
AN INSIGHT INTO MARITAL RAPE AND THE LEGAL PROVISIONS UNDER INDIAN LAWS

AUTHORS:

Anshul Pratap Singh, Manipal University, Jaipur

Umendra Singh Gurjar, Manipal University, Jaipur

Jayesh Sharma, Manipal University, Jaipur

CHAPTER ONE

INTRODUCTION AND THE MEANING

1.1 INTRODUCTION

The term rape is most often defined in criminal law, which may differ between jurisdictions. The legal definition of rape is general, though for research purposes incidences of rapes are classified into a number of categories, such as the gender or characteristics of the victim, and/or the gender or characteristics of the perpetrator. Other categories of rape look at the relationship of the perpetrator to the victim or the situation in which the rape occurs, such as date rape, gang rape, marital rape, incestual rape, child sexual abuse, prison rape, acquaintance rape, war rape and statutory rape.

Violence within the four walls towards a woman by her husband or family confined has always been a debatable situation where the husband is always with the benefit of not being questioned about it. The very first reason behind marital rape not being considered as a criminal intention is because it occurs under socially accepted institution known as marriage. Thus a woman is accepted to be ready for sexual intercourse once she is married to her husband, her rights against her body is accepted to be of someone who would have married her and his forcing himself on her isn't a crime in the Indian law.

Implying marital rape as same as rape would bring a very much needed change in the society and the legal sector, it is important to understand that the existing law has no effect on the crime against married women which also makes them not report marital abuse they suffering it silently. The society also has a very important role to play against marital rape, as it is the main institution under marriage.

The society needs to understand that for keeping a marriage intact doesn't mean you have to tolerate things which aren't right in the institution of marriage. Giving legal recognition to marital rape will bring a changed status towards the mind of people who believe it is always the woman who is wrong for a relationship to fail.

To understand the importance and depth of marital rape one should understand the forms of marital rape,

- Sexual coercion by non-physical- it is a social coercion under which the wife is forced to have sexual intercourse and is reminded about her duty as a wife.
- Forced sex- this is another way of forcing the wife to have sex when she is not willing using physical force
- Battering Rape- where there is use of aggression and force against the wife for sexual intercourse
- Force only rape- in these kind there is not battering but force is used in the wife who is not willing to
- Obsessive rape- involves sexual sadistic pleasure by the husband

The issue of marital rape can have a lot of similarities with child abuse or child marriage, still marital rape is considered to not have a legislation as it is regarded as a domestic act between a husband and a wife.

We also need to understand the status of the husband causing force against his wife for sexual intercourse, there can be various reason for a husband to behave that way to his wife the childhood has a lot to do with how a man behaves with his wife, we need to understand how a bad childhood could make the man so harsh can make him commit such offence mental instability could be another reason for a husband to treat his wife in a manner as such.

Despite having so many revolutionary legal reforms which had granted women and wife many rights, marital rape is still not given the legislation requirement it requires, in a country like India where women are worshipped in different forms of idols it is sad to see how the respect and dignity of the women is not being taken care of by many men. When a woman gets married she comes with the hope of getting the same respect and love which she received in her parental house starting a new life the first person she trusts at her new house is her husband and when the person she trusts delivers such acts she is broken and her respect and trust is broken.

It is required to understand that for a marriage to become successful torturing or forcing isn't required both the wife and husband should respect the willingness of each other.

Though there is no legal law that considers marital rape as a crime even if it is one, one more important thing which we need to know is does the wife herself accept it as rape? Many women consider themselves at fault for the sexual abuse they go through which make them keep quiet

about it and suffer the incident. Sexual violence is one of the most effective violence by a man against a woman. Sexual violence shows the men's deliberate move of using force to show his power against a woman.

Consent is an important part in a married life too, marriage doesn't take the rights of a woman on her body and is not totally the husband's right towards her body, consent in a rape is considered as an important part so does in a marriage. The most intimate relationship shared between a husband with his wife is governed by consent. From the time the girl agrees to marry the man to engaging in sexual intercourse the clear thing between them is the consent.

The decision in a woman's life have always been taken by the men in her life, from childhood it has been the father or brother then after marriage it's the husband this dominating behavior and being scared to go against the decisions of the husband and get judged the woman doesn't voice out on issues like marital rape or tortures experienced by them. Though India as a country has become progressive towards different rights of woman the issue of consent in a married relationship is still not looked upon. It is to be understood that many women in our country doesn't stand or react against marital rape because since ages it is believed in that way forceful sexual intercourse that they experience. It happens because of the fact how the rights and freedom of a woman is not given the required importance which needs to be given.

There is a difference between giving one's consent and submitting oneself many women in our country silently suffer the torture, according to the Indian scenario consent cannot be proven if there is absence of injury.

In a play by Saitan theatre group Pinjra, the female character named Jaanki is married to a man who derives lust from the physical pain which he gives to his wife while engaging in sexual intercourse and he didn't care for the consent of his wife and the relationship between Jaanki and her husband was purely based on force, torture and coercion.

This situation is experienced by many women of our country and is the harsh reality, many women keep tolerating these harsh acts against them for years.

Though marital rape cases don't go to the police but they do go to the hospitals, and there are many cases where women are seen with bruises and marks in their body which can very aptly show the torture they have experienced.

Article 21 of the Indian constitution also speaks about self bodily determination under which it explains that a person has sole right to take ultimate decisions about one's own body but when it

comes to marital rape this right of a woman is snatched from her as it is assumed that as she gave her consent to marry man she had also given her lifetime consent for sex to her husband regardless of the physical, emotional circumstances she is going through. It is shocking to see how the very basic and important fundamental right is being taken away by the husband of her wife.

¹Though we in India still don't have laws that criminalize marital rape but there have been different judgements that have shown the need for a legislation against marital rape, in the *Maneka Gandhi v. Union Of India* justice Bhagwati very well described the term personal liberty and how it cannot be taken away by anyone but only can be questioned by the law.

The supreme court has in many cases given judgements on rape and said how the act of rape is not only a gross act of violation but also disturbing the most basic dignity of the women.

Article 21 of the Indian constitution also protects the right of sexual privacy, which is the most important aspect of marital rape which is also constitutionally protected under article 2136. Thus, if a woman is subjected to forced sex then it will be considered as a violation of her sexual privacy.

Marital rape is the violation of the fundamental right of the women, we argue how the lack of criminalization of marital rape infringes on the fundamental rights of a woman.

Even if the marital rape is an act which occurs under a private sphere of marriage it is the responsibility of the government to look upon the matter and when the same is not being done the women is left without any remedy when raped by her husband. The exception of section 375 of the IPC states that how non-consensual intercourse by a man with his wife doesn't amount to rape if she is over 15, thus marital rape is kept outside the coercive of legal ground.

If we compare two countries one being Brazil which had criminalize marital rape in the year 2005 and India which still doesn't have any law which criminalizes marital rape, ² Brazil being a country which had criminalized marital rape have brought a great help to all the women of its country who have been tortured by their husbands and physically assaulted on the other hand our country India doesn't have any law which makes the women scare to even report about it because the society also doesn't provide the rightful help to the victim.

¹[http://ijhssi.org/papers/vol7\(4\)/Version-3/10704035869.pdf](http://ijhssi.org/papers/vol7(4)/Version-3/10704035869.pdf)

²https://en.wikipedia.org/wiki/Marital_rape_laws_by_country

Though the supreme court has said a lot against rape but when it comes to marital rape it strangely remains silent about it and the state also doesn't have strict legislature against it which makes the wife in a relationship remain quiet about the situation.

Marital rape, to a certain extent has been mentioned, although not explicitly in the Domestic
³Violence Act 2005. The act condones any form of sexual abuse in a live in or a marital relationship. The definition of sexual abuse only takes into consideration life threatening or grievously hurtful

abuse which can be physically shown or proven. This at least acknowledges the fact that a woman, despite being in a marital institution, she retains her individual identity and status where she does not have to accept or concede any sort of physical overture, even if it is her husband. The JS Verma committee, established about the brutal Nirbhaya gangrape in Delhi (2013) recommended that marital rape must be criminalized. It stated that —The law ought to specify that marital or other relationship between the perpetrator and victim is not a valid defense against the crimes of rape or sexual violence.

Thus, the committee also believes that there should be a new law by the lawmakers regarding marital rape which should also legalize marital rape and furnish punishments for the accused so there starts to build a fear among people who commit such crime and also easier for the wives who go through these situations to come up with it to the police and the legal system.

Being a married woman doesn't change the status of the women and her rights to live free and with dignity.

