

# The Jurisprudential Evolution of Rape Sentencing in India-A critical analysis

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*Abstract*— Rape is one of the most terrible and vicious crimes against humanity, but it required a long time for it to be acknowledged as a violation of women's 'sexual autonomy' and 'bodily integrity.' Rape was only considered illegal when it involved the infringement of another man's property because women were mostly denigrated as objects for a long time in human history. The Latin expression 'reperere,' meaning to capture or acquire something, is where the term 'rape' originates. The term again implies possession. For the wrongdoings committed, the fathers or husbands used to receive compensation. This is recorded in the Code of Hammurabi, one of the earliest collections of laws ever written by mankind. It states that if a virgin was raped, the father would receive compensation and the victim of the crime would be married to the offender. But if the raped woman had married someone else, that made her adulterous, and both she and the rapist would face the death penalty. Since the Hebrews followed comparable codes and believed in the concept of 'an eye for an eye' severely, it was permissible for the father of the victim to rape the rapist's spouse in vengeance for the rape. Many of the early laws, though were awful but some of them tried to infuse the concept of consent. For example, pre-British English Celtic laws recognized rape of a woman as a crime against her and distinguished between rape committed without consent and rape committed while intoxicated. In this article, the researcher attempts to critically analyze the jurisprudential evolution of rape sentencing in India in the light of decided case laws and the legislative changes.

*Index Terms*—Rape sentencing, sentencing, sexual offences, deterrence.

**I. INTRODUCTION** Rape is one of the most barbaric of all crimes. In the initial part of recorded human history, rape was considered simply as a crime against human property as women were regarded as "chattels" or property of men. Over time, as societal standards and opinions evolved, the idea that rape was a crime underwent significant changes. Indian laws regarding the subject of rape originated in the English common law, and the IPC first mentioned anti-rape provisions in 1860. Nonetheless, the prejudicial attitude of colonial judiciary towards the victims is demonstrated by the observations made by the seventeenth-century jurist Sir Matthew Hale on rape:

"an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent."

Since the trial courts presumed the woman might be exaggerating the facts, they focused more on proving the victim's guilt than the accused's guilt. The emphasis on her previous sexual activity or her chastity played a significant role in the case's verdict. As a result of the colonial inaccuracies in understanding the rules and regulations of both Hindu and Mohammedan laws, still, its effect can still be seen in the modern Indian context. One of the first Sanskrit writings to be interpreted into English was the Manusmṛiti, which had a profound impact on British imperial perceptions regarding ancient India. Because of this, early India was only perceived as a place of philosophical speculative thinking of Manu's codes of conduct, the chastity-obsession of Sita and Anasūya, and the Sati system. As it was similar to the Victorian Puritanism that the colonial administration introduced, this selective understanding of Indian tradition benefited the British administration in the 19th century. Following Thomas Babington Macaulay's direction, the Indian Penal Code (henceforth IPC) was drafted in 1860 with a strong Puritanical view regarding the female body. Multiple violent cases against women that resulted in numerous significant legislative modifications, ultimately made the anti-rape laws stronger and broader over the years. The expansion of the Feminist Movements raised the consciousness and altered the narrow social views, ultimately gave rise to substantial legislative changes. Numerous instances including the rape incidents in Mathura, Delhi, Unnao, and Kathua—led to changes in the criminal codes in 1983, 2013, and subsequently in the year 2018. The Justice Verma Committee (submitted its report on January 23, 2013), which was established in the wake of the Delhi rape case, offered multiple suggestions for modifications to the terminologies and penalties of anti-rape laws. The modifications made to the Indian Penal Code's anti-rape provisions as a result of these amendments are some of the substantial legal areas explored. It is crucial to highlight that in India women are only recognized as victims of rape and men are recognized as those who perpetrate it. Section 375 of the IPC, 1860 defines rape. Explanation 2 defines 'consent' as the woman's "unequivocal, voluntary, verbal or non-verbal communication" to get involved in an act of sexual behaviour. The prosecution continues to have the burden of establishing beyond any reasonable doubt that the rape occurred against her consent.

