor for consideration by the court while awarding the sentence to the rapist.”*

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<sup>3</sup> (1923) GLJ 1185

<sup>4</sup> AIR 1989 SC 937

But this situation has been changed in another case i.e. **the State of Maharashtra vs. Madhuker**<sup>5</sup>. In this case one Madhuker who was a police inspector, had knocked at the hut of one Banubi at night and want to be physical with her. But she started shouting, on hearing that her neighbour and husband came in. On the basis of her complain the inspector got dismissed.

But after the primary inquiry had been done it was found that Banubi was a “woman of easy virtue”. On the appeal of the police inspector the High Court took into account the fact that Banubi was a woman of easy virtue and passed an order in favour of the inspector. This case further went to Supreme Court. According to Supreme Court-

*“Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to protection of law. Therefore merely because she is woman of easy virtue her evidence cannot be thrown overboard.”*

Finally in this case the judgement of High Court was reversed

## DEVELOPMENT OF RAPE LAWS IN INDIA

Let's start with the *Tukaram vs. State of Maharastra*<sup>6</sup> which is commonly known as **The MATHURA RAPE CASE**. This a worthy case to discuss in the social transformation perspective because this is the very first case which led to public outrage and as a result of the protest the reforms have been made in the existing law. In this case, a 16 years old girl who belonged to a tribal community named Mathura was raped in a Police station. After which, the family members made a criminal complaint against those two police officers. But the Supreme Court of India rejected this case stating – *“Mathura's body bore no outwards sign of rape”*.

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<sup>5</sup> JT (1990) 4 SC 169

<sup>6</sup> AIR 1979 SC 185

This judgement leads to a huge movement by many women groups all over the nation. Consecutively, huge protest, four eminent law professors wrote an open complaint letter to the Chief Justice of India opposing this judgement. After this entire incident an amendment was made in criminal law in 1983. The main features of the criminal law amendment, 1983 are:

1. For the first time custodial rape has been recognised.
2. Closed proceeding for the rape trials.
3. It is also banned the publication of victims identifications.

Another famous case *Sakshi vs. Union of India*<sup>7</sup> is significant in this regards. A NGO called Sakshi filed a Public Interest Litigation for redefine the term rape. In this case the law commission of India was directed by the Supreme Court of India to respond to the specific issue raised in the petition. After the several meetings and consultation with Sakshi; law commission of India in 2000 published its 172 reports on the review of rape law.

The highlights of the 172 law commission report are following below:

- Rape should be replaced by the term sexual assault.
- All form of penetration should come under the purview of Sexual intercourse as contained in 375 of Indian penal code.

In the year of 2002 an amendment of section 146 of the Indian Evidence Act has been made<sup>8</sup>. According to this amendment, it does not allowed any types of cross examination of rape victims that directly or indirectly raised questions about the moral character of the rape victim also any types of question which is about the previous sexual experience of the victims.

After the Delhi Gang Rape case people start protesting; several protect by public took place. It became the burning topic of the nation. People from all over the India joined this protest either by physically or by virtually. Many people raised their voice against this incident on various social networking sites. All they want is to safer and better country for women.

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<sup>7</sup> AIR 2004 SC 3566

<sup>8</sup> See the Indian Evidence Act 146

Then the government form a committee to recommend legal reforms and also suggest the other ways to eliminate sexual violation. This committee was headed by Justice Verma. The justice Verma's committee received more than 80,000 recommendations from all over the world. The main aim of the committee was to create a tough anti rape law and to make a safer country for women<sup>9</sup>. After 29 days the report was submitted by the justice Verma's committee. The committees report not only recommended for strong law for crimes against women but also recommend many essential things which can take an important role to gender equality and social transformation.

It included many things; like:

- Police reforms
- Educational reforms
- Special training for boys
- Special training for the officers who are in criminal justice system
- Establishment of rape crisis centres.

Finally on 19th march 2013 the bill was passed by the Lok Sabha and on 21st March 2013 it was passed by the Rajya Sabha. On 2nd April 2013 the bill received the assent of the president. Under this new act "the term "sexual assault" has been replaced back to rape." The offence rape is not a gender neutral offence. According to the new act only man can commit rape. The clause which is dealing with the "touching of private part" has been removed from the new act.<sup>10</sup> According to the criminal (amendment) act, 2013; marital rape does not consider as rape. This is criticised by several jurist, women organisation and NGOS.