A married woman's no also is to be respected and agreed to getting married to her husband doesn't mean she has agreed to get affected and being forced upon to have sexual intercourse.

1.1.1 FORMS OF RAPE

Penetrative and non-penetrative

The definition of rape varies from country to country and at different times in their history. It is defined in many jurisdictions as sexual intercourse, or other forms of sexual penetration, initiated by a person against another person without the consent of that person. The United Nations organization on Drugs and Crime defines rape as "sexual intercourse without valid consent," and

³[http://ijhssi.org/papers/vol7\(4\)/Version-3/10704035869.pdf](http://ijhssi.org/papers/vol7(4)/Version-3/10704035869.pdf)

the World Health Organization on 2002 defined it as "physically forced or otherwise coerced penetration – even if slight – of the vulva or anus, using a penis, other body parts or an object".

The elements that form the definition of rape under the ICC Statute are that:

- "The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body."
- "The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent."

In 2012, the Federal Bureau of Investigation changed their definition from "The carnal knowledge of a female forcibly and against her will" to "The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim" for their annual Uniform Crime Reports. The definition, which had remained unchanged since 1927, was considered out-dated and narrow. The updated definition includes any gender of victim and perpetrator, not just women being raped by men, recognizes that rape with an object can be as traumatic as penile/vaginal rape, includes instances in which the victim is unable to give consent because of temporary or permanent mental or physical incapacity, and recognizes that a victim can be incapacitated and thus unable to consent because of ingestion of drugs or alcohol. The definition does not change federal or state criminal codes or impact charging and prosecution on the federal, state or local level; it rather means that rape will be more accurately reported nationwide.⁴

In some countries such as Germany, are now using more inclusive definitions which do not require penetration, and the 1998 International Criminal Tribunal for Rwanda defines it as "a

⁴Rebecca Walker, *The Women's Movement Today- An Encyclopedia of Third-Wave Feminism* 90 (Greenwood Press, U.S.A. 5th edn., 2006).

physical invasion of a sexual nature committed on a person under circumstances which are coercive". In some countries jurisdiction, the term rape has been phased out of legal use in favour of terms such as sexual assault or criminal sexual conduct. Many other countries or jurisdictions continue to define rape to cover only acts involving penile penetration of the vagina, treating all other types of non-consensual sexual activity as sexual assault. Scotland is among the country that emphasizes penile penetration, requiring that the sexual assault must have been committed by use of a penis to qualify as rape.

1.1.2 Consent

In any forms of rape, the absence of consent to sexual intercourse on the part of the victim is critical and vital. In any sexual intercourse case consent need not be expressed, and may be implied from the context and from the relationship of the parties, but the absence of objection does not of itself constitute consent. Lack of consent may be due to forcible compulsion by the perpetrator or incapacity to consent on the part of the victim (such as persons who are asleep, intoxicated or otherwise mentally and physically helpless). The law can also invalidate consent in the case of sexual intercourse with a person below the age who are legally competent to consent to such relations with older persons.

Such cases are known as statutory rape or "unlawful sexual intercourse". Consent can always be withdrawn at any time, so that any further sexual activity after that constitutes rape.

Marital rape / spousal rape, is non-consensual sexual form in which the perpetrator is the victim's spouse, in such cases it known as partner rape, of domestic violence, and of sexual abuse. Once ignored by law and society, spousal rape is now repudiated by international conventions and increasingly criminalized. Still, in majority of the countries, spousal rape is legal, or is illegal but widely tolerated and accepted as a husband's right to do so.

In many countries, it is not clear if marital rape may or may not be prosecuted under rape laws. In the absence of a marital rape law, it may be possible to bring prosecution for acts of forced sexual intercourse inside marriage by prosecuting, through the use of other criminal offenses

(such as assault based offenses), the acts of violence or criminal threat that were used to attain submission.

1.2 HISTORY OF RAPE

The concept of rape, abduction, seducing, assault and in the sexual sense, makes its **historical** appearance in early religious texts and manuscripts.

1.2.1 Classical Era

1.2.1.1 Greek mythology

The rape of women / youth is a common in Greek mythology. The rape of Chrysippus by Laius was known as "the crime of Laius", a term which came to be applied to all male rape. It was seen as an example of hubris in the original sense of the word, i.e. violent outrage, and its punishment was so severe that it destroyed not only Laius himself, but also his entire extended family.

Also the rapes or abductions of Europa and Ganymede committed by Zeus, the supreme deity of the Greek had been mentioned.

1.2.2. Ancient Rome

According to Roman law, kidnapping or abduction; sexual violation is a secondary issue are termed as raptus (or raptio). The "abduction" of an unmarried girl from her father's house in some circumstances and situation was a matter of the couple eloping without her father's consent to marry. Stuprum is the term expressed for Rape in the English sense of "forced sex", a sex crime committed through violence or coercion (cum vi or per vim). As per the late Roman Republic legal distinction for "abduction for the purpose of committing a sex crime, is termed as "Raptus ad stuprum.

The official position under the emperor Diocletian (reigned 284–305 AD) held that: Intercourse by force or compulsion, even if it took place under circumstances that were otherwise unlawful or immoral, left the victim legally without blame.

Although the law recognized the victim's innocence, rhetoric used by the defence indicates that victims might inculcate attitudes of blame for the sexual act.

1.2.3. **Christian Empire**

Attitudes toward rape changed when the Roman Empire became Christianized. St. Augustine interpreted Lucretia's suicide as a possible admission that she had secretly encouraged the rapist, and Christian apologists regarded her as having committed the sin of involuntary sexual pleasure. Augustine's interpretation of the rape of Lucretia (in *The City of God* against the Pagans 1.19) has generated a substantial body of criticism, starting with a satire by Machiavelli. Historian of early Christianity Peter Brown characterized this section of Augustine's work as his most vituperative attack on Roman ideals of virtue. Augustine redefines sexual integrity (*pudicitia*) as a purely spiritual quality that physical defilement cannot taint; the Romans had viewed rape and other forms of *stuprum* ("sex crime") within a political context as crimes against the citizen's body and liberty.

The first Christian emperor Constantine redefined rape as a public offense rather than as a private wrong. Since under Roman law *raptus* could also mean cases of abduction or elopement without the head of household's permission, Constantine ordered that if the girl had consented, she should be punished along with the male "abductor" by being burnt alive. If she had not consented, she was still considered an accomplice, "on the grounds that she could have saved herself by screaming for help." As a participant to the rape, she was punished under law by being disinherited, regardless of the wishes of her family. Even if she and her family consented to a marriage as the result of an elopement, the marriage was legally void.

1.3. **TYPES OF RAPE**

Rape can be categorized in different ways: for example, by reference to the situation in which it occurs, by the identity or characteristics of the victim, and by the identity or characteristics of the perpetrator. These categories are referred to as types of rape. The types of rape described below are not mutually exclusive: a given rape can fit into multiple categories, by for example by being both a prison rape and a gang rape, or both a custodial rape and the rape of a child.

In 1993, American researcher Patricia Rozee created the following classification of rapes: marital rape (rape by a spouse); exchange rape (rape occurring as the result of bargaining or solidarity-displaying among men); punitive rape (rape used to punish or discipline); theft rape (rape that happens when a woman is abducted, in most cases to be used as a slave or a prostitute); ceremonial rape (rape involving defloration rituals); and status rape (rape resulting from differences in hierarchy or social class).

1.3.1. Date rape

The term "date rape" is used to refer to several types of rape, broadly acquaintance rape, which is a non-domestic rape committed by someone who knows the victim, and drug facilitated sexual assault (DFSA), where the rapist intentionally drugs the victim with a date rape drug so that they are incapacitated. Acquaintance rape constitutes the vast majority of reported rapes, while DFSA is infrequent. A frequently overlapping category is incapacitated rape, where the victim is incapacitated and unable to give consent – this is often the result of intoxication, but can also simply be because the victim is asleep or has a medical condition. DFSA is when the rapist intentionally incapacitates the victim via drugs, while acquaintance rape can occur when the victim is not incapacitated.

Acquaintance rape can occur between two people who know one another usually in social situations, between people who are dating as a couple and have had consensual sex in the past, between two people who are starting to date, between people who are just friends, and between acquaintances. They include rapes of co-workers, schoolmates, family, friends, teachers and other acquaintances, providing they are dating; it is sometimes referred to as "hidden rape" and has been identified as a growing problem in western society. A college survey conducted by the United States' National Victim Centre reported that one in four college women have been raped or experienced attempted rape. This report indicates that young women are at considerable risk of becoming a victim of date rape while in college. In addition, there have been reported incidents of colleges questioning accounts of alleged victims, further complicating documentation and policing of student assaults, despite such preventative legislation as the Clery Act.

