

Rape Laws in India: An Analytical Analysis

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Received Nov. 05, 2016

Accepted Dec. 11, 2016

Rape Law in Ancient India

In ancient India, 'sexual offences' were punishable by law. As per Hindu Law, they were mainly divided into two classes – rape (*Sahasa*) and adultery (*Stri Sangraha*). The ancient law givers described rape as one of the most heinous crimes and provided stringent laws inflicting severe punishments and penalties on the rapists. The caste of the victim and of the rapist played a very crucial role. It was a major determining factor in the severity of the punishment to be inflicted. The Code of Manu prescribed corporal punishment for the ravishment of an unwilling woman.¹ Other ancient scholars have prescribed capital punishment and the confiscation of entire property in rape cases of minors girls and high caste women.²

In British India, the courts set up by the East India Company administered and adopted Muslim penal norms of criminal justice.³ In 1828, an Act for improving the administration of criminal justice in the British colonies in Asia was passed, which declared rape as an offence punishable with death, provided the girl was below eight years and with imprisonment in other cases. In 1834, Thomas Macaulay landed in India to take his seat as Law Member on the Supreme Council, under the charter of 1833.⁴ He undertook the Herculean task of providing a code of substantive criminal law for India. He devoted clauses 359 to 360 to the offence of rape in the Penal Code. Section 359 defined the offence and section 360 specified the punishment for it. Clause 359 of Macaulay's code read –

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

First – Against her will.

Secondly – Without her consent, while she is insensible.

Thirdly – With her consent, when her consent has been obtained by putting her in fear of death or of hurt.

Fourthly – With her consent, when the man knows her consent, is given because she believes that he is a different man to whom she is, or believes herself to be, married.

Fifthly – With or without her consent when she is under nine years of age.

Exception – Sexual intercourse by a man with his wife is in no case rape.

Section 360 stipulated that the punishment for rape should not be more than 14 years and not less than 2 years, with or without an additional fine. Macaulay did not give any reasons for his drafting of clause 359. JF Thomas, a judge in Madras Presidency, criticized the code for giving too wide a range of punishment. He argued that once the commission of rape is proved, character of the woman should be no criteria and same punishment should be awarded to all offenders.⁵ But the Law Commissioners took a different view and held that injury in case of a high class woman is surely infinitely more than in case of a woman of low caste, who was presumed to be without character. It is pertinent to point out that both Law Commissioners and Thomas saw the problem in terms of a high caste woman's violation by low caste man as the most heinous of rapes, requiring the strictest punishment. Hence, instead of assuring equal protection of law for all, the Commissioners were only reinforcing the caste system hierarchy.⁶ Section 375 of the final version⁷ differed from clause 359 as it incorporated as important amendment that 'sexual intercourse by a man with his own wife, the wife not being under 10 years of age, is not rape'. No reasons for this change were given by the Select Committee.

For 30 years, after the enactment of Indian Penal Code in 1860, rape law remained the same. In 1891, Sir Andrew Scoble introduced the Bill, which culminated in the Indian Criminal (Amendment) Act 1891.⁸ This Act raised the age of consent to 12 years both in case of marital and extra-marital rapes. The object of the Act was humanitarian, viz, 'to protect female children from immature prostitution and from premature cohabitation'.⁹ which resulted in immense suffering and sometimes even death of the girl and generally resulted in injury to her health and that of the progeny. The beginning of the 20th Century witnessed increased public attention towards the improvement in the physique of the nation and reduction of causes leading to abnormal mortality of younger generation. In 1922, Rai Bahadur Bakshi Sohan Lal, MLA, moved

for leave to introduce a bill in marital and extra-marital cases.¹⁰ This attempt to legislation proved futile, but with the passing years, agitation for a modification of law steadily grew owing to a better knowledge of the evil consequences of early marriage and early consummation.

In 1924, Dr. Hari Singh Gour introduced a Bill to amend section 375, IPC, raising the age to 14 years in both marital and extra-marital cases. The Bill was referred to a Select Committee, which made a material alteration by reducing the age from 14 to 13 in the case of marital rape.¹¹ On September 1, 1925, Sir Alexander Muddiman introduced the Bill fixing 14 years the age in extra-marital cases and 13 years in marital cases, which culminated in the Amendment Act 1925.¹² The amendment in 1925 for the first time introduced a distinction between marital and extra-marital rape cases by providing different age of consent in marital rape cases. The distinction was further emphasized in section 376 by incorporating the words – ‘unless the woman raped is his own wife and not under twelve years of age’, in that case the punishment was diluted by prescribing a maximum of two years. Thus, the purpose aimed to be achieved by raising the age of consent to 13 years, stood mitigated to a large extent by the diluted punishment provided by the amended section 376. Dr Hari Singh Gaur again introduced a Bill in 1927 to raise the age to 14 and 16 years in marital and extra-marital cases respectively. It was followed by the appointment of the Age of Consent Committee,¹³ which reviewed the prevailing situation and suggested some amendments. The Committee recommended the use of term ‘marital misbehaviour’ instead of rape in marital cases. The offence of marital misbehavior would be committed by a husband in case of sexual intercourse with his wife below 15 years of age. The Committee recommended the inclusion of offence of marital misbehavior in Chapter XX of IPC and that sections 375 and 376 of the IPC be confined to rape outside the marital relation. The Committee also recommended maximum punishment of either description for 10 years and fine where the wife was below 12 years of age and imprisonment, which may extend up to one year or fine or both, where the wife was between 12-15 years.¹⁴