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<sup>9</sup> REPORT TO THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAWS, available at [http://www.thehindu.com/multimedia/archive/01340/Justice\\_Verma\\_Comm\\_1340438a.pdf](http://www.thehindu.com/multimedia/archive/01340/Justice_Verma_Comm_1340438a.pdf)

<sup>10</sup> THE CRIMINAL LAW (AMENDMENT) ACTS,2013, available at <http://indiacode.nic.in/acts-inpdf/132013.pdf>

## RAPE AND JUDICIARY

Our judiciary system has played positive as well as negative role in rape cases. In our country Judiciary is known as the independent wing of government. This independent Judiciary has two roles:

- 1) the traditional role i.e. to interpret the laws, and another is
- 2) Judicial activism i.e. to go beyond the statute and to exercise the discretionary power to provide justice.

Our Indian judiciary can be regarded as a creative judiciary. Credibility of judicial process ultimately depends on the manner of doing administration of justice. Justice K. Subba Rao explains the function of the judiciary as thus:

- It is balancing wheel of the federation;
- It keeps equilibrium between fundamental rights and social justice; it forms all forms of authorities within the bounds;
- It controls the Administrative Tribunals<sup>11</sup>

A problem with rape trials is the interpretation of victim's consent by courts. The current law and the amended version consider non-consensual penetration for sexual purpose as sexual assault. But determination of consent is hampering justice. The core of the offence of sexual assault remains sexual intercourse without consent. The term consent has itself been subjected to numerous interpretations.

In **Mohd.Habib v. State** <sup>12</sup>, Delhi High Court allowed a rapist to go scot-free merely because there were no marks of injury on his private part- which the High Court presumed was a indication of no resistance. The most important facts such as the age of the victim (being seven years) and that she had suffered a ruptured hymen and the bite marks on her body were not considered by the High Court. Even the eye- witnesses who witnessed this ghastly act, could not sway the High Court's judgment.

In a case in 2016, there was a case pertains to an allegation of rape by a woman in Bangalore 19 years ago. While the Sessions Court had acquitted the three men accused, the

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<sup>11</sup> Akshay Goel, <http://www.legalindia.in/rape-laws-in-india>

<sup>12</sup> 1989 CriLJ 137



Karnataka high court later sentenced them to life imprisonment. The Supreme Court has set aside the high court judgment and set free the accused, citing reasons including inconsistencies in the woman's statements, hostile witnesses and the medical report conducted after the incident.

The woman has said she works as a domestic worker, though a witness (her roommate) said she was a sex worker – leading the judges to treat the case as one where she was not paid her dues by the men, who were her clients.

In their order, a Supreme Court bench comprising Justices Pinaki Chandra Ghosh and Amitava Roy said:

*“Her conduct during the alleged ordeal is also unlike a victim of forcible rape and betrays [a] somewhat submissive and consensual disposition. From the nature of the exchanges between her and the accused persons as narrated by her, the same are not at all consistent with those of an unwilling, terrified and anguished victim of forcible intercourse, if judged by the normal human conduct.*

*“Her post incident conduct and movements are also noticeably unusual. Instead of hurrying back home in a distressed, humiliated and a devastated state, she stayed back in and around the place of occurrence, enquired about the same from persons whom she claims to have met in the late hours of night, returned to the spot to identify the garage and even look at the broken glass bangles, discarded litter etc. According to her, she wandered around the place and as disclosed by her in her evidence, to collect information so as to teach the accused persons a lesson. Her vengeful attitude in the facts and circumstances, as disclosed by her, if true, demonstrably evinces a conduct manifested by a feeling of frustration stoked by an intense feeling of deprivation of something expected, desired or promised. Her confident movements alone past midnight, in that state are also out of the ordinary.”<sup>13</sup>*

The court felt it necessary to bring up the woman's actions and behaviour after the alleged incident, comparing them to what they see as ‘usual’ in that situation, in order to assess whether or not they think the incident occurred.

