



Revisiting Indian Rape Laws in the Wake of Kolkata Rape Case

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Abstract

Rape has always been considered as one of the most heinous and barbarous crimes of all time but still quite debatable to be defined as a 'crime against the bodily integrity and sexual autonomy of women.' Throughout most of the history women had no rights and were treated as mere property, therefore, rape was viewed as crime only in terms of property violation of another man.ⁱ

With the evolving time, there was shift in the cultural beliefs and norms which lead to the significant alterations as to the point of view for rape to be a crime. The Indian rape laws trace its origin in the English law and it was in 1860 when the anti-rape laws were first mentioned in IPC. But the seventeenth-century jurist Sir Matthew Hale's comment on rape as "an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent"ⁱⁱⁱ, shows the prejudiced attitude of colonial courts towards the victims. The assumption that the women may be lying became the reason because of which the trial courts were directed more towards proving the credit of the victim rather than proving the guilt of the accused.ⁱⁱⁱ It was focus on her past sexual relations or her virginity which determined the outcome of the case.

Eventually, the anti-rape laws strengthened over the decades because of some brutal cases that led to several major amendments in laws. The need for change in laws gathered momentum with the growth of the Women's Movement which brought about awareness and change in attitude of the society. The paper is an attempt to discuss cases of Mathura, Delhi, Unnao and Kathua which led to amendments of 1983, 2013, 2018 respectively in the country's criminal law regime. It also analyzes the recommendations of the Justice Verma Committee, duly constituted after the Delhi rape case to suggest amendments and reforms in the anti-rape laws. It looks closely into the several changes made in the definition and punishments of anti-rape laws. It focuses specifically on the changes brought about by these amendments in the rape laws under the IPC.^{iv} The paper also presents a detailed account of the recent Kolkata Rape Case. The author shall also make an attempt to elucidate on the provisions of newly enforced Bhartiya Nyaya Sanhita, 2023.^v

Keywords: *Indian, Rape Laws, Kolkata Rape Case*

The Kolkata Rape Case

The last time the nation experienced widespread demonstrations against sexual assault on women, it was in December 2012, following a vicious gang rape of a medical student in New Delhi. The state amended its criminal law regime in response to the social movement's demands for changes at that time.

Just like other families in West Bengal, the victim's family were waiting for a grand celebration as well. "We are a poor family and we raised her with a lot of hardship. She worked extremely hard to become a doctor. All our dreams have been shattered in one night," her 67-year-old father told. "This was to be the third year of our home Puja and she had plans to organise a bigger one this time. This was meant to be a special occasion as she would have completed her PG," her mother said. Considered a role model, both for her good academic scores and her soft-spoken manner, the 31-year-old trainee cracked both JEE and medical, a relative said. "She chose MBBS and qualified for the course at two state-run medical colleges. Eventually, she chose JNM Medical College Hospital in Kalyani. When she decided to pursue PG, she qualified at two medical colleges and picked RG Kar (which is about an hour's bus ride from her Sodepur home). She meant everything to us," she said.

On August 9, after a hectic schedule for 36 hours even without a break, she had fallen asleep on the platform of seminar's room and where she is sexually assaulted and murdered brutally by single or many employees of hospital. Fellow postgraduate and trainees who had come to the seminar room the next morning found her body in the seminar hall in a semi-nude state with her eyes, mouth, and genitals bleeding. Later she was declared dead and college authorities informed the family about her committing suicide. But in autopsy report the cause of death mentioned as unnatural death.

According to a senior officer on Saturday, police have detained a suspect, 33-year-old Sanjoy Roy, a civic volunteer for his alleged role in the death plot of a female postgraduate trainee doctor at the RG Kar Medical College and Hospital. The man who is the Kolkata doctor case suspect was an outsider with unrestricted access to the hospital's departments. Expanding on the Kolkata doctor case suspect's arrest, police mentioned about finding a broken piece of Bluetooth earphone that pointed them towards the offender. According to police, the suspect has responded contradictory whatever asked about his involvement. The suspects were placed under judicial detention for 14 days on Saturday by a Kolkata court. Sections 64^{vi} (rape) and 103^{vii} (murder) of the BNS have been used to accuse him.

Another Event Amid Chaos

Prohibitory orders around the R.G. Kar Medical College and Hospital in north Kolkata were extended till September 30, an officer said. The orders, which were first imposed on August 18, restrict gatherings of more than five people in the designated area. The restrictions were imposed amid protests over the said case at the hospital. 'The prohibitory orders issued under Section 163 (2) of BNSS' would also be in place at the Shyam bazar five-point crossing, besides the roads leading to the R.G. Kar hospital, said a notification.