1.3.2 Gang rape

Gang rape occurs when a group of people participate in the rape of a single victim. Rape involving at least two or more violators (usually at least three) is widely reported to occur in many parts of the world. Systematic information on the extent of the problem, however, is scant.

One study showed that offenders and victims in gang rape incidents were younger with a higher possibility of being unemployed. Gang rapes involved more alcohol and other drug use, night attacks and severe sexual assault outcomes and less victim resistance and fewer weapons than individual rapes. Another study found that group sexual assaults were more violent and had greater resistance from the victim than individual sexual assaults and that victims of group sexual assaults were more likely to seek crisis and police services, contemplate suicide, and seek therapy than those involved in individual assaults. The two groups were about the same in the amount of drinking and other drug use during the assault.

1.3.3. Spousal rape

Also known as marital rape, wife rape, husband rape, partner rape or intimate partner sexual assault (IPSA), is rape between a married or de facto couple. Research reveals that victims of marital/partner rape suffer longer lasting trauma than victims of stranger rape.

1.3.10. Custodial rape

Custodial rape is rape perpetrated by a person employed by the state in a supervisory or custodial position, such as a police officer, public servant or jail or hospital employee. It includes the rape of children in institutional care such as orphanages.

Custodial rape has been reported in India, Pakistan, Bangladesh, Malaysia, Sri Lanka, Iran, Cambodia, Nigeria, Kenya, Zambia and the United States.

In India custodial rape has been a major focus of women's rights organizations, and has been an official category of rape defined under law since 1983. Indian law says this type of rape takes advantage of the rapist's position of authority and is therefore subject to extra penalty.

The term custodial rape is sometimes used broadly to include rape by anyone in a position of authority such as an employer, money-lender, contractor or landlord, but under Indian law it refers only to government employees. Victims of custodial rape are frequently minorities, people

who are poor, or low-status for example because of their caste. Researchers say custodial rape is part of a broader pattern of custodial abuse, which can also include torture and murder.

1.4 GROTH TYPOLOGY

Nicholas Groth has described three types of rape, based on the goal of the rapist.

- **Anger rapist**

The aim of this rapist is to humiliate, debase, and hurt their victim; they express their contempt for their victim through physical violence and profane language. For these rapists, sex is a weapon to defile and degrade the victim, rape constitutes the ultimate expression of their anger. This rapist considers rape the ultimate offense they can commit against the victim.

Anger rape is characterized by physical brutality, much more physical force is used during the assault than would be necessary if the intent were simply to overpower the victim and achieve penetration. This type of offender attacks their victim by grabbing, striking and knocking the victim to the ground, beating them, tearing their clothes, and raping them.

The experience for the offender is one that is of conscious anger and rage.

- **Power rapist**

For these rapists, rape becomes a way to compensate for their underlying feelings of inadequacy and feeds their issues of mastery, control, strength, authority and capability. The intent of the power rapist is to assert their competency. The power rapist relies upon verbal threats, intimidation with a weapon, and only uses the amount of force necessary to subdue the victim.

The power rapist tends to have fantasies about rape and sexual conquests. They may believe that even though the victim initially resists them, that once they overpower their victim, the victim will eventually enjoy the rape. The rapist needs to believe that the victim enjoyed what was done to them, and they may even ask the victim to meet them for a date later. Because this is only a fantasy, the rapist does not feel reassured for long by either his own performance or the victim's response. The rapist feels that he must find another victim, convinced that this victim will be "the right one".

Hence, their offenses may become repetitive and compulsive. They may commit a series of rapes over a short period of time. This is the most common type of rapist in the United States.

- **Sadistic rapist**

For these rapists, there is a sexual association with various concepts, so that aggression and the infliction of pain is eroticized. For this rapist, sexual excitement is associated with the causing of suffering upon his/her victim. The offender finds the intentional maltreatment of his victim intensely gratifying and takes pleasure in the victim's torment, anguish, distress, helplessness, and suffering; the offender finds the victim's struggling an erotic experience.

Sadistic rape usually involves extensive, prolonged torture and restraint. Sometimes, it can take on ritualistic or other bizarre qualities. The rapist may use some type of instrument or foreign object to penetrate his/her victim. Sexual areas of the victim's body become a specific focus of injury or abuse.

The sadistic rapist's assaults are calculated. They will often wear a disguise or will blindfold their victims. Prostitutes or other people whom they perceive to be "promiscuous" are often the sadistic rapist's targets. The victims of a sadistic rapist may not survive the attack. For some offenders, the ultimate satisfaction is gained from murdering the victim.\

1.7 RAPE IN INDIA

Rape is the fourth most common crime in India. According to the National Crime Records Bureau 2015 annual report, 29,328 rape cases were reported across India in 2014. Out of these, 24,470 were committed by relative or neighbor; in other words, the victim knew the alleged rapist in 98 per cent of the cases. The incidences of reported rapes in India for 2014 were 1.8 per 100,000 people, among the lowest in the world. The US figure for 2014 was 27.3 per 100,000. However, it is estimated that only 1 in 10 rapes in India gets reported, while in the US 46% are reported.

According to 2015 statistics, New Delhi has the highest number of rape-reports among Indian cities, while Jabalpur has the per capita incidence of reported rapes. Several rape cases in India

received widespread media attention and triggered protests since 2015. This led the Government of India to reform its penal code for crimes of rape and sexual assault.

Marital rape is not a criminal offense in India unless the victim is separated from the perpetrator. There is some protection against marital rape in those Indian states that have ratified the Protection of Women from Domestic Violence Act 2005 (PWDVA). To date, the law has been ratified by all states and union territories except Jammu and Kashmir.

Rape and violence against women are a massive problem in India. According to the country's National Crime Record Bureau, crimes against women have increased by 7.1 percent since 2010. The number of rapes reported has also risen. Nearly one in three rape victims in India is under the age of 18. One in 10 are under 14. Every 20 minutes in India, a woman is raped.

And yet India only ranks *third* for the number of rapes reported each year. The United States ranks First in Rape. In India, a country of over 1.2 billion people, 24,206 rapes were reported in 2013. The same year in the United States, a nation of 300 million, 83,425 rapes were reported. In the United States, every 6.2 minutes a woman is raped.

Even if sexual assault in India is dramatically underreported, which most likely it is, the statistical difference is still striking—as is our uniquely American inclination to dismiss such monstrous human rights violations as problems that *other countries* face. Not only is violence against women a global pandemic but the United States may be leading the pack.

1.8. INDIAN PENAL CODE ON RAPE

After February 3 2013, the Indian penal code defined rape under Article 375 as:

Rape is now included as a crime of sexual assault, which is currently defined for the purposes of Indian penal code as:

A person is said to commit “sexual assault” if that person – (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of another person or makes the person 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 another person or makes the person to do

so with him or any other person; or (c) manipulates any part of the body of another person so as to cause penetration into the vagina, urethra, anus or any part of body of such person or makes the person to do so with him or any other person; or (d) applies his mouth to the penis, vagina, anus, urethra of another person or makes such person to do so with him or any other person; (e) touches the vagina, penis, anus or breast of the person or makes the person touch the vagina, penis, anus or breast of that person or any other person, except where such penetration or touching is carried out for proper hygienic or medical purposes under the circumstances falling under any of the above descriptions:—

- **First.** — Against the other person's will.
- **Secondly.** — Without the other person's consent.
- **Thirdly.** — With the other person's consent when such consent has been obtained by putting such other person or any person in whom such other person is interested, in fear of death or of hurt.
- **Fourthly.** — When the person assaulted is a female, 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 to be lawfully married.
- **Fifthly.** — With the consent of the other person when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by that person personally or through another of any stupefying or unwholesome substance, the other person is unable to understand the nature and consequences of that action to which such other person gives consent.
- **Sixthly.** — With or without the other person's consent, when such other person is under eighteen years of age.
- **Seventhly.** — When the person is unable to communicate consent.

Even after the 2013 reform, marital rape is not a crime in India. However, it is considered a form of prosecutable domestic violence under different sections of Indian penal code, such as Section 498(A) as well as the Articles of Domestic Violence Act, 2005.

1.8 Statement of the problem

India is a country where women has been experiencing molestation and rape since a long time, the Indian law under section 375 of the Indian penal code refers rape as a punishable offence.

Men and women of a society are equally important in the creation of the society and they both equal part in the society. As a women of the society they do face several difficulties from the society. After being developed as a country in various things women are still discriminated and also are not safe. We have various national and global protection for women yet women aren't safe.