In British India, the reflections of ‘Victorian morality’ could be seen in provisions of IPC dealing with the offence rape and their implementation. Very strong moral judgments were brought to bear upon the victim and her character before she could obtain justice. It would be pertinent to point out that on one hand, in case of homosexuality, sodomy or other unnatural offences, whatever may be the age of both the parties, even mutual consent was considered irrelevant and on the other hand, the rape victim was considered capable of giving at a very young age.¹⁵ The Law Commissioners in 1846 had assumed Indian morality to be the principles professed by upper class male. Coupled with this, the sexual ethics of Indian society deteriorated the scenario and justice became an utopian illusion for the rape victim.

Vasudha Dhagamwar has commented:

It is extremely depressing to see how the narrow authoritarian sexual ethics of Indian society, heavily weighed in favour of the male, has inspired a case law, which renders the Penal Code even more hostile to those, who seek justice or protection than its Victorian framers made it.¹⁶ In British India, Indian courts were following more or less the English precedents, though there were few marked differences. The sections of the IPC dealing with rape were so drafted that they could be construed to permit a miscarriage of justice. Courts adopted a very loose definition of what constitutes consent and had set very rigid and inflexible standards regarding the reliability of the woman’s testimony.

Law after independence

In 1949, rape laws were further amended in respect of the age of consent. The age was raised to 16 years in clause ‘fifthly’ of section 375, dealing with extramarital cases and 15 years in the exception dealing with the marital cases, by section 3 of the Amending Act.¹⁷ Another amendment was brought about in 1955, which substituted the words ‘transportation for life’ by ‘imprisonment for life’ in section 376.¹⁸ The Indian Law Commission had stated its intention of revising the IPC in 1959 but it was only after 12 years, in 1971 that the Law Commission could send its report on the IPC to the Union Law Minister.¹⁹ The main recommendations of the 42nd Law Commission Report are as follows:

1. The members of Law Commission noted that under the third clause of section 375, consent of the woman is vitiated only when she is put in the fear of death or bodily hurt to herself. The clause did not cover the situations, where death or greavious hurt is threatened to someone else present on the spot. They suggested the addition of the words – ‘either to herself or to anyone else present at the place’ after the word ‘hurt’ to cover such situations.²⁰
2. The members of Law Commission took note of the case of forcible sexual intercourse by husband when the couple had been living apart under a degree of judicial separation or by mutual agreement. They considered that such sexual intercourse shall be treated as rape.²¹

3. The members recommended that the forcible intercourse by husband when the wife is under 15 years of age, should not be called rape in the technical sense and the punishment for the offence may be provided in a separate section.²² They recommended section 376A, which provided for the punishment for sexual intercourse with his child wife.²³
4. The members opined that in case of a girl between 12-16 years, who consented for the intercourse, the offence should not be equated and not punished as severely as rape.²⁴ They recommended a separate section 376B for such cases and the maximum period of punishment prescribed was seven years.²⁵
5. The Law Commissioners prescribed enhanced rigorous punishment of 14 years for the offence of rape.²⁶
6. The most significant contribution by the Law Commission was the recognition of the phenomenon of 'custodial rape'. It was commented that under certain situations, woman's submission to sexual intercourse is really not a willing consent, whereby men in authority take advantage of the women under their custody. Section 376C, D and E ²⁷ were recommended, prescribing for punishment in cases of illicit intercourse by a public servant, superintendent of women's or children's institution and manager of the hospital.

The 42nd report had inherent anomalies:

1. Section 376A²⁸ as suggested by the Law Commission, which provided for the punishment for the sexual intercourse with child wife in fact diluted the punishment in case of wife under 12 years of age. The Law then prevailing provided discretion to the court to extend the punishment up to 2 years in all rape cases, whereas the suggested section reduced the punishment to a maximum of two years.
2. The patriarchal notions were reflected in the provisions as the maximum punishment provided in section 376B, for the rape of a girl between 12 -16 years, who had consented, was seven years with fine and the maximum punishment for her married counterpart only two years.
3. Whereas the cases of illicit intercourse of public servant, superintendent of children's or women's institution and manager of a hospital, etc, were covered under section 376C, D, E, custodial rapes committed by police were not even recognized by the Law Commission.

The 42nd Law Commission Report was followed by the IPC (Amendment) Bill 1972. A Joint Committee was appointed to review the Bill, which presented its report on 29 February 1976.²⁹ Its main observations were as follows:

1. The Committee was of the opinion that sexual intercourse by a man with his own wife whatever might be her age, should not be regarded as rape.³⁰
2. The Committee diluted the maximum punishment to 10 years from life imprisonment, which could be imposed depending upon the gravity of the offence.
3. Punishment for three years was recommended for in case of judicially separated wife.
4. The cases of custodial rape, cases of seduction by the public servant etc, taking undue advantage of his position, were recognized and compulsory imprisonment with fine were imposed as punishment. In case of a mental patient, the rapist's knowledge of her condition was rendered irrelevant.³¹

The Bill of 1972 also lapsed and old rape law continued to exist with minor amendments from time to time regarding the age of consent. In 1979, the Bill which was passed by Rajya Sabha and was pending in Lok Sabha because of the dissolution of Lok Sabha in 1979.

