

## **RAPE AND INDIAN PENAL CODE: A WAY FORWARD FOR A GENDER - JUST SOCIETY**

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The Indian Penal Code which was drafted by Lord T.B. Macaulay and his law commissioners in 1860 criminalizes rape as a coercive non consensual sexual intercourse with a woman based on the existing sexual mores in India that time. Macaulay devoted clauses 359 and 360 to the offence of rape. A man is said to commit rape except in the cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions. Firstly 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 the fear of death or hurt and fourthly with her consent when man knows her consent is given because she believes that he is different man to whom she is or believe herself to be married and fifthly with or without her consent when she is under nine years of age. As an exception, it is clear in the code that Sexual intercourse by a man with his wife is no case rape. If she was not married, she had no right to give her consent to any person whatsoever, the fact that she gave it was sufficient to acquit a man.

In the rape cases the courts usually used to take into consideration of the details of the victims profile such as her age, character and past history in determining the severity of punishment and to obtain justice. Rape as a social phenomenon, where socio-cultural factors, gender roles, socialisation and social stratification reflects the meaning, definitions and impact, the rape laws reflects undesirable statuesquo and on-equalitarian system of justice when arguing that poor woman is less sensitive because she is less able to protect. Women of the low caste in India, whose economic status was as low as their social status, did not find it easy to evade assaults on them by men of more powerful social groups. Consent is relevant to rape and if the woman's consent be proved, then there is no rap Women as considered capable of giving her consent at very young age and high caste woman's violations by low caste men as the most heinous rapes, requiring strictest punishment. While drafting the sections of rape, abduction, the British law commissioners had assumed Indian morality to the principles professed by upper caste men.

1861, Parsi reformer Malabari campaigned to increase the minimum age of consent for married and unmarried girls from 10 to 12. Medical reports of phulmonee claimed that she died of violent sexual penetration and cases of premenstrual cohabitation and assault reported by medical doctors . As a result, Criminal Law amendment Act , which revised sec 375 of the IPC. The sections 375 and 376 of the IPC which deals with the offense of rape remained unchanged in the statute books, until Mathura rape case and the amendments thereafter. The Mathura rape cases galvanised the women's movement which attempted to challenge the prevailing legal and social understanding of rape and consent. The Mathura judgement had highlighted that in a rape trial it is extremely difficult for a woman to prove that she did not consent "beyond reasonable doubt" as was required under criminal law. The demand of the campaign was firstly the burden of proving that she had consented should be on the accused <sup>2</sup> and secondly in a rape trial a woman's past history and general character should not be used as evidence.

The major changes introduced in the amendment includes firstly, a new section was added which made sexual intercourse by persons in a custodial situation an offence even if it was with the consent of the women and secondly for the first time the minimum punishment for rape was laid down

10 years in case of custodial rape, gang rapes, rape of pregnant women and girls under 12 years of age, and 7 years in all other cases. An analysis of rape laws following the amendments reveals that reforms are not successful in questioning the traditional definition of rape and same assumptions about women's sexuality continue to prevail in the cases. In the cases of sexual crimes women's modesty is tested and the essence of a women's modesty is her sex and the primary hurdle to her is her reputation when she makes her sexual assault in public. In a country where virginity is valued any attack on her honour is fate worse than death, and communities, parents and in-laws collude to hide sexual assault, due to which women rarely get legal justice in crime<sup>3</sup>.

State in the name of protecting women actually penalise women and strengthened the state, and women's scholarship begun to explore the diversity of oppression across class, religion, ethnicity and culture and the way in which law has implicated in that oppression. Women's movements in India failed to bring about a transformation in the definition of rape in 1980s. In cases where an indecent assault is made upon the person of a woman, but where rape is not committed- the culprit is charged with Section.354 of IPC, because unless the Court is satisfied that there was determination in the accused to gratify his passion at any cost, and in spite of all resistance, such person is not charged with rape. According to Sc insertion of finger into the vagina of a girl of the age of seven years and half causing severe injury may be an offence of assault but not rape (State of Punjab Vs. Major Singh (1967 SC 63)). Even though the perception of rape have changed with time from an assault on the honor of the family to an exercise of power and a violation by force of the integrity of a person's body and violation of basic human right to 'security of persons'. The concept of penile penetration and criminalizing penile rape has been to protect patriarchal marriage and it focuses more on what men define as sexuality than on women's experience of their sexual being. The laws on rape illustrate the dilemma when social norms differ or contradict the provisions of law, as offence of violence weighted against the victim. Conceptualizing men as offenders and women as victims not only assumes a heterosexual matrix but also reinforces this very matrix. Society must focus on prevention and must get rid of the larger social environment of attitudes and beliefs that contribute to an enormously high rape incidence" Aruna Shanbaug Case, Anjana Mishra rape case, Scarlett Keeling Rape and Murder case, A. K Chopras case, Soumya murder case, all reflect that justice to the rape victim is hard to achieve with the prevailing criminal justice system.