Offences against women doesn't stop in molestation or rape of a women but also includes different other offences that includes dowry death, sexual harassment, domestic violence and many other.

1.9 Review of the Literature

- Under section 375 of the Indian penal code which explains rape, exception 2 exempts unwilling sexual intercourse between a husband and a wife over fifteen years of age.
- Article 21 of the Indian constitution is being violated by not criminalizing marital rape.
- The law commission of India 172nd report on review of rape laws.
- The protection of women from domestic violence Act 2005 have only bought a civil remedy but did not criminalize marital rape under the act.
- In the Francis corallieMuin v. Union territory of Delhi case Article 21 which explains the right to live with human dignity is focused upon and explained by the Supreme court how offence of rape abuses the right to life and right to live with human dignity.
- The chairman, railway board v. Chandrima Das, the supreme court in this case observed that rape is not only an offence but a crime against the society all together.
- In the case of State of Maharashtra v. Madhkar Narayan, the supreme court held that every woman has the right to sexual privacy and no one can violate her privacy.
- The supreme court of India in the state of Maharashtra vs. Madhukar Narayan Mandikar the court has very well criminalized the offence of raping a girl by a stranger however have not included marital rape in it.
- In Shree Kumar vs. pearly Karun, the Kerala High court under section 376A IPC won't be pulled in as the spouse is not living indecently from her husband, when the women went to live with her husband for the reason of settlement procedure which was

⁵⁶occurring between the two, yet the spouse was not held liable by the court as she was his wife that time.

- For bringing strictness towards anti rape laws the government constituted Verma Committee on December 2012 after the Rape of twenty-three-year-old student in Delhi.
- RashidaManjoo, the UN Special Rapporteur on violence against women said that Justice Verma committee's recommendation and subsequent legislation was a "golden moment for India" but recommendations on marital rape, age of consent for sex, etc. were not adopted in the legislation.
- Justice Krishna Iyer in the Rafiq v. state of UP made a remark "a murderer kills the body, but a rapist kills the soul".
- In the judgement of case Independent thought v. Union of India, where a division bench of SC read exception 2 to § 375, IPC, which now stands thus altered and is read as, "Sexualintercourse by a man with his wife, thewife not beingless than 18 yearsof age, is not rape".

1.10 Research Objective

- The research paper has been conducted to look upon the issue of marital rape and the lack of proper laws which doesn't criminalize marital rape causing a harm to all the married women and their safety and dignity.
- To study the issue and discuss the means to bring effective changes.
- To critically examine the efficiency of the latest laws on Marital Rape.
- Discuss and do a comparative study between and where marital rape is not criminalized with a country where it is criminalized.
- How Marital rape is still not criminalized and not taken as a part of Indian penal code.
- To look upon the importance given to women safety and the responsibility taken by the society and the law regarding the safety of a married women.
- How the existing law doesn't provide the required safety to specially a married woman?
- The study of marital rape and opinion of various scholars.

⁵<http://www.legalservicesindia.com/article/2369/Marital-Rape.html>

⁶<file:///C:/Users/HP/Desktop/Downloads/Paper-5.pdf>

1.11 Research questions

1. Why there is a need to bring more effective laws against marital rape?
2. How important it is to criminalize marital Rape?
3. Why is a married women safety not being given importance by the Indian Law?
4. Why after various of women complaining about being forceful being sexual assaulted by their spouse not being given the required amount of legal aid?
5. Does marriage give the spouse the right to force himself against his wife?

1.12 Research Methodology

The research methodology used in the following research paper includes the use of secondary source of information and the doctrinal research type. I have tried to also use my own knowledge about Marital Rape gained by discussing about it with women who have experienced it.

The paper will also be comparative because the author will compare the marital laws of a different country with India and also the similarities.

CHAPTER 2

AFFECTS AND TYPES OF MARITAL RAPE

2.1. Indian Penal Code

Under Section 375 and 376 of the Indian Penal Code, only a man can be convicted of committing rape and the victim can only be a woman. Further, the laws relating to stalking, voyeurism and sexual harassment¹ are gender specific i.e. the perpetrator can only be a man while the victim can only be a woman. However, the law relating to throwing acid is gender.⁷

The Indian law is based on the belief that a victim of rape can only be a woman. This arises from the assumption that rape is an act of sex alone⁸ to satisfy the sexual desire of the perpetrator. However, there is a growing awareness that sexual assault is not only an act of lust and desire but also a manner of showing dominance or superiority of one caste, class, religion, community over the other and are acts of power and humiliation⁹. If this is so, then there is no reason the male gender is excluded from being a rape victim in India.

Another concern while determining what constitutes gender neutral is whether it constitutes bodies are clearly either male or female¹⁰ who violate the normative understanding of what it means to be¹¹. incorrect. We know that coercive sexual intercourse with men by men is covered under Section 377 of the IPC, as carnal intercourse going against the order of nature. One of the questions I seek to address in this paper is- why coercive men on men intercourse cannot be covered by the rape law? There must be a distinction between coercive and consensual homosexual sexual intercourse.

Supreme Court of India while showing its concern over most heinous crime rape observed “*Rape is a crime not only against the person of a woman; it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. Rape is*

⁷The Criminal Law Amendment Act 2013 (Act no.13 of 2014)

⁸A. Narrain, *Violation of Bodily Integrity, Economic and Political* 48 (Sage Publications, Delhi, 4th edn., 2013).

⁹*Ibid.*

¹⁰N. Menon, *Seeing like a Feminist* 118 (Zubaan and Penguin Books India Pvt. Ltd. 2013).

¹¹*Ibid.*

therefore the most hated crime. It is a crime against basic human rights and is violation of the victims most cherished rights, namely right of life which includes right to live with human dignity contained in Article 21. Rape for a woman is deathless shame and must be dealt with as a gravest against human dignity; it is violation with violence on the private person of a woman.”

Section 375 and 376, 376-A to 376-D IPC are related with the offence of rape, which are amendment by Criminal law (Amendment) Act, 2013. The most important change that has been made is the change in definition of rape under IPC.

Section 375¹², deals with the definition of Rape, it says that “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 clauses; 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;

¹²The Criminal Law (Amendment) Act, 2013(Act no.13 of 2013).

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.”

Basically definition of rape contains two essential ingredients:

1. Sexual Intercourse by a man with a woman, and
2. The sexual intercourse must be under circumstances falling under any of the seven clauses of section 375.

In order to file the complaint under rape against a man, it is necessary

to prove that the sexually intercourse was done by the perpetrators is against the will of the victim or without her consent.

The Supreme Court in *Dileep Singh v. State of Bihar*⁶ observed that “*the will and consent often interlace and an act done against the will of the person can be said to be an act done without consent, the Indian Penal Code categorizes these two expressions under separate heads in order to as comprehensive as possible.*”

The Apex Court in *State of UP v. Chottey Lal*¹³ has held that “be that as it may, in our view, clause Sixth of Section 375 IPC is not attracted since the prosecutrix has been found to be above 16 years (although below 18 years). In the facts of the case what is crucial to be considered is whether clause First or Second of Section 375 IPC is attracted. The expressions, against her will”

¹³(2011)2 SCC 550.

and „without her consent“ may overlap sometimes but surely the two expressions in clause first and clause second has different connotation and dimension.”

The Courts always followed the test laid down under Section 90 of the IPC for establishing “consent”. Section 90 reads thus: “*Consent known to be given under fear or misconception.- A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.*”¹⁴

The apex court has clearly stated that the court shall presume that the victim did not consent to the sexual intercourse. In *Deepak Vs. State of Haryana*¹⁵ cited Section 114-A of the Indian Evidence Act. It reads as under:

*“In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m) or clause (n) of sub-section (2) of section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court. That she did not consent, the court shall presume that she did not consent.”*¹⁶

In order to enable the court to draw presumption as contained in Section 114-A against the accused, it is necessary to first prove the commission of sexual intercourse by the accused on the prosecutrix and second, it should be proved that it was done without the consent of the prosecutrix. Once the prosecutrix states in her evidence that she did not consent to act of sexual intercourse done by the accused on her which, as per her statement, was committed by the

¹⁴Indian Penal Code 1860 (Act 65 of 1860).

¹⁵*Deepak Vs State of Haryana* SC (CA) 65 OF 2012.

¹⁶The Criminal Law (Amendment) Act, 2013 (13 of 2013).

accused against her will and the accused failed to give any satisfactory explanation in his defence evidence on this issue, the court will be entitled to draw the presumption under Section 114-A of the Indian Evidence Act against the accused holding that he committed the act of sexual intercourse on the prosecutrix against her will and without her consent. The question as to whether the sexual intercourse was done with or without consent being a question of fact has to be proved by the evidence in every case before invoking the rigour of Section 114-A of the Indian Evidence Act.