Position of rape law after Mathura case

In the year 1979, in Tuka Ram v State of Maharashtra,³² the decision given by Supreme Court of India created furors in the field of rape law and led to the culmination of mass movement for the amendment of rape laws. The decision drew attention of four law teachers.³³ In October 1979, they wrote an 'Open Letter to the Chief Justice of India',³⁴ protesting against the judgment. This letter created an unprecedented furor and received tremendous publicity from the press. The open letter criticized Supreme Court judgment and stated that there is a clear difference in law and common sense between consent and submission. The facts of the case revealed submission on the part of Mathura and not the consent. It was questioned in the open letter, whether the taboo against pre-marital sex was so strong as to provide a license to the Indian police to rape young women.³⁵

This decision shook the conscience of many belonging to civilized society for the custodian of law and order and had taken advantage of an innocent girl. There was a nationwide movement for the amendment of law

and many mass protests, demonstrations and meetings were organized by the women organizations, lawyers, teachers, students, social workers, etc. The judgment was widely criticised both inside and outside Parliament as an extraordinary decision sacrificing human rights of women under law and the constitution.³⁶ The government took a serious note of the rare degree of sensibility of public as well as of the Parliamentary criticism of the law and its failure to safeguard the rights of innocent rape victims. Thus, the Law Commission³⁷ was appointed to submit its report on law relating to rape and allied offences in 1980. The Law Commission submitted its 84th Report in a remarkable time period of less than one month. The main recommendations of the 84th Law Commission Report were as follows:

The Substantive Law

1. The Law Commission devoted special attention to the concept of consent. They emphasized that the consent should be active consent, which is not said to be implied by silence. They suggested the substitution of the word 'consent' by the words 'free and voluntary consent' in section 375.³⁸
2. The Law Commission considered that in the third clause to section 375, the consent is vitiated not only when a woman is put in fear of death or hurt, but also when she is put in fear of any 'injury' being caused to any person, including herself in body, mind reputation or property and also when her consent is obtained by criminal intimidation. Thus, they suggested the insertion of word 'injury' in third clause to section 375, which would take care of situations, in which woman is threatened with injury to herself or anyone else in whom she is interested.³⁹
3. The Law Commission pointed out that rape can be committed without overt violence and the injuries on the person of the woman are not compulsory and conducive evidence of the commission of the crime.⁴⁰
4. The Law Commission suggested that addition of sub-clause (b) to clause 'fourthly', to take into account numerous situations falling under the guise of misconception.⁴¹
5. The Law Commission suggested that a new clause 'fifthly' should be added to section 375, covering the situation when consent is obtained by intoxication or administration of some stupefying substance to the woman.⁴²
6. The Law Commission made a strong suggestion to raise the age of consent to 18 years. It was asserted that when according to the Child Marriage Restraint Act, 1929, marriage of a girl below 18 years is prohibited then sexual intercourse with a girl below 18 years should also be prohibited.⁴³
7. The Law Commission recommended that a rape of child wife should not be dealt with separately. Explanation II, dealing with judicially separated wife, was retained.⁴⁴
8. The Law Commission retained the recommendations of the 42nd Report in regard to sexual offences committed by a public servant, superintendent or manager of a woman's or children's institution and a person on the management of staff of a mental hospital.⁴⁵
9. The Law Commission opined that the discretion of the court to award punishment should remain unfettered. The maximum limit of punishment was life imprisonment or punishment up to ten years.⁴⁶
10. In cases of gang rape, where more than one person raped the woman one after the other, each one of them should be punishable with a maximum punishment of ten years rigorous imprisonment.⁴⁷ Similar punishment was also suggested in cases of minor's rape, rape of a pregnant woman and rape by a police officer.

Arrest and Investigation

1. The Law Commission suggested the addition of a proviso to clause (1) of section 46, Code of Criminal Procedure 1973 (CrPC), dealing with the manner of arrest of a person, which would spare a woman the indignity of well being touched by strange men.⁴⁸ Thus, a male police officer could lay hands on a woman being arrested only in exceptional circumstances.
2. The Law Commission recommended the addition of section 417A in the CrPC⁴⁹ for keeping a woman under detention in women's or children's homes.
3. The Law Commission considered that woman police officers alone should interrogate female victims of sexual offences. They also recommended the additions to section 160, CrPC to provide that the statement of rape victim, when she is under 12 years of age should be recorded by a female police officer or a person interested in welfare of women or children as recognized by the state government.⁵⁰

4. The Law Commission emphasized that the interrogation under section 160(1) of the CrPC, should take place at the dwelling place only⁵¹ and the police officer who violates such provisions should be punishable under the new section 166A, IPC with one year imprisonment or fine or both.⁵² The Law Commission also recommended a woman should not be interrogated after sun set and before sun rise⁵³ and a social worker should be permitted to be present during interrogation.⁵⁴

The insertion of section 167A in the IPC was also recommended, which punishes the failure of non-recording of any information regarding any cognizable offence.⁵⁵

Medical examination of Accused and the Victim

The Law Commission observed that the procedures for examining the accused and the victim are quite cursory and tardy. Hence, they recommended addition of sub-section (1A), (1B), (1C) and (1D) to section 53, CrPC, which deals with the medical examination of the accused in all cases and the insertion of a new section 164A to the CrPC⁵⁶ to improve the existing provisions regarding the medical examination of the victim.