## II CRIMINAL LAW AMENDMENT, 1983

With the Mathura rape case, *Tuka Ram and Another v. State of Maharashtra*, the Indian Penal Code underwent significant modifications. The first known reform to the laws against rape came in the year 1983 as a result of the Mathura rape case of 1972, which occurred when two policemen sexually assaulted an Adivasi girl while she was in custody. Demonstrations and protests led to the creation of Section 114(A) of the Indian Evidence Act in 1983. Before this case, our system of justice had completely disregarded rapes committed by public servants. Consequently, the term 'custodial rape' was created to refer to rapes that occur when women are in the custody of public servants. Furthermore, this amendment forbade the 'defamation' of rape victims in court proceedings as well as disclosure of their identity. This amendment is the reason why victims of rape are now identified by pen names like 'Nirbhaya.' The Parliament attempted to create the rape-laws more pragmatic through the Criminal Law Amendment Act, 1983, but it was unable to put an end to the crime, that was consuming society and expanding like a forest fire.

## III AMENDMENT OF INDIAN EVIDENCE ACT, 2002

According to a PIL (Public Interest Litigation) initiated by a non-governmental organization Sakshi, women are hesitant to come forward with reports of sexual assault because the accused parties always attempt to repress their personal space during the time of court trial. Not considered as someone who has experienced severe physical and psychological trauma and who requires special care and protection, the victims are subdued by the defense lawyers. The Indian Supreme Court recommended the Law Commission to reexamine the laws pertaining to rape and to suggest any necessary modifications. They pointed out that Section 155(4) of the Indian Evidence Act, 2002 allowed the accused party to use the victim's previous sexual acts as evidence of her immoral character. After this clause was amended in 2002, it became illegal to have the victims cross-examined in such a manner.

## IV PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

The number of child rape cases was on the rise over time, and a new justice system was urgently required to handle these instances. Prior to that, cases of child rape were classified as statutory rape, which made having sex with a female younger than sixteen absolutely illegal, regardless of consent. In addition, the Act stipulated that such cases to be resolved promptly within a year. The Act is gender-neutral, and prohibits child pornography, aiding and abetting child sexual abuse, and sexual harassment. The Hon'ble SC recently in *Nawabuddin versus State of Uttarakhand* expressed concern while addressing the vulnerability of a girl child. In Para 18 of the judgment, the Apex Court described different modes of exploitation of a girl child which includes sexual assault/abuse by stating: "In our view, exploitation of children in such a manner is a crime against humanity and the society. Therefore, the children and more particularly the girl child deserve full protection and need greater care and protection whether in the urban or rural areas."

## V VISHAKA GUIDELINES

In spite of the modifications brought by the Criminal Amendment Act of 1983, the hideous act of rape continued largely unchanged. In 1992, a woman whose name is Bhanwari Devi, who worked for the Rajasthan State Government's Women Development Programme, was sexually harassed and sexually assaulted at work. This incident sparked a nationwide protest. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 was established on guidelines issued by the Court on August 13, 1997, in response to a writ petition filed by Vishakha, a women's rehabilitation group, seeking justice for Bhanwari Devi. The guidelines included provisions for a secure working atmosphere and laid down the duties and responsibilities of employers.

## VI CRIMINAL LAW (AMENDMENT) ACT, 2013

The 2012 horrific rape of a paramedical student in Delhi on a moving bus, which resulted in her injuries and eventual death, sparked outrage across the country and raised awareness about inadequate rape laws. Criminal Law (Amendment) Act, 2013, was based on public outrage and was the outcome of the efforts taken by multiple non-governmental organizations. The task of recommending current criminal laws was given to a Commission headed by Justice J.S. Verma. During a span of 29 days, the Committee produced a 172-page report outlining its recommendations for implementing stringent anti-rape laws, as well as recommended significant modifications to the criminal justice system. This Bill was approved by the Lok Sabha and Rajya Sabha on March 19 and 21, correspondingly, and the President signed it into law on April 2, 2013. A harsher stance against sexual harassment and rape offenses was taken by the Criminal Law (Amendment) Act of 2013, which carried a maximum sentence of imprisonment for such offenses and even added the death penalty for rape. The crime of attacking someone with acid now carries an imprisonment term of ten years. According to some critics, the inability of the Criminal Law (Amendment) Act, 2013 to make marital rape a crime was its gravest flaw. The Criminal Law (Amendment) Act of 2013 established several changes to Indian laws and investigation procedures pertaining to sexual crimes including rape. The most significant of which was the expansion of the definition of rape and the implementation of more severe penalties. The statutory definition of rape was expanded under Section 375 of the Indian Penal Code (IPC) to include penetration in other ways, including oral, hand, or any other foreign object. Furthermore, Section 376 was amended to increase the severity of the penalties for rape. Rape was now punishable by a minimum of 7 years in prison, a minimum that was later increased to ten years under the revised provision. A minimum of twenty years in prison was the penalty for rape that left the victim dead or in a vegetative state.