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<sup>13</sup> <https://thewire.in/gender/supreme-court-rape-sex-work>

In **State V. Deepak & Ors.**<sup>14</sup> Decided by Sessions Court Judge Kaveri Baweja in 2014, the judge said that being a sex worker had nothing to do with the victim's allegations of gang rape. *"The accused had taken the plea she was a sex worker and illegally living in India (the woman was from Rwanda)," Grover said, "and wanted to implicate them in a false case so that she could stay in the country."*

In that case, Baweja ruled:

*"It may be reiterated that simply because the victim was working as a sex worker before the incident in question, does not confer any right upon anyone to violate her dignity or to rob her and can certainly not be a ground to award lesser than the minimum prescribed punishment."*

Judges are applying the discretionary power to provide better justice to women in the new context of the Socio-Economic conditions. Judiciary has played an active role in enforcing and strengthening goals towards protection of rights of the women of the land. The courts in India have tried to interpret laws in consonance with the international treaties and conventions for betterment of women , which are as follows :-

In 1992, **Vishakha Judgement**, came about after the case received unprecedented media attention and for the first time the Supreme Court defined 'Sexual harassment at work place'. And the Apex Court laid down landmark guidelines.

In **State of Punjab v. Gurmit Singh**, the Supreme Court has advised the lower judiciary, that even if the victim girl is shown to be habituated to sex, the Court should not describe her to be of loose character.<sup>15</sup>

The Supreme Court has in the case of **State of Maharashtra v. Madhukar N. Mardikar**<sup>16</sup>, held that "the unchastity of a woman does not make her open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate her person against her wish. She is equally entitled to the protection of law. Therefore merely because she is of easy virtue, her evidence cannot be thrown overboard."

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<sup>14</sup> <https://indiankanoon.org/doc/170354337/>

<sup>15</sup> 1996 AIR 1393

<sup>16</sup> AIR 1991 SC 207,

**Suo Motto v. State of Rajasthan** <sup>17</sup>popularly known as German Lady rape case. It is a landmark judgment laying down principles and guidelines for the protection of dignity of the women. Hon'ble Mr. Justice N.N. Mathur, who wrote the judgment, took Suo Motto cognizance of a rape case of a foreign tourist in Rajasthan in May 2005 which had hit the headlines of State and national newspapers. In this case, court laid down certain highly relevant guidelines for criminal investigation and trial of offences against women in rape cases. The court opined:

*“In order to combat the increasing crime against women and to ensure protection and preservation of their human rights – the criminal justice system needs to be addressed from the point of view of systemic victim support service. There is need to promote proactive role of police as well as trial courts”*

In the landmark case of *The Chairman, Railway Board v. Chandrima Das*, the Hon'ble Court held that rape is not a mere matter of violation of an ordinary right of a person but the violation of Fundamental Rights which is involved. Rape is a crime not only against the person of a woman; it is a crime against the entire society. It is a crime against basic human rights and is violative of the victims most cherished right, namely, right to life which includes right to live with human dignity contained in Article 21.

Recently in **Nipun Saxena & Ors. v. Union of India**, Supreme Court Bench headed by Justice M.B. Lokur and Justice Deepak Gupta, has accepted the National Legal Services Authority (NALSA) Scheme called Victim Compensation for Survivors of Sexual Assault and Acid Attack.

The Gang Rape victims will be compensated from Rs.5 Lacs – Rs.10 Lacs, the rape victim's for Rs.4 Lacs – Rs.7 Lacs, unnatural sex assault victims from Rs.4 Lacs - Rs.7 Lacs. He victims who have loss of their foetus will be compensated from Rs.2 Lacs- Rs.3 Lacs. Victims who got their face disfigures from acid attack will be compensated from Rs.7 Lacs- Rs.8 Lacs, depending up cases.

## CONCLUSION

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<sup>17</sup> RLW 2005 (2) Raj 1385

Thus, it is observed that Judiciary being the third pillar of the Constitution has played a vital role in finding the proper solution in rape cases. Sometimes through wide interpretation of provisions of various legislation and Constitution and sometimes by laying down landmark judgments where there are no specific laws, the judiciary has tried to strike a balance and equilibrium in the society.

The judiciary has tried to fulfil the gap between fast changing society and rigid laws (because of the long and time taking procedure of enactments of laws by legislature, its not easy to amend these laws with the fast changing society). Nirbhaya's case has once again raised the question of inadequacy and lack of proper implementation of the laws, however, Anti-rape Bill- Criminal Law (Amendment) Bill, 2013 has been passed. The laws relating to rape victim's has been enacted after much public cry or through judicial intervention only. This Amendment Bill also came after losing Nirbhaya and mass protests. It has rightly been observed by the judge in Nishan Singh's case that Court can only lay down the guidelines but important role has to be played by the society in its implementation.