Trial in Camera and Publication of Proceedings During Trial

1. The Law Commission endorsed the need of trial in camera and recommended the addition of proviso (2) to section 327,⁵⁷ CrPC, which provides for the court to open.
2. The Law Commission felt that in cases of rape, to avoid embarrassment to the victim caused by publicity during the trial, a new section 228A, should be added to the IPC, which provided punishment in cases of violation prohibition regarding publicity of proceedings.⁵⁸

Evidence

The Law Commission recommended various changes in law relating to burden of proof and character of woman.

1. Insertion of a new section 111A was recommended in the Indian Evidence Act 1872, which shifted the burden of proof on the accused instead of prosecutrix, that the act was done with the consent of the woman.⁵⁹
2. The Law Commission recommended that in section 155(4) of the Indian Evidence Act, the evidence of sexual relations of prosecutrix other than with the accused should not be permitted⁶⁰ On similar lines, addition of clause (4) to section 146 was recommended, which would render it unpermissible to put questions in cross-examination of the prosecutrix as to her general immoral character.⁶¹
3. The Law Commission recommended the insertion of a new section 53A, which rendered the evidence related to prosecutrix's previous sexual relations with any other person than the accused, irrelevant.⁶²

The Bill of 1980, Joint Parliamentary Committee Report of 1982 and The Amendment Bill of 1983.

After considering the recommendations of the Law Commission, the Criminal Law (Amendment) Bill 1980, was introduced in Lok Sabha on 12 August 1980.⁶³ The purpose of Bill was to make rape law more stringent and to create conditions in which the victim is not inhibited by fear or embarrassment to prosecute the offender.⁶⁴ The Bill departed from the recommendations of 84th Law Commission mainly in the following ways:

1. It shifted the burden of proof on the accused only in cases of custodial rape, gang rape, rape of a minor and pregnant woman.
2. Only a married woman could plead the misconception of fact in clause fourthly to section 375.
3. Punishments to sections 376A, B, C were enhanced to five years.
4. It included sections 375, 376, A, B, C under the heading 'Sexual Offences' in the IPC.

The Joint Committee submitted its report on 2 November 1982. Unfortunately, the Committee took few grave retrogressive steps:

1. The Joint Committee did not accept the words 'free and voluntary consent' in place of the word 'consent' in section 375.
2. The joint committee reduced the age of marital rape from 15 years to 12 years. If this suggestion had been incorporated in the Amendment Act, it would have led to retrogressive leap to 1891, when the age of consent for marital rape was 12 years.
3. Though the Committee inserted section 376A to acknowledge the rape cases of judicially separated wife, it diluted the punishment up to two years imprisonment only. The Committee took that this could help in re-conciliation between spouses.

However, the Bill took almost three years to be introduced in Lok Sabha, which can be considered as a reflection on the seriousness of the Government's approach towards it.

The Criminal Law (Amendment) Act 1983

In 1983, after being debated in Lok Sabha for three days and in Rajya Sabha for two days, the Bill finally received President's assent on 25 December 1983.⁶⁵ The main features of the Criminal Law (Amendment) Act 1983, are as follows:

1. The Act for the first time recognized the existence of aggravated forms of rape, viz, rape of minor, gang rape, rape of a pregnant woman, custodial rape committed by a police officer, public servant, a person on the management or staff of jail, remand home, women's or children's home, hospital, etc. It also provided enhanced punishment under section 376(2) for cases of aggravated rape.⁶⁶
2. The Act also distinguished the rape of a judicially separated wife under section 376A and provided for punishment up to 2 years along with imposition of fine.⁶⁷
3. The Act also provided for mandatory minimum punishment which is seven years under section 376(1) in general rape cases along with imposition of fine. Section 376(2) took care of aggravated rape cases and provided a mandatory minimum of 10 years rigorous imprisonment along with the imposition of fine.⁶⁸
4. A new clause 'fifthly' was added to section to section 375, which made the consent of a woman of unsound mind or the consent, which is given under intoxication or administration of some stupefying or unwholesome substance, irrelevant against a rape charge.⁶⁹
5. Section 327, CrPC, was amended to include sub-sections (2) and (3). Clause (2) provided that in case of inquiry into and trial under sections 375, 376, 376A, 376B, 376C and 376D shall be conducted in camera. Clause (3) prohibited the printing and publication of any matter in relation to the proceedings covered under clause (2), without the previous permission of the court.⁷⁰

A new section 228A was inserted in the IPC, which made the disclosure of identity of rape victim penal except under permission granted for publication by the victim. The officer in charge of a police station or the police officer investigating such case can also give permission by a written order of such publication.⁷¹