According to the Supreme Court even the slightest penetration is sufficient to make out an offence of rape. However depth of penetration is immaterial.

The Supreme Court in *KoppulaVenkatrao v. State of AP*¹⁷ held that “The sine qua non of the offence of rape is penetration, and not ejaculation. Ejaculation without penetration constitutes an attempt to commit rape and not actual rape. Definition of „rape“ as contained in Section 375 IPC refers to „sexual intercourse“ and the Explanation appended to the section provides that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Intercourse means sexual connection.”

The Apex Court in *Bantu v. State of U.P.*¹⁸ explained the term “rape” and according to the Court, “the offence of rape in its simplest term is the ravishment of a woman, without her consent, by force, fear or fraud, or as the carnal knowledge of a woman by force against her will. „Rape“ or „Raptus“ is when a man have carnal knowledge of a woman by force and against her will; or as expressed more fully, „rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will“. The essential words in an indictment for rape are rapuit and carnalitercognovit, but both must be present. In the crime of rape, „carnal knowledge“ means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation.”¹⁹

Section 376 deals with the Punishment for Rape. It says that—*(1)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*

¹⁷(2004)3 SCC 602.

¹⁸2008 (2) Crime 264 (SC).

¹⁹J. Stephen, *Criminal Law* 262 (ABH Publishing House, Chicago, 9th edn.,1999).

imprisonment for life²⁰, and shall also be liable to fine. (2) Whoever,- (a) being a police officer, commits rape- (i) within the limits of the police station to which such police officer is appointed; or (ii) in the premises of any station house; or (iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or (b) 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 (c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or (d) 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 (e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or (f) 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 (g) commits rape during communal or sectarian violence; or (h) commits rape on a woman knowing her to be pregnant; or (i) commits rape on a woman when she is under sixteen years of age; or (j) commits rape, on a woman incapable of giving consent; or (k) being in a position of control or dominance over a woman, commits rape on such woman; or (l) commits rape on a woman suffering from mental or physical disability; or (m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or (n) 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.²¹

Section 376A deals with Intercourse by a man with his wife during separation²²

—Whoever commits an offence punishable under sub-section (1) or subsection (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

²⁰The Criminal Law (Amendment) Act, 2013 (Act no. 13 of 2013).

²¹Indian Penal Code, 1860(Act no. 45 of 1860).

²²The Criminal Law (Amendment) Act, 2013(Act no. 13 of 2013).

imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.¶

Section 376B deals with Intercourse by public servant with woman in his custody

—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.¶

Section 376C. Intercourse by superintendent of jail, remand home, etc.²³

—Whoever, being- (a) in a position of authority or in a fiduciary relationship; or (b) a public servant; or (c) 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 (d) 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.

Section 376D. Intercourse by any member of the management or staff of a hospital with any woman in that hospital²⁴

—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:

²³*Ibid.*

²⁴*Ibid.*

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.¶

Section 376E. Repeat offenders²⁵

—Whoever has been previously convicted of an offence punishable under section 376 or section 376A or section 376D 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.

2.2. The Criminal Law (Amendment) Act of 1983

In 1983, the CrPC was amended to provide for in camera rape trials. It also became an offence to disclose the identity of a rape victim. A provision for enhanced punishment.

2.3. The Indian Evidence (Amendment) Act of 2002

The Indian Evidence (Amendment) Act of 2002 prohibited the defence from putting questions in cross examination of the prosecutrix about her general moral character and sexual history.²⁶

Reports

The 172nd Law Commission Report recommended that the rape law must be gender neutral, both the victim and the offender. The Justice Verma Committee Report recommended a gender neutral law for the victim but a gender specific law for the offender. However, none of them were incorporated into the law of the land.

²⁵*Ibid*

²⁶*Satish, M. (2013), Virginty and rape sentencing, Times of India, available at: <http://www.timescrest.com> (Visted on April 20, 2020).*

2.4. The Criminal Law Amendment Act 2013

The Delhi gang rape case led to significant changes in the Indian Penal Code regarding rape laws. The amendment introduced special provisions for acid attacks, sexual harassment, disrobing a woman, voyeurism, stalking and trafficking vaginal penetration butoral, anal, and insertion of any object into the vagina, urethra or anus of a woman as well.²⁵ The punishment for rape in aggravated and non- aggravated situations was enhanced.²⁶ The offence is not gender neutral under the Act as under the Ordinance. Therefore, only a man can commit rape on a woman.

2.5. Rape is a crime against whole Society

2.5.1. Rape is a crime against whole Society - The Hon[“]ble Supremecourt in *PushpanjaliSahu v. State of Orissa*²⁷, has held that —*Sexual violence is not only an unlawful invasion of the right of privacy and sanctity of a woman but also a serious blow to her honour. It leaves a traumatic and humiliating impression on her conscience, offending her self-esteem and dignity, rape as not only a crime against the person of a woman, but a crime against the entire society. It indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, honour, reputation and not the least her chastity. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is a crime against basic human rights, and is also violative of the victim’s most cherished of the fundamental rights, namely, the right to life contained in Article 21 of the Constitution. The courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely.*

2.5.2. Awarding Compensation and protect identity of Rape Victim

²⁷2012 (9) SCC 705.

The Apex Court in *Delhi Domestic Working Women's Forum v Union of India and Others*²⁸ suggested with a view to assisting rape victim and laid down the following broad guidelines:

²⁸1995 (1) SCC 14

CHAPTER 3

COMPARISON BETWEEN TWO COUNTRIES ON THE CRIMINALIZATION OF MARITAL RAPE

CANADA

Till 1983 the criminal law in Canada was so incompetent that it lacked trust on women claiming to be rapes. In 1983 amendments were made to the Criminal Code of Canada by C-127 project in order to make the victims comfortable enough to come up and report the cases of crimes against them and to remove the bias inherent in the criminal law against women.

This amendment brought a lot of changes in the criminal law of the country. S 265 of the Criminal Code dealt with the definition of sexual assault and it defined assault as the use of force by any person intentionally without the will of the person, or threatens to use force on other person, or by openly carrying a weapon demand any favour from the other person. The word rape was substituted with sexual assault and as a lot of other sexual offences was also dealt with in this category. The law was made gender neutral in terms of sexual offences. A step was also taken to make marital rape a crime. The corroboration requirement was done away with and the rule that the victim's previous sexual conduct was brought into question was also removed.²⁹ Sexual offences included assault with a weapon, under fear or threat etc. The punishment for sexual assault offences was 10 years, 14 years and life imprisonment.

The English law also made changes in its law taking cue from the Canadian amendment. The amendments made in the Canadian law in 1983 were welcomed because they removed some of the discriminatory laws relating to women. The women organisations in Canada have been very vocal and active and they have influenced these changes in the law. The public also seems to be a lot aware regarding the changes made in the law and thus their awareness acts as a encouragement for the law makers.³⁰

²⁹ Rape Law Reform in Canada: The Success and Limits of Legislation, Kwong-leung Tang, accessed from <http://citeseerx.ist.psu.edu/> (Visited on Mar 20, 2021).

³⁰*Ibid.*

The changes that were made to the law led to an increase in the reporting of rape cases as compared to the previous years because the relaxation in the evidentiary rules of non-corroboration etc., gave the women the boost to go up to the police and complaint about such offences taking place.

The changes were to also criticised by some advocates who thought that replacing the word rape with sexual assault will harm the women in the longer run by minimising the harm of rape because the law was made gender-neutral. They have advocated that the word sexual assault desexualises the crime of rape in regard to women and so is detrimental for them. There are several other issues also which are of concern. In Canadian law, the honest belief of consent is a defence and will negate the crime of the perpetrator. But, the honest belief also needs to be proven on evidentiary basis. Also, earlier if the honest belief was proved then it was a valid defence. It was only later that a change was made in the Criminal Code by adding s 265, and the requirement of reasonableness of belief of consent was added.³¹

One of the major demerits of the amendment made by C-127 project in 1983 in the Canadian Criminal Code was that it completely removed the word rape and by substituting it with the word sexual assault, it made the definition very wide and vague. In order to prove the graveness or seriousness of the offence like rape, a woman would have to go to a great extent to prove the crime committed against her body. The changes though made a relaxation in evidentiary laws which helped women to report matters more often to the police but still the definition should have more specifically dealt with sexual assault rather than defining assault in general. The factor of consent was stated in Section 266 which said that consent obtained by putting threat of using force on the victim or on a person other than the victim in whom the victim is interested, or by fraud, or by exercise of authority, or by using actual force on the victim or any person other than the victim.³²

Canada has a broad definition of sexual assault. It includes all unwanted sexual activity, such as unwanted sexual grabbing, kissing, and fondling as well as rape.