The feminist reconceptualisation of sexual violence portrays rape as an act of domination and control and identifies socio cultural causes including gender roles and socialization and social stratification and highlights the prejudicial attitudes towards rape victims. Society is responsible for throwing out victims from active life and this process ensures that victim remains a victim instead of becoming a survivor. Even though rape law has received a serious attention of the fifth, fourteenth and fifteenth Law commissions of India. Fifteenth law commission of India, in an intensive deliberation with Sakshi, an NGO and National commission for women in 2000 recommended that law relating to rape be made gender neutral, wider and more comprehensive to bring it in tune with current thinking. The commission recommended that the offence of rape be substituted by the offence of sexual assault a gender neutral phrase and that all kinds of penetration in the vagina, anus and urethra of another as well as oral sex be brought under the purview of the proposed "sexual assault". But this commission also not accepted marital rape as a crime and agreed with the marital rape exemption and consequential immunity from liability of a husband for raping his wife is premised on the assumption that a wife does by the fact of marriage give an implied consent in advance for the husband to have

sexual intercourse with her. Even though NGOs, women's movements and law commissions and NCW is working hard to change the rape victim's situations in India, due to lack of political will nothing materialize with regards to the existing rape law reforms from victims perspectives.

It is only after the aftermath of Nirbhaya case the parliament thought seriously on this line, and acted in the form of criminal law amendment Act, 2013, which is a historic move in dealing with rape. The definition and perspective of the rape changed with this. A man is said to commit "rape" if he:— (a) 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 (b) 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 (c) 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 (d) 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: Firstly 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. With regards to explanation in this amendment: For the purposes of this section, "vagina" shall also include labia majora. 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. A medical procedure or intervention shall not constitute rape; Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape. 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. The 'character of the victim' is now rendered totally irrelevant, and 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. Even though this amendment is much needed to deal with the cruelty and crimes committed against women in India, it is only the beginning, and much needs to be done to bring gender equality on the ground. According to S. 375 of the IPC, you have to be a man to officially rape and a woman to officially get raped. This section does not recognize men as rape victims. There is a need to reconsider the definition of rape and sexual assault must be classified in accordance with various degrees of harm caused by each and each must be defined in a comprehensive manner. There is no age of consent for males: If a boy of 16 and a same aged girl has consensual sex, the boy will be charged with rape. The Indian legal system is not prepared to accept marital rape as a crime. Rape within same sex is a reality is not accepted too.

Rape is serious crime with severe trauma to the victim. The sexuality of women should be defined from their perspectives otherwise rape will continue to be a crime of violence on women by men as defined by men. It is true that Indian criminal law has gone through a series of changes, but what we need to do is not amendment in pen and paper but also in the minds of the people, where the seat of crime is rooted through educating the young minds of moral values and gender equality. Caution must be there when a guilty person acquitted by the court due to lack of evidence, plea of being a juvenile, he thinks himself to be free to commit more and more crime. The legislature in the new millennium will have to opt for more progressive and general neutral approaches to take India in to the path of development. A symbolic law embodying the new values and expressing the consensus of the society to adhere to these values generates the conditions that are conducive to mobilize such a change. As rape is the grave violation of human rights of the individual, we must try our best wipe out this heinous crime from our society and make all efforts to make the rape victims feel very much part of the society. Apart from judicial and legal awakening, what is required is generation of awareness, by educating the citizens to view women as valuable partners in life and their social responsibility to combat all forms of gender discrimination.

**References:**

- i) Criminal Law Amendment Act, 2013
- ii) Indian Penal Code., section 375
- iii) Writ Petition (crl.) 33 of 1997.
- iv) [http://www.legalserviceindia.com/articles/rape\\_1.htm](http://www.legalserviceindia.com/articles/rape_1.htm).
- v) <http://www.crin.org/en/library/legal-database/sakshi-v-india-and-ors>.
- vi) (2011) 2 SCC 550.
- vii) AIR 1996 SC 1393.
- viii) *Bhat Prabha Ruda*, (1961) 2 G.L.R. 251

**(Endnotes)**

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- 2 Flavia Agnes (1990)
- 3 Times of India 20th April 1999"70 % of the victims remain untraceable"