In the Act, all recommendations of the 84th Law Commission Report regarding the provisions relating to evidence were not accepted, but for the provisions relating to burden of proof, which was accepted partly. To this effect, a new section 114A⁷² was inserted in the Evidence Act, which shifted the burden of proof on the accused in aggravated rape cases covered under section 376, IPC. A few changes were made in the First Schedule to the CrPC, which made the offence of rape cognizable and non-bailable. Marital rape remained non-cognizable and bailable. The offence under section 228A was also made cognizable and bailable. The offence under section 376, B C, and D are cognizable and bailable but no arrest can be made without a warrant or without an order of a magistrate.⁷³

The age of consent is 16 years in general rape case, 15 years in marital rape cases and in the case where the victim is below 12 years section 114A of Evidence Act is applicable. The position of wife remained same in the amendment of 1983 as it was in 1891 except for the three years increase in the age of consent in marital rape cases.⁷⁴ Thus, the offence of marital rape of woman over 15 years still remains unrecognized by the IPC.

Flavia Agnes has observed⁷⁵ that the 1983 Act was an inadequate answer to the campaign for change in rape laws and what started with a bang ended in a whimper.⁷⁶ But at the same time, the Act was welcomed as a progressive step and it symbolized the beginning towards future changes.⁷⁷

The 156th and 172nd Law Commission Report

Despite several progressive changes introduced by the 1983 Act, there remain many lacunae in the existing law. To fill the gaps, the National Commission for Women made suggestions, which were considered by the Law Commission in its 156th Report on Indian Penal Code.⁷⁸ The main recommendations of the 156th Report are as follows:

1. The Commission was of the view that the offence of rape should be retained in the IPC subject to a few modifications.
2. The Commission recommended clause 'thirdly' to section 375, IPC, be modified to include words - 'or of any other injury'. These words expand the scope of the clause to provide for the situations of rape by persons in position of trust, authority and guardianship or of economic or social

dominance. The Commission was of the view that such change will cover cases of incestuous abuse where the victim is totally dependent upon the offender.⁷⁹

3. The Commission recommended that the age limit prescribed in the clause 'sixthly' to section 375 IPC, be raised to 18 years from the existing 16 years.⁸⁰
4. The Commission did not endorse the view of the NCW that the age limit for wife in the Exception to section 375 IPC, should be raised.⁸¹

In a move to rectify these lacunae, an NGO, Sakshi, approached the Supreme Court of India for directions concerning the definition of the expression 'sexual intercourse', as contained in section 375 IPC.⁸² The Supreme Court directed the Law Commission to examine the issues involved. In response to this order of the Hon'ble court, the Law Commission brought forth its 172nd report on review of rape laws⁸³ in 2000. The main recommendations of the 172nd Report of Law Commission are as follows:

Substantive Law

1. The Commission strongly recommended making the provisions of rape gender neutral because not only women and girls, but young boys are also subjected to forced sexual assaults, which cause no less psychological trauma to a boy than a girl.⁸⁴
2. The Commission felt that it was necessary to include under the definition of rape not just penile penetration but penetration of any other part of the body (like finger or toe) or any other object. The modified explanation makes it clear that penetration to an extent is sufficient to constitute rape.⁸⁵
3. The Commission retained the marital exception to rape though Sakshi wanted its deletion. The Commission found it to be in excessive interference with the marital relationship, but raised the age of wife from 15 to 16 years.⁸⁶
4. The Commission has proposed the addition of a new proviso to section 376 IPC providing that when sexual assault is committed by the father, brother, grandfather or any other person in position of trust or authority towards that person the punishment should be severe.⁸⁷
5. For aggravated minor rapes, the Commission raised the age of the victim from 12 to 16 years.⁸⁸
6. The Commission has retained both 'adequate and special reasons clause' to section 376 IPC.
7. Retaining section 376 IPC, rape by husband during judicial separation, the Commission enhanced the minimum punishment as not less than two years but which may extend to seven years.⁸⁹
8. Retaining sections 376B, 376C, 376D, the Commission recommended that an explanation should be added which cover all types of sexual intercourse, as described above for section 375.⁹⁰
9. The Commission recommended the insertion of a new section 376 E which gives the definition of 'unlawful sexual contact' as including many other acts of sexual abuse eg, touching directly or indirectly, with a part of body or an object to any part of the body of another person.⁹¹ The section also covers sexual harassment at the work place.
10. The Commission recommended the deletion of section 377 IPC, as in the light of the proposed modifications, it will not be required.⁹²
11. The Commission has reiterated the suggestions made in the 84th Law Commission Report that a new section 166A⁹³ should be inserted in the IPC. The proposed section punishes a public servant who knowingly disobeys the law prohibiting him for requiring the attendance at any place of any person for the purpose of investigation into any offence or during the course of conduct of investigation, and such an act results in prejudice to another person.

The Code of Criminal Procedure 1973

1. The Commission recommended that sub-sections (3) and (4) be inserted in section 160, CrPC to the effect that the statement of the victim shall be recorded by a female police officer, in case a female police officer is not available, by a female government servant available in the vicinity and in case a female government servant is not available, by a female authorized by an organization interested in the welfare of women or children. Where either of these alternatives are not available, the officer in charge of the police station shall record the statement of the victim in presence of her relative.⁹⁴
2. Substitution of the proviso to sub-s (1) of s 160, CrPC, was also recommended for raising the age limit from 15 years to 16 years.⁹⁵
3. The proviso to sub-s (1), CrPC, should provide for recording of the statement of the victim. In presence of one of her relatives of her choice, who shall not interfere with the recording of the statement.⁹⁶

4. The Commission recommended the insertion of a new section 164A, CrPC, for medical examination of the victim with her consent, by a medical practitioner, during investigation, so that the valuable medical evidence is not destroyed due to the delay etc.⁹⁷
5. The Commission also recommended the insertion of a new s 53A, CrPC, to provide for the medical examination of the accused without delay.⁹⁸
6. The Commission recommended strongly that the proviso to s 273, CrPC be modified, so that the minor victim is not confronted by the accused while at the same time ensuring the right on the accused to cross-examine.⁹⁹

Indian Evidence Act 1872

1. The Law Commission recommended the insertion of s 53A, which provides that where consent of the victim is in issue, her past sexual experience with any person will not be RELEVANT.¹⁰⁰
2. The Commission was of the view that s 146(4) should be inserted, prohibiting the questions regarding general character of the victim.¹⁰¹

The Code of Criminal Procedure (Amendment) Act, 2005.

The Amendment Act of 2005 provides the provisions for the medical examination of the rape victim and the accused which are as follows:

1. The newly inserted s 164A¹⁰² contemplates the medical examination of the rape victim within 24 hours of the receiving the information relating to commission of rape. Such medical examination is to be done by registered medical practitioner employed in a hospital run by the Government. If such a doctor is not available, then medical examination of the victim can be conducted by another registered medical practitioner. In such a case, with the consent of the victim or to the other person competent to give consent on her behalf.
2. The new additional clause to section 176, CrPC, Provides for a case where rape is alleged to have been committed on a woman while such woman is in custody of the police officer or any other custody authorized by the court, under CrPC, an inquiry shall be held by the Judicial Magistrate or Metropolitan Magistrate having local jurisdiction over the case.¹⁰³ The inquiry will be in addition to the police investigation.¹⁰⁴
3. Another newly inserted provision section 53A CrPC, provides for the medical examination of the accused in the rape case by medical practitioner practiced in the government hospital or by any other medical practitioner who is acting on the request of the police officer not lower than the rank of a sub-inspector.¹⁰⁵ The section further states that it will be lawful for such medical practitioner or any other person acting in good faith and under his direction to use such force as is reasonably necessary for the purpose of medical examination of the accused.¹⁰⁶

The penal provisions relating to rape in IPC witnessed five amendments since their initial enactment in 1860, but the law has been hardly able to make even a dent in the societal structure responsible for such violence. Various lacunae have still been embodied in the criminal justice system which makes the rape law more or less inefficacious.

The Criminal Law (Amendment) Act, 2013

The Criminal Law (Amendment) Act, 2013 was passed by the Lok Sabha on 19 March 2013, and by the Rajya Sabha on 21 March 2013, which provides for amendment of Indian Penal Code, Indian Evidence Act, and Code of Criminal Procedure, 1973 on laws related to sexual offences. The Bill received Presidential assent on 2 April 2013 and came into force from 3 April 2013. It was originally an Ordinance promulgated by the President of India, Pranab Mukherjee, on 3 April 2013, in the light of the protests in the 2012 Delhi gang rape case.

On 16 December 2012, a female physiotherapy intern was beaten and gang raped in Delhi. She died from her injuries thirteen days later, despite receiving treatment in India and Singapore. The incident generated international coverage and was condemned by the United Nations Entity for Gender Equality and the Empowerment of Women, who called on the Government of India and the Government of Delhi "to do everything in their power to take up radical reforms, ensure justice and reach out with robust public services to make women's lives more safe and secure". Public protests took place in Delhi, where thousands of protesters clashed with security forces. Similar protests took place in major cities throughout the country.

Six days after the incident, on 22 December 2012, the central government appointed a judicial committee headed by J. S. Verma, a former Judge of Supreme Court, to suggest amendments to criminal law to sternly deal with sexual assault cases. The committee, which also included retired judge Leila Seth and leading advocate Gopal Subramaniam, was given a month to submit its report. The Committee submitted its report within 29 days, on 23 January 2013, supposedly after considering the 80,000 suggestions and petitions received by them during that same period from the public in general and particularly from jurists, lawyers, NGOs and women's groups. The report indicated that failures on the part of the Government and Police were the root cause behind crimes against women. Major suggestions of the report included the need to review AFSPA in conflict areas, maximum punishment for rape as life imprisonment and not death penalty, clear ambiguity over control of Delhi Police etc.

The Cabinet Ministers on 1 February 2013 approved for bringing an ordinance, for giving effect to the changes in law as suggested by the Verma Committee Report. According to former Minister of Law and Justice, Ashwani Kumar, 90 percent of the suggestions given by the Verma Committee Report have been incorporated into the Ordinance. The ordinance was subsequently replaced by a Bill with numerous changes, which was passed by the Lok Sabha on 19 March 2013.

Changes in law

The most important change that has been made is the change in definition of rape under IPC. Although the Ordinance sought to change the word *rape* to sexual assault, in the Act the word 'rape' has been retained in Section 375, and was extended to include acts in addition to vaginal penetration. The definition is broadly worded with acts like penetration of penis, or any object or any part of body to any extent, into the vagina, mouth, urethra or anus of another person or making another person to do so, apply of mouth or touching private parts constitutes the offence of sexual assault. The section has also clarified that penetration means "penetration to any extent", and lack of physical resistance is immaterial for constituting an offence. Except in certain aggravated situations the punishment will be imprisonment not less than seven years but which may extend to imprisonment for life, and shall also be liable to fine. In aggravated situations, punishment will be rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

A new section, 376A has been added which states that if a person committing the offence of sexual assault, "inflicts an injury which causes the death of the person or causes the person to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean the remainder of that person's natural life, or with death." In case of "gang rape", persons involved regardless of their gender shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life and shall pay compensation to the victim which shall be reasonable to meet the medical expenses and rehabilitation of the victim. The age of consent has been increased to 18 years, which means any sexual activity irrespective of presence of consent with a woman below the age of 18 will constitute statutory rape. Certain changes have been introduced in the CrPC and Evidence Act, like the process of recording the statement of the victim has been made more victim friendly and easy but the two critical changes are:

1. the 'character of the victim' is now rendered totally irrelevant, and
2. there is now a presumption of 'no consent' in a case where sexual intercourse is proved and the victim states in the court that she did not consent.

Rape

Section 376

A man is said to commit rape if he

1. 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
2. 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
3. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any ~ of body of such woman or makes her to do so with him or any other person; or
4. 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 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 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.’

Punishment for Rape.

Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

Whoever,—

being a police officer, commits rape—

within the limits of the police station to which such police officer is appointed; or in the premises of any station house; or

on a woman in such police officer’s custody or in the custody of a police officer subordinate to such police officer; or

being a public servant, commits rape on a woman in such public servant’s custody or in the custody of a public servant subordinate to such public servant; or

being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women’s or children’s institution, commits rape on any inmate of such jail, remand home, place or institution; or

being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

commits rape during communal or sectarian violence; or

commits rape on a woman knowing her to be pregnant; or

commits rape on a woman when she is under sixteen years of age; or

commits rape, on a woman incapable of giving consent; or

being in a position of control or dominance over a woman, commits rape on such woman; or

commits rape on a woman suffering from mental or physical disability; or

while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life, and shall also be liable to fine.

Explanation-- For the purposes of this sub-section,—

“armed forces” means the naval, military and air forces and includes any member of the Armed Forces constituted under any Law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government!, or the State Government;

“hospital” means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

“police officer” shall have the same meaning as assigned to the expression “police” under the Police Act, 1861;

“women’s or children’s institution” means an institution, whether called an orphanage or a home for neglected women or children or a widow’s home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

Punishment for causing death or resulting in persistent vegetative state of victim.

Section 376A: Whoever, commits an offence punishable under sub-section (1) or sub-section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life, or till death.

Sexual intercourse by husband upon his wife during separation

Section 376B: Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Explanation.—In this section, “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

Sexual intercourse by person in authority.

Section 376C: Whoever, being—
in a position of authority or in a fiduciary relationship; or

1. a public servant; or
2. superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women’s or children’s institution; or
3. on the management of a hospital or being on the staff of a hospital, abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine.

Explanation 1. In this section, “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

Explanation 2. For the purposes of this section, Explanation 1 to section 375 shall also be applicable.

Explanation 3. “Superintendent”, in relation to a jail, remand home or other place of custody or a women’s or children’s institution, includes a person holding any other office in such jail, remand home, place or institution by virtue of which such person can exercise any authority or control over its inmates.

Explanation 4. The expressions “hospital” and “women’s or children’s institution” shall respectively have the same meaning as in Explanation to sub-section (2) of section 376.

Gang rape

Section 376D. Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person’s natural life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim.

Provided further that any fine imposed under this section shall be paid to the victim.

Punishment for repeat offenders.

Section 376E: Whoever has been previously convicted of an offence punishable under section 376 or section 376A and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person’s natural life, or with death.¹⁰⁷

All history attests that man has subjugated woman, to minister to his sexual pleasure, to be instrumental in promoting his comfort... He has done all he could do to debase and enslave her mind and now he looks triumphantly on the ruin he has wrought, and says the being he has thus injured is his inferior.¹⁰⁸ Ever since the inception of this world, women, irrespective of race, religion or region, have acquired a secondary status. They have been treated as mere chattels. Rape, one of the gravest offences known to mankind, rests on this idea of inferiority. It originated to safeguard the 'masculine pride in the exclusive possession of a sexual object'.¹⁰⁹

As Susan Brownmiller asserts:¹¹⁰

The ancient patriarchs who came together to write their early covenants has used the rape of a woman to forge their own male power-how then they could see rape as a crime of man against women? Women were wholly owned subsidiaries and not independent beings. Rape could not be envisioned as a matter of female consent or refusal: nor could a definition acceptable to males be based on a male-female understanding of a female's right to her bodily integrity. Rape entered the law through the backdoor, as it were, as a property crime of man against man. Woman, of course, was viewed as the property.

The above proposition, though true of other civilizations, did not match with the Indian scenario. The rape victims in India are still a poor lot. They have as yet not received the sympathetic treatment they deserve; rather they have time and again been discarded and ostracized for a wrong committed against them. The state, as well as its machinery has seriously failed in its task of providing care and protection to the hapless victims of such brutality. Either in terms of passing legislation or in terms of functioning of the concerned authorities, the state has only blatantly shown its inefficiency and ineffectiveness in arresting the problem and offering a solution. As per the recommendations of the Supreme Court of India in *Delhi Domestic Working Women's Forum v Union Of India*,¹¹¹ a criminal injuries compensation board is yet to be constituted. What results from such laxity is the dependence of the victims on their own resources, if any, to tide over the problem and/ or begging before the state authorities for any support which it may or may not provide. The need of the hour is to devise measures, by means of state legislation, whereby the victims are ensured the bare minimum of care and protection. To draw up an entire list of the facilities to be provided is quite a difficult task but the researcher might herein try to enumerate a list of certain basic facilities that may be accorded to them.

In the first place, compensation to victims of rape must be drawn up as a matter of right. Rape involves infliction of wounds on the body as well as the soul of the women. Hence, it requires years to recover from the traumatic experience. In fact, victims have opined that in most cases it is difficult to forget the nightmarish experience of rape. It overshadows the happiness of the entire life. Whether married or unmarried, a woman is traumatized forever; she suffers from anxiety, shock, intense fear, depression, suicidal tendencies, and post-traumatic stress disorder. Long-term effects also include disordered eating, sleep problems, sexual dysfunction and increased negative feelings. Apart from the psychological part, in forced or violent rapes, the victim may have severe injuries over her body. Recovery from such deep-seated mental as well as physical problems involves long-term treatment involving lakhs of rupees. The state must provide for payment of adequate compensation to the victim. Furthermore, payment of compensation should not be dependent on the conviction and/ or acquittal of the offender. In all cases where an allegation of the commission of such offence is made by the victim and it prima facie appears from medical reports and/or otherwise to the concerned authorities that such an act has taken place, payment of compensation may be ordered. Immediacy in payment of compensation is a dire requirement since much of its efficacy/need may be lost with the passage of time. Thus, a payment of money after two or five years of the incidence would be of no utility; rather, its immediate access would benefit the victim to tide over the physical as well as mental distress through proper medical/psychological care of treatment.

Determination of the quantum of compensation must be a matter of discretion for the court/board. However, in no case should it fall below the bare minimum fixed by the state or be a mere token amount for the satisfaction of the court and the accused. Having a regard to the heinousness of the crime, the court should be stern in ordering a hefty amount as compensation. The nature of injuries caused, the gravity of the injuries, the impact of the incident on the victim, the present situation of the victim etc, should be factors for the court to consider in the matter of fixation of compensation.

The next important aspect is the setting up of rape crises centers all over the country. These centers would operate as after care institutions for the victims as well as place of temporary stay and comfort. To be run primarily by NGOs with the financial assistance of the state governments, these centers would employ trained women as doctors, nurses, counseling experts, psychologists to enable the victims to tide over their physical problems and mental stress. Rehabilitation of the victim would be the final goal of

such institutions. While it may not be compulsory for all victims to take recourse to these centers and the facilities offered by them, those who desire and/or approach must necessarily be extended the services. The court may also, having regard to the condition of the victim in specific cases, direct that she be treated or kept at the centers for a substantial period of time.

India, being a tradition bound conservative society, rape victims are treated with much intemperance and brutality. There are several instances of rape victims being discarded by relatives and left to fend for themselves. It is also true that in India, most women are still brought up as homemakers, with little or no education to rescue them in times of distress. In such a scenario, one can well imagine the plight of the victim. With minimum education and no skills whatsoever, she is left with no alternative but to beg and/or die. To avert such misfortune, the state may provide for vocational training programs, financial assistance for small-scale business opportunities, etc. A slightly liberal and sympathetic approach from the part of authorities would help in devising better means vis-à-vis the victim.

However the one aspect, which has continued to bother the legislators and common man, is the increase in the number of such instances. However the number continued to rise, despite efforts by the legislators to make the laws more stringent. No reform can be successful unless it is accepted by the people at large. The societal attitude towards rape and the victims has not changed. Despite the latest amendments in the law, the rate of commission of the offence is increasing. Most alarming is the increase in the involvement of the juveniles in the commission of this crime.

The jurisprudential foundation of victim justice perspective has gained importance only in the recent years. The Indian criminal justice system is not victim oriented. The Indian judiciary has shown a mixed trend over the years. Decisions of the Supreme Court of India have had a remarkable impact on the victim justice movement. An increased sensitivity towards the plight of the victims is particularly noticeable in the landmark case of *State of Punjab v Gurmit Singh*.¹¹²

It has been left solely to the discretion of the courts to award compensation in individual cases to the victims. Since there is also disparity in this regard with some courts awarding huge amount as compensation while others not awarding any or little amounts. However, sadly enough much has to be done by the legislators on this front. Hence, each one of us must bear the moral responsibility of raising our voices against the occurrences of these vulgar incidents and support their ill-fated victims in all possible ways, so as to establish a society where women hood is respected with equal concern and sensitivity.

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