"Carrying sticks, dangerous and lethal weapons are banned and any attempt to disturb peace and tranquillity will invite legal prosecution under Section 223 of the BNS," it said. As the provision is "Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, -

(a) shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance, or injury, to any person lawfully employed, be punished with simple

imprisonment for a term which may extend to six months, or with fine which may extend to two thousand and five hundred rupees, or with both;

(b) and where such disobedience causes or tends to cause danger to human life, health, or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both”

Rape: Provisions under the BNS, 2023

- **Section 63:** This Section defines the term ‘Rape’. It illustrates that “A man is said to commit rape if he—
 - 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
 - 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
 - manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus, or any part of body of such woman or makes her to do so with him or any other person; or
 - 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: —

1. against her will;
 2. without her consent;
 3. 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;
 4. 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;
 5. 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;”
 6. with or without her consent, when she is under eighteen years of age;
 7. when she is unable to communicate consent.”
- **Section 64:** ‘Section 64 of the BNS deals with punishment for rape’. *Section 64(1)* states that “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 ten years, but which may extend to imprisonment for life, and shall also be liable to fine.” whereas *Section 64(2)* states that “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 Government 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
- 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 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,"

“should be punished with rigorous imprisonment for a term not less than 10 years but which may extend to imprisonment for life, which should mean imprisonment for the remainder of that person's natural life and a fine”.

- **Section 65:** This Section highlights “punishment for rape in certain cases. *Section 65(1)* states that whoever commits an offence of rape on a woman under 16 years of age should be punished with rigorous imprisonment for a term not less than 20 years but which may extend to imprisonment for life, which should mean imprisonment for the remainder of that person's natural life, and a fine provided that such fine should be paid to the victim and should be a reasonable amount to meet the medical expenses and rehabilitation of the victim. On the other hand, *Section 65(2)* illustrates that whoever commits rape on a woman under 12 years of age should be punished with punishment mentioned in sub-section (1) or with death”.
- **Section 66:** “Whoever commits an offence of rape and causes the death of the woman or causes her to be in a persistent vegetative state should be punished with rigorous imprisonment for a term not less than 20 years but which may extend to imprisonment for life, which should mean imprisonment for the remainder of that person's natural life, or with death”.
- **Section 67:** “As per this provision, sexual intercourse by a husband with his wife during separation and without her consent should be punished with imprisonment for a term not less than 2 years but may extend to 7 years and also be liable to fine”

- **Section 68:** “This Section of BNS deals with sexual intercourse by a person in authority being in a position of authority or a fiduciary relationship, or a public servant, or superintendent or manager (of jail, remand home, women’s institution, or children’s institution or other place of custody established under any law), or on the management of a hospital or being on the staff of a hospital. It states that if a person in authority 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, should be punished with rigorous imprisonment for a term not less than 5 years but which may extend to 10 years and a fine”
- **Section 69:** “This section illustrates that if an individual who by deceitful means or by making a promise to marry a woman without any intention of fulfilling the same has sexual intercourse with her, such sexual intercourse does not amount to the offence of rape, should be punished with imprisonment which may extend to 10 years and should a fine”.
- **Section 70:** It deals with the punishments for ‘the offence of Gang rape’.
 - As per *Section 70(1)* of the BNS, “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 imprisonment for 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 sub-section shall be paid to the victim.”
 - As per *Section 70(2)* of the BNS, “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. 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 sub-section shall be paid to the victim.”

Apart from these provisions, the new law BNS, 2023 also defines punishment for repeated offenders for ‘an offence of rape’ under **Section 71**.

Mathura Rape Case to Delhi Rape Case

With the escalation in crime over the decades, there have been several amendments in the anti-rape laws. The infamous Mathura case created a nationwide uproar which eventually led to the ‘Amendment Of 1983’.

Tukaram And Ors v. State of Maharashtra in 1972, a teenage Adivasi girl named Mathura was alleged to be raped by two policemen while she was in their custody. When the matter reached the sessions court, the judge acquitted the policemen stating ‘that the prosecution had failed to prove its case.’ The court concluded “that she had sexual intercourse while at the police station but there was a world of difference between sexual intercourse and rape”. It further stated “that she was habituated of sexual intercourse” and thus ‘her consent was voluntary’. When the appeal went to High court, it convicted and sentenced the two accused and held that it was a case of "passive submission". It stated that "*the girl felt helpless in the presence of persons in authority...and inferred that her submission was a result of fear and therefore no consent in*

the eyes of law". However, the Hon'ble Supreme Court in its final verdict 'reversed the judgment and acquitted the policemen' on the grounds that "there were no marks of injury on the girl" and the "girl had raised no alarm" which indicated that the alleged intercourse was a "peaceful affair".

This verdict led to wide scale protest and the four professors Upendra Baxi, Raghunath Kelkar, Lotika Sarkar and Vasudha Dhagamwar wrote 'an open letter to the Chief justice of India' questioning the concept of "consent" in the judgment.⁷ In the letter they drew the distinction between submission and consent which stated, "*Consent involves submission; but the converse is not necessarily true. Nor is absence of resistance necessarily indicative of consent.*"

The letter resulted in the public outcry and a number of feminist groups were formed. A Mumbai based feminist group named Forum against Oppression of Women demanded a review of judgment. It led to mobilization of women's movement and coordinated demonstrations were held in Bombay, Delhi, Nagpur, Pune, Ahmedabad, Bangalore and Hyderabad.

Moreover, the increasing number of custodial rape cases such as the Rameeza Bee case and Maya Tyagi case sparked the debate about the need for change in the rape laws and this resulted the legal reforms with the passing of "***The criminal law (second amendment) Act, 1983***". The act brought about significant changes, and sections 376-B, 376-C and 376-D were inserted for custodial rape. Section 114A was inserted in 'The Indian Evidence Act, 1872', under which if a girl in her testimony contends that 'there was no consent given by her then the court shall presume the same and the onus to prove that there was consent lies on the accused'. The amendment further introduced section 228A in the IPC which dealt with the prohibition of disclosure of the identity of the victim.¹²

In the coming years, the court gave some progressive decisions on 'rape laws' and emphasized that the cases need to be dealt with utmost sensitivity. 'The Supreme Court of India' in the case of '*The State Of Punjab v. Gurmit Singh & Ors*¹³' on 16 January, 1996 stated, "*Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female.*" Further, 'owing to the growing criticism of the treatment of the victims in court during their cross-examination', the court was of the opinion that, "*While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime*"

The Nirbhaya Rape Case

In 2012, the gruesome Delhi rape case shook the whole country with the brutal gang rape of a young woman who was named Nirbhaya by media for not revealing her identity as per section Section 228A (2) of IPC. Brutally gang raped by six men on a bus in, and her internal organs were pulled and her private parts were mutilated in a very inhuman manner that caused grave injuries which ultimately annihilated her life. She was treated as an object, an article for experimentation and prey to the pervert proclivity of the six. "*The attitude, perception, the bestial proclivity, inconceivable self-obsession and individual centralism of the six made the young lady to suffer immense trauma and, in the ultimate eventuate, the life-spark that moves the bodily frame got extinguished in spite of availing of all the possible treatment that the medical world could provide.*" On 29 December 2012, she succumbed to her injuries and died at a Singapore hospital.

Justice Verma Committee Report

The national level demonstration and massive public outrage after the Nirbhaya case led the government to act quickly and as a result 'Justice J.S. Verma committee' was set-up to suggest

amendments to criminal laws. The committee made recommendations on all kinds of sexual crimes.

The Committee recommended that 'the exception for marital rape' should be removed and stated, "*the relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity*". It made recommendations to 'the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Bill, 2012' and criticized the existing mechanism of Internal Complaints Committees stating that it defeated the purpose of 'the Bill' and recommended setting up of an employment tribunal.

The committee stated that "*There are instances where the victim/survivor is still in a position from which she can, with some support from society, overcome the trauma and lead a normal life. In other words, we do not say that such a situation is less morally depraved, but the degree of injury to the person may be much less and does not warrant punishment with death.*" "It took into consideration the view of the Working Group on Human Rights" which suggested that "*the murder rate has declined consistently in India over the last 20 years despite the slowdown in the execution of death sentences since 1980.*" Hence, 'the committee was of the opinion that the introduction of death penalty for rape may not have a deterrent effect'. The committee also took into account the views of majority of scholars, leaders of women's organizations, and other stakeholders who strongly submitted that "*the seeking of death penalty would be a regressive step in the field of sentencing and reformation*". However, they enhanced the punishment to mean the remainder of life.

The Committee further recommended the insertion of certain offences such as Voyeurism, Stalking and Intentional Touching in the Penal code. It also reviewed the "two-finger test" during 'the medical examination of the victim' and suggested the scrapping of the test by stating that "*the size of the vaginal introitus has no bearing on a case of sexual assault, and therefore a test to ascertain the laxity of the vaginal muscles which is commonly referred to as the two-finger test must not be conducted. On the basis of this test observations/ conclusions such as 'habituated to sexual intercourse' should not be made and this is forbidden by law*".

The committee emphasized on the importance of 'gender equality' and also drafted a separate 'Bill of Rights for women' stating "*Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of violence, exploitation, cruel, inhuman or degrading punishment and treatment targeting women are prohibited*".

The Criminal Law Amendment Act 2013

Earlier, the law was restricted to only penile-vaginal intercourse but the new amendment substituted the section 375 of IPC and widened its ambit by including any bodily penetration as rape. The amended section 375 of IPC thus stated that 'a man is said to commit rape if

"there is penetration of his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or making her to do so with him or any other person; or insertion, 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 making her to do so with him or any other person; or manipulating any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or making her to do so with him or any other person; or applying his mouth to the vagina, anus, urethra of a woman or making her to do so with him or any other person."

Further an explanation was added in the section which defined consent as "*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*". Also, 'the age of consent was raised from 16 to 18 years'.

The scope of section 376(2) was expanded to include “rape committed by a member of armed forces deployed in an area by the Central or a State Government in such area. The 376 A was inserted according to which if rape caused death or persistent vegetative state of the victim then he shall be punished with rigorous punishment for not 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. The section 376 B was inserted which made sexual intercourse by husband upon his wife during separation punishable by the term of 2 years which may extend to 7 years and shall also be liable to fine. Section 376 C dealt with sexual intercourse by a person in authority like ones in fiduciary relationship or public servant or manager of a jail or hospital and made it punishable by term of 10 years which may extend to life imprisonment and shall also be liable to fine. A separate section 376 D was introduced which dealt with the offence of gang rape and made it punishable with the rigorous imprisonment for a term of 20 years which may extend to life imprisonment and also fine. Punishment for repeat offences was made under section 376 E which made repeated offenders punished with life imprisonment or death”.

Conclusion

As per new law, ‘an offence of rape is said to be committed if a man with or without consent commits rape of a woman under 18 years of age which was 15 years in the Indian Penal Code, 1860’. Also, the BNS, 2023 defines ‘punishment for rape of women under 12 years and 16 years into a single section that is Section 65’. Overall, the Bharatiya Nyaya Sanhita, 2023 ensures to protect and safeguard the lives of Indian citizens as well as improves fairness and transparency in the legal process.^{viii}

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ⁱⁱ Elizabeth Kolsky, *"The Body Evidencing the Crime": Rape on Trial in Colonial India, 1860-1947*, 22 GENDER & HISTORY, 111 (2010) https://www.researchgate.net/publication/229448954_The_Body_Evidencing_the_Crime'_Rape_on_Trial_in_Colonial_India_1860-1947.

ⁱⁱⁱ *Ibid.*

^{iv} <https://articles.manupatra.com/article-details/An-Extensive-study-of-Rape-Laws-in-India>.

^v Secs. 63-71.

^{vi} 'Section 64 of the Bharatiya Nyaya Sanhita deals with punishment for rape'. Section 64(1) states that "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 ten years, but which may extend to imprisonment for life, and shall also be liable to fine." whereas Section 64(2) states that "Whoever, -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 being in a position of control or dominance over a woman, commits rape on such woman; 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, should be punished with rigorous imprisonment for a term not less than 10 years but which may extend to imprisonment for life, which should mean imprisonment for the remainder of that person's natural life and a fine".

^{vii} 'Section 103 of the Bharatiya Nyaya Sanhita deals with Punishment for murder'

"(1) Whoever commits murder shall be punished with death or imprisonment for life, and shall also be liable to fine.

(2) When a group of five or more persons acting in concert commits murder on the ground of race, caste or community, sex, place of birth, language, personal belief, or any other similar ground each member of such group shall be punished with death or with imprisonment for life, and shall also be liable to fine."

^{viii} <https://www.freelaw.in/legalarticles/Punishment-for-Rape-under-the-Bharatiya-Nyaya-Sanhita-2023->