³¹ *Historical Development of the Offence of Rape*, available at: <http://www.canadiancriminallaw.com> (Visited on April 22, 2021).

³²*Ibid.*

Sexual activity is only legal when both parties consent. Consent is defined in Canada's *Criminal Code* in s. 273.1(1), as the voluntary agreement to engage in the sexual activity in question. The law focuses on what the person was actually thinking and feeling at the time of the sexual activity. Sexual touching is only lawful if the person affirmatively communicated their consent, whether through words or conduct. Silence or passivity does not equal consent.

The *Criminal Code* also says there is no consent when:

- Someone says or does something that shows they are not consenting to an activity
- Someone says or does something to show they are not agreeing to continue an activity that has already started
- someone is incapable of consenting to the activity, because, for example, they are unconscious
- the consent is a result of someone abusing a position of trust, power or authority
- someone consents on someone else's behalf.

A person cannot say they mistakenly believed a person was consenting if³³:

- that belief is based on their own intoxication; or
- they were reckless about whether the person was consenting or;
- they chose to ignore things that would tell them there was a lack of consent; or
- they didn't take proper steps to check if there was consent.

The responsibility for ensuring there is consent is on the person who is initiating or pursuing the sexual activity. When someone has said no to sexual contact, the other person cannot rely on the

³³*The Ganag Rape*, available at: <https://www.leaf.com> (Visited on Mar 20, 2021).

fact that time has passed or the fact that the individual has not said no again to assume that consent now exists.

No one can legally consent in advance to sexual activity in the future when they will be unconscious. No one can legally consent to activity where they will suffer bodily harm, such as activity that will cause serious bruises, stitches or broken bones.

The law about sexual activity involving young people has recently changed. Generally, the age of consent for sexual activity is 16 years. However, the age of consent is 18 years where the sexual activity involves prostitution, pornography or occurs in a relationship of authority, trust or dependency (e.g., with a teacher, coach or babysitter).

There are exceptions for sexual relationships for people who are close in age. This means that a person as young as 14 can legally consent to sexual activity with someone who is less than five years older than them as long as there is no relationship of trust, authority or dependency or any other exploitation. Similarly, a 12 or 13 year old can consent to sexual activity with another young person who is less than two years older and with whom there is no relationship of trust, authority or dependency or other exploitation.

The Supreme Court of Canada has said consent laws should not be based on stereotypes. Therefore, judges and juries cannot rely on the fact that a person has consented to sexual activity with someone in the past to mean that they consented the next time. It also means that someone's sexual history should not be used to show that they automatically consented. There are rules about when a person's past sexual history can be brought up in court.

Definitions

- **490.011 (1)** The following definitions apply in this section and in sections 490.012 to 490.032.

crime of a sexual nature means a crime referred to in subsection 3(2) of the Sex Offender Information Registration Act (.crimes de nature sexuelle)

database has the same meaning as in subsection 3(1) of the Sex Offender Information Registration Act (.banque de données)

designated offence means

- (a) an offence under any of the following provisions:
 - (i) subsection 7(4.1) (offence in relation to sexual offences against children),
 - (ii) section 151 (sexual interference),
 - (iii) section 152 (invitation to sexual touching),
 - (iv) section 153 (sexual exploitation),
 - (v) section 153.1 (sexual exploitation of person with disability),
 - (vi) section 155 (incest),
 - (vi.01) subsection 160(1) (bestiality),
 - (vi.1) subsection 160(2) (compelling the commission of bestiality),
 - (vii) subsection 160(3) (bestiality in presence of or by a child),
 - (viii) section 163.1 (child pornography),
 - (ix) section 170 (parent or guardian procuring sexual activity),
 - (ix.1) section 171.1 (making sexually explicit material available to child),
 - (x) section 172.1 (luring a child),
 - (x.1) section 172.2 (agreement or arrangement — sexual offence against child),
 - (xi) subsection 173(2) (exposure),
 - (xii) to (xv) [Repealed, 2014, c. 25, s. 25]
 - (xvi) section 271 (sexual assault),
 - (xvii) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm),

- **(xviii)** paragraph 273(2)(a) (aggravated sexual assault — use of a restricted firearm or prohibited firearm or any firearm in connection with criminal organization),
- **(xviii.1)** paragraph 273(2)(a.1) (aggravated sexual assault — use of a firearm),
- **(xix)** paragraph 273(2)(b) (aggravated sexual assault),
- **(xx)** subsection 273.3(2) (removal of a child from Canada),
- **(xxi)** section 279.011 (trafficking — person under 18 years),
- **(xxii)** subsection 279.02(2) (material benefit — trafficking of person under 18 years),
- **(xxiii)** subsection 279.03(2) (withholding or destroying documents — trafficking of person under 18 years),
- **(xxiv)** subsection 286.1(2) (obtaining sexual services for consideration from person under 18 years),
- **(xxv)** subsection 286.2(2) (material benefit from sexual services provided by person under 18 years), and
- **(xxvi)** subsection 286.3(2) (procuring — person under 18 years);
- **(b)** an offence under any of the following provisions:
 - **(i)** section 162 (voyeurism),
 - **(i.1)** subsection 173(1) (indecent acts),
 - **(ii)** section 177 (trespassing at night),
 - **(iii)** [Repealed, 2019, c. 25, s. 202]
 - **(iii.1)** section 231 (murder),
 - **(iv)** section 234 (manslaughter),
 - **(v)** paragraph 246(b) (overcoming resistance to commission of offence),
 - **(vi)** section 264 (criminal harassment),
 - **(vii)** section 279 (kidnapping),

- **(vii.1)** section 279.01 (trafficking in persons),
- **(vii.11)** subsection 279.02(1) (material benefit — trafficking),
- **(vii.12)** subsection 279.03(1) (withholding or destroying documents — trafficking),
- **(viii)** section 280 (abduction of a person under age of sixteen),
- **(ix)** section 281 (abduction of a person under age of fourteen),
- **(ix.1)** subsection 286.1(1) (obtaining sexual services for consideration),
- **(ix.2)** subsection 286.2(1) (material benefit from sexual services),
- **(ix.3)** subsection 286.3(1) (procuring),
- **(x)** paragraph 348(1)(d) (breaking and entering a dwelling house with intent to commit an indictable offence),
- **(xi)** paragraph 348(1)(d) (breaking and entering a dwelling house and committing an indictable offence),
- **(xii)** paragraph 348(1)(e) (breaking and entering a place other than a dwelling house with intent to commit an indictable offence), and
- **(xiii)** paragraph 348(1)(e) (breaking and entering a place other than a dwelling house and committing an indictable offence);
- **(c)** an offence under any of the following provisions of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 4, 1983:
 - **(i)** section 144 (rape),
 - **(ii)** section 145 (attempt to commit rape),
 - **(iii)** section 149 (indecent assault on female),
 - **(iv)** section 156 (indecent assault on male), and
 - **(v)** subsection 246(1) (assault with intent) if the intent is to commit an offence referred to in any of subparagraphs (i) to (iv);

○ **(c.1)** an offence under any of the following provisions of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as enacted by section 19 of *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, chapter 125 of the Statutes of Canada, 1980-81-82-83:

- **(i)** section 246.1 (sexual assault),
- **(ii)** section 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm), and
- **(iii)** section 246.3 (aggravated sexual assault);

○ **(d)** an offence under any of the following provisions of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 1, 1988:

- **(i)** subsection 146(1) (sexual intercourse with a female under age of fourteen),
- **(ii)** subsection 146(2) (sexual intercourse with a female between ages of fourteen and sixteen),
- **(iii)** section 153 (sexual intercourse with step-daughter),
- **(iv)** section 157 (gross indecency),
- **(v)** section 166 (parent or guardian procuring defilement), and
- **(vi)** section 167 (householder permitting defilement);

○ **(d.1)** an offence under any of the following provisions of this Act, as they read from time to time before the day on which this paragraph comes into force:

- **(i)** paragraph 212(1)(i) (stupefying or overpowering for the purpose of sexual intercourse),
- **(ii)** subsection 212(2) (living on the avails of prostitution of person under 18 years),
- **(iii)** subsection 212(2.1) (aggravated offence in relation to living on the avails of prostitution of person under 18 years), and
- **(iv)** subsection 212(4) (prostitution of person under 18 years);

- (e) an attempt or conspiracy to commit an offence referred to in any of paragraphs (a), (c), (c.1), (d) and (d.1); or
- (f) an attempt or conspiracy to commit an offence referred to in paragraph (b).infraction désignée)

Ontario Act means *Christopher's Law (Sex Offender Registry), 2000* (, S.O. 2000, c. 1.loi ontarienne)

pardon means a conditional pardon granted under Her Majesty's royal prerogative of mercy or under section 748 that has not been revoked. pardon)

record suspension means a record suspension, as defined in subsection 2(1) of the Criminal Records Act (, that has not been revoked or ceased to have effect.suspension du casier)

registrationcentre has the same meaning as in subsection 3(1) of the Sex Offender Information Registration Act (.bureau d'inscription)

Review Board means the Review Board established or designated for a province under subsection 672.38(1). commission d'examen)

verdict of not criminally responsible on account of mental disorder means a verdict of not criminally responsible on account of mental disorder within the meaning of subsection 672.1(1) or a finding of not responsible on account of mental disorder within the meaning of subsection 2(1) of the National Defence Act (, as the case may be.verdict de non-responsabilité)

- **Marginal note: Interpretation**

(2) For the purpose of this section and sections 490.012 to 490.032, a person who is convicted of, or found not criminally responsible on account of mental disorder for, a designated offence does not include a young person

- (a) within the meaning of subsection 2(1) of the Youth Criminal Justice Act unless they are given an adult sentence within the meaning of that subsection for the offence; or

- (b) within the meaning of subsection 2(1) of the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985, unless they are convicted of the offence in ordinary court within the meaning of that subsection.

INDIA

Age of Consent

The age of consent in India is 18 years old. The age of consent is the minimum age at which an individual is considered legally old enough to consent to participate in sexual activity. The individual within 17 years of age or younger, will not be considered to be legally old enough to give their consent to participate in any kind of sexual activity.

Statutory rape law is violated in circumstance where an individual engages himself in the sexual activity with a person under age of 18. The age of consent lowers to 15 years old in case if the couple is married.

The Protection of Children against Sexual Offences Act, 2012 was passed by both the Houses of Parliament on May 22. This Act aims to define various offences against the minor/children to provide penalties to them. Before this Act was passed, the age of consent was 16 years of age. As the new Act came into force the exploitation of children will reduce at some extent.

Key Points of Statutory Rape

1. The Statute for this offence is The Protection of Children against Sexual offences Act, 2012 (POCSO) but it is regulated by the Section 375 of IPC.
2. This Act regulates the exploitation against the children by the adults,
3. The consent is immaterial of the victim in these type of offences,
4. This offence includes punishment under Section 376 of IPC.

Definition as given in Section 375 of IPC:

Old Provision:

Section 375 defines Rape as:

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

1. First – Against her will.
2. Secondly – Without her consent.
3. 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.
4. 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.
5. 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.
6. Sixthly – With or without her consent, when she is under sixteen years of age.

Explanation – Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

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

New Provision: (As of Amendment 2013)

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;
2. 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;
3. or 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;
4. 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:
 - 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 I.—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 nonverbal 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 I.—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.’

Rationale of Statutory Rape Laws in India

Statutory rape laws are about the circumstances where a private person is lawfully incapable of willing to sexual activity till that person reaches a particular age. The law mandates that although he or she willingly engage in sexual activity, the sex isn't consensual. Critics argue that the person's age limit cannot be used to determine the ability to consent to sex, since a young juvenile might possess enough social sense to make aware and mature choices about sex, while some adults might never develop the ability to make mature choices regarding sex, as even several mentally healthy people stay naive and simply manipulated throughout their lives.

Another point of law comes from the fact that minors are generally economically, socially, and legally is not equal to adults. By making it a punishment for an adult to have sex with a minor, statutory rape laws focuses to give the minor some safeguards against adults in a position of power over the youth.

Another heated argument presented in defense of statutory rape laws relates to the difficulty of prosecution in prosecuting a rape case (against a victim of any age) in the courtroom. Because forced sexual activity with a minor is considered a particularly heinous form of rape, these laws helps the prosecution relieving the burden to prove lack of consent. This makes conviction more flexible in cases involving minors.

The aim of statutory rape laws is to protect young minor females from males who might exploit them and do not take responsibility by giving support for the child. In the past, the solution to such problems was often a shotgun wedding, a forced marriage by the parents of the minor girl in

question. This rationale is to preserve the marriageability of the minor girl and to stop their unwanted teenage pregnancy.

Analysis of the Statutory Rape falling under the Sixth Clause of the above definition

Any Sexual activity with a woman with or without her consent when she is below 18 years of age constitutes rape. A woman under the age of 18 is considered incapable of giving consent for any kind of sexual activity. The age of consent was raised from 16 to 18 by the Criminal Law (Amendment) Act of 2013.

The Supreme Court in *Harpal Singh* held that ‘even if the girl of 14 is a willing party and invited the accused to have sexual intercourse with her, the accused would be liable for rape under this clause’.

In *Manu Ramchandra Jadhav v. State of Maharashtra* the victim left her mother’s house and started living with the accused because her mother had declined the proposal of her marriage with the accused on the ground that she was too young. While she was with the accused they had sexual intercourse which was against her will. The act of intercourse with the prosecution will be covered under this clause.

Exception to this Clause

“Exception 2: Sexual intercourse or sexual acts by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault.”

Since child marriage in India is not yet void and is only voidable, such law was must to restrain men from taking advantage of their marital rights prematurely. No man can be held guilty of rape on his own wife when she is over 15 years of age on account of the matrimonial consent that she has given.

In *Bishnudayal v. State of Bihar*, where the victim, a girl of 13 or 14, who was sent by her father to accompany the relatives of his elder daughter’s husband to look after her elder sister for some

time, was forcibly 'married' to the appellant and had sexual intercourse with her, the accused was held liable for rape under section 376.

However under section 376 B, IPC sexual intercourse with one's own wife without her consent under a decree of judicial separation is punishable by 2 to 7 years imprisonment.

Punishment for Statutory Rape: [Section 376]

As per section 376 of IPC the Statutory Rape comes under the purview of the definition of Rape, so the punishment for Section 375 is:

Section 376 reads as:-

Punishment for rape.—

(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,—

(a) being a police officer commits rape—

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) 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 woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

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

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years. Explanation 1.—Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section. Explanation 2.—“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 by any other name, which is established and maintained for the reception and care of woman or children. Explanation 3.—“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.

CHAPTER 4

WOMEN AND THEIR VIEWS AGAINST MARITAL RAPE

India's response to gender neutrality in rape law can be described by two words: reactionary and inconsistent. Past judicial decisions and legislative amendments on the issue do not evidence any focused deliberation assessing the contours of the competing legal principles involved. There is little to suggest that the legislature considered the legitimate interests of all stakeholders while suggesting various amendments to the offence of rape under the IPC.³⁴ As noted in the Minutes of the National Consultation Meeting organized in 2001 in the aftermath of the *172 nd Report of the Law Commission of India*, the opinions of various sexual minorities were never taken into consideration despite them emerging as a formidable force in the struggle for basic rights.

The issue of gender neutrality in rape law was first raised in 1996 by Jaspal Singh, J of the Delhi High Court in *Sudesh Jhaku v KC Jhaku*. Therein, the Court was required to determine whether the pre-2013 definition of rape could be interpreted to include non-penetrative sexual acts. However, the court went beyond its mandate to opine on the issue of gender neutrality as well. While holding that the prayed-for relief could not be granted by a judicial authority, but only by means of legislative amendment, Singh, J went on to articulate his preference for the offence of rape to be redefined in gender-neutral terms. The judge noted that the offence of rape was the sole avenue under the Indian criminal law for dealing with heinous acts of sexual assault before quoting the following passage from an article in the California Law Review:

Men who are sexually assaulted should have the same protection as female victims, and women who sexually assault men or other women should be as liable for conviction as conventional rapists. Considering rape as a sexual assault rather than as a special crime against women might do much to place rape law in a healthier perspective and to reduce the mythical elements that have tended to make rape laws a means of reinforcing the status of women as sexual possession.

In 1997, a Delhi-based group, Sakshi, filed a writ petition before the Supreme Court of India requesting it to reconsider the question that had arisen in *Jhaku*.³⁵ In 1999, the apex court framed the "precise issues" to be considered by the Law Commission of India. Subsequently, the *172 nd Report of the Law Commission of India* recommended that the offence of rape be

³⁴*Ibid.*

³⁵*Sakshi v Union of India* (1999) 6 SCC 591.

substituted by a completely gender-neutral offence of “sexual assault”. Interestingly, one of the key reasons for the Commission to make this suggestion was a sizeable increase in the number of instances of sexual assault against young boys that could not have been considered as acts of rape under the unamended definition.³⁶ This concern, however, no longer holds much relevance after the *Protection of Children from Sexual Offences Act, 2012* (POCSO), which aims to protect children from cases of sexual assault, harassment, and pornography when perpetrated by a man. The recommendations of the Law Commission never translated into a legislative amendment up until 2012, when the *Criminal Law (Amendment) Bill, 2012* proposed a completely gender-neutral definition of rape. Many found this proposal to be surprising post POCSO since the reasons for the amendment remained unclear. The *167th Report on the 2012 Bill* compiled by the Parliamentary Standing Committee does not disclose the factors considered by the Parliament before proposing a gender-neutral definition of rape. *Per contra*, it expressly acknowledges that the responses received from the public and State Governments favoured “[m]aking the offence of rape and sexual assault gender neutral only in so far as the victim is concerned, but making the perpetrator male.” Even the Note of Dissent given by two members of the Council of States described the adoption of a completely gender-neutral definition as trivializing the increasing number of rapes conducted by men on women.³⁷ Amidst the prevailing ambiguity, this arcane proposal drew immense criticism from feminist scholars. For instance, in her opening statement to the Justice Verma Committee (JVC), Ms Indira Jaising, a prominent Senior Advocate in India, labelled this move as unacceptable since rape was to be always characterized as a crime constitutive of patriarchy, and therefore, gendered.³⁸

Before this 2012 *Bill* could be passed, the nation was rocked by the gang rape of a 23-year-old woman while travelling in a public bus in the capital city, Delhi, on 16 December 2012. As a consequence of the outrage that followed, the legislature constituted the JVC to look into amending the criminal law in order to provide for quicker trials and enhanced punishment for committing sexual assaults of an extreme nature against women. Unlike the 2012 *Bill*, the *JVC Report* recommended that the offence of “rape” be retained, and not be substituted by the offence

³⁶Law Commission of India, *172nd Report: Review of Rape Laws* (New Delhi: Ministry of Law and Justice, Government of India, 2000).

³⁷ *Ibid.*

³⁸*The Wilson Center, “Opening Statement by Additional Solicitor General Indira Jaising to the Verma Committee, available at:* <https://www.wilsoncenter.org/sites/default> (Visited on April 23, 2020).

of “sexual assault”, as it was widely understood as an expression of society’s strong moral condemnation. The Committee also recommended that the offence be made gender neutral; however, this was to be done *only* from the perspective of the victim. While the *JVC Report* is admirably detailed, it does not contain an account of the reasons behind this recommendation.

Despite being well received, the recommendation of partial gender neutrality did not result in the desired change. In a rather perplexing reversal, the legislature promulgated the *Criminal Law (Amendment) Ordinance, 2013* to adopt a completely gender-neutral definition of rape. This decision was criticized as being hurried, violative of the letter and spirit of the *JVC Report*, and bearing the potential to create a chilling effect on a woman’s ability to file a rape complaint.³⁹ Compelled by such criticism, and possibly motivated by political considerations, the legislature readjusted its stance after only a few months. In the next Parliamentary session, the legislature enacted the *Criminal Law (Amendment) Act, 2013* to supplant the ordinance, and reverted to the gender-specific definition of rape that is presently in effect.⁴⁰

While this move did appease those who had criticized the *Ordinance*, it also led to a new line of criticism from certain members of the queer movement, who viewed the reversion as damaging the interests of the transgender community. In the words of Arvind Narrain, “[t]he [2013 Act] was a slap in the face for all those who believed that finally transgender persons too are equal citizens in India”. A gender-specific definition of the offence of rape worded in terms of *men* and *women* reflects a binary understanding of gender, creating doubts as to its suitability in the minds of gender equality proponents. The same is crucial considering that presently there is no offence under the IPC equivalent to the offence of rape that adequately protects the class of victims currently excluded. Pertinently, such criticism poses another difficult question – whether the interests of the transgender community ever featured in the entire discourse surrounding gender neutrality in Indian rape law.

A perusal of the above chronology clarifies that India’s response to gender neutrality has been far from ideal. Despite a plethora of reports and amendments, the issue has yet to receive the purposive deliberation it warrants. The fact that most of the debate on the issue is confined to the corridors of various academic institutions and policy research organizations, as opposed to the

³⁹Nivedita Menon, “Gender Just, Gender Sensitive, Not Gender Neutral Rape Laws, at: <http://kafila.org/2013/03/08/gender-just-gender-sensitive>(Visited on April 23, 2020).

⁴⁰*Ibid.*

Parliament or courts, is disappointing. As such, it is both reasonable and appropriate to address the issue of gender neutrality in Indian rape law afresh, at least from a theoretical standpoint.

An analysis of the issues of gender neutrality in rape law must be preceded by a study of the characterization of the offence of rape and its impact on the victim. As regards India, Section 375 of the IPC, as amended by the *Criminal Law (Amendment) Act, 2013*, states that:

[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 .⁴¹

The amended definition broadened the notion of rape to include non-penetrative sexual acts violating a woman's bodily integrity without any penile-vaginal penetration. The *Criminal Law (Amendment) Act, 2013* achieved what the Supreme Court of India had refused to do in *Sakshi v Union of India* in 2004. In *Sakshi*, the apex court had held that when there is no ambiguity in the text of the provision, altering the definition of rape through judicial interpretation will “result in [a] good deal of chaos and confusion, and will not be in the interest of society at large.” While this definition does define the ambit of the offence, one must travel beyond the statutory text to truly appreciate its import.

Unfortunately, judicial opinions on Indian rape law reflect a rather traditional understanding, where rape is not only viewed as an assault on the body of a woman, but also her modesty, chastity, and honour. This view stands on patriarchal bedrock, and undermines the sufficiency of

⁴¹*Indian Penal Code, 1860* (Act no. 45 of 1860).

arguments based on the victim's individual autonomy and bodily integrity. For instance, in 1980 Krishna Iyer, J opined in *Rafiq v State of UP*⁴² that:

[w]hen a woman is ravished [in rape,] what is inflicted is not merely physical injury, but “the deep sense of some deathless shame.” ... [R]ape for a woman is deathless shame and must be dealt with as the gravest crime against human dignity.

In 1983, MP Thakkar, J elaborated on this idea in *BharwadaHirjibhai v State of Gujarat*, stating that when a woman is raped, she is likely to be ostracized by society, her own family, relatives, and friends, and that she would be overpowered by a feeling of shame on account of the upbringing in a tradition-bound society where by and large sex is taboo, amongst other social consequences evidencing of a loss of respect in society.⁴³ Most recently, in *State of MP v Madanlal*, the Supreme Court of India, while laudably dismissing the idea of a compromise in cases of rape or an attempt thereof, went on to reason that:

rapes are crimes against the body of a woman which is her own temple. These are offences which suffocate the breath of life and sully the reputation. And reputation, needless to emphasise, is the richest jewel one can conceive of in life. No one would allow it to be extinguished. When a human frame is defiled, the “purest treasure”[] is lost. Dignity of a woman is a part of her non-perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most. It is sacrosanct.

Undeniably, this characterization of rape is a product of a property-based positioning of women in society, where their chastity constitutes a valuable treasure of importance.⁴⁴ At first, these observations may appear to hold little legal significance. However, continuous reliance on this property-based approach creates a distinction between an honourable victim of rape and a dishonourable one, who does not fulfil this criterion, the consequence being that, despite the prevalent evidentiary safeguards and judicial directions to this effect, while the testimony of the former is considered reliable, the latter's narration of an act of rape is often looked down on with suspicion.

⁴²*Rafiq v State of UP* (1980) 4 SCC 262.

⁴³*BharwadaHirjibhai v State of Gujarat* (1983) 3 SCC 217.

⁴⁴*Ibid.*

Accordingly, instead of relying on the honour and chastity of a victim, a sounder alternative is to view an act of rape solely as a violation of the victim's bodily integrity; a simple denial of his or her sexual autonomy. This approach limits the possibility of non-factors like the victim's familiarity with sexual intercourse, moral character, etc. permeating into the trial. This is one of the reasons why this approach was also endorsed by the *JVC Report*, which noted that:

rape is a form of sexual assault just like any other crime against the human body under the IPC It is the offence against the bodily integrity of the woman as a person [and] it must not be viewed that a woman, while making a complaint, is in any way acting less honourably