## VII JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015

In the Nirbhaya case, which is frequently regarded as the most horrific of all, one of the rapists was minor. In 2015, he was released from a reform centre after being there for just three years, whilst the others received death sentences and were executed. In response to the public fury, the Juvenile Justice (Care and Protection of Children) Act, 2015, also known as the JJ Act, was substantially amended to allow for the trial of minors who are accused of 'heinous crimes'. 'Initial assessment of "juveniles in conflict with the law" is required by Section 15 of the Act, in accordance with the following kinds of requirements:

1. 'Juveniles' are defined as those who are above 16 but under 18 years.
2. The commission of a heinous offense as specified by Section 2(33) of the Act.

## VIII CRIMINAL LAW (AMENDMENT) ACT, 2018

Before Nirbhaya could receive justice, in 2018, another criminal law amendment came to light which had its origins in the rape cases of Unnao and Kathua, in which minor girls were the victims. The Criminal Law (Amendment) Act, 2018 went into effect in 2018 and modified the Indian Penal Code, 1860 by introducing Section 376(AB), which adds another class of penalty for rape of women to the already-existing two, and by inserting additional sections such as Section 376(DA) and Section 376(DB). There was an omission of Section 376(2)(i). Furthermore, the Indian Evidence Act, POCSO, and CrPC underwent modifications concurrently.

## IX BHARATIYA NYAYA SANHITA

On August 11, 2023, "The Bharatiya Nyaya Sanhita Bill, 2023" was introduced in the Lok Sabha with the intention of repealing and replacing the current IPC, 1860, with the inclusion of two other bills for replacing the Indian Evidence Act, 1872 and the Code of Criminal Procedure, 1973. The purpose of Chapter V of the Bill is to replace Chapter XVI of the IPC with Offenses Affecting the Human Body and provisions dealing with offenses related to marriage. The Bill includes two freshly introduced provisions, although it does not define or classify 'marital rape' as a crime. These are Section 69 (Sexual intercourse by employing deceitful means, etc.) and Section 70 (Gang rape). Section 70(2) of Bharatiya Nyaya Sanhita Bill says: "Where a woman under eighteen years of age 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 imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine, or with death." Moreover, The Bharatiya Nagarik Suraksha Sanhita, 2023 Bill now specifies that any girl child under 18 years of age who is raped by a group of people shall face a life sentence or death penalty (Section 70(2)).

**X AREAS TO BE ADDRESSED:** The anti-rape laws have undergone significant changes since 1860. Although there have been numerous legal improvements but the number of sex crimes has neither decreased nor completely stopped. Among the significant flaws in the current anti-rape laws some are discussed below:

1. The Nirbhaya Rape incident raised concerns about the criminal justice system as a whole because it took a span of seven years to provide justice. The citizens' reverence for the judiciary wanes when justice is delivered with such a long delay. The main shortcomings of this case were giving insignificant opportunities and absurd arguments that delayed capital punishment.
2. The laws that have developed as anti-rape laws are often focused on women and frequently serve as means for many women to falsely accuse innocent people. So that fair justice can be served, a positive change is needed by placing the burden of proof equally on both parties.
3. 'Passive submission' and 'consent' need to be distinguished precisely and unambiguously.
4. A few of the rape laws that require reconsideration and discussion are:
  - (i) expanding the definition of rape;
  - (ii) reducing the duration of rape proceedings; and
  - (iii) providing statutory consistency in the age of consent.
5. We must ensure the safety of the citizens by strengthening police departments. Furthermore, the inquiry process must be more impartial, reliable, and speedy.
6. Ironically, within the limits of a married bond, a woman is able to defend her right to life and liberty but not her body. Section 498-A till now has been used by marital rape victims, which only deals with 'cruelty' to defend themselves from the husband's perverse sexual conduct which is not adequate as there is no standard for measuring 'perversion' by the Courts within intimate spousal relation

**XI CONCLUSION** Since the introduction of rape laws in the Indian Penal Code 1860, they have undergone legal changes significantly. While several legislative reforms have been progressive in nature there are still many improvements needed to be made, such as making marital rape a crime. Even with the greatest of intentions, some laws, like the POCSO proved to be inadequate in the long run. It is observed as a trend in the development of rape laws in India that after a major rape case, shaking the nation at large, the government amends the rape laws in an effort to pacify the public and lessen the public anger. It is also a fact that many rape cases go unreported and unnoticed by the public because not every incident comes into the light. It is the right time to take a proactive and determined stance against this evil by effectively updating our laws rather than waiting for the next major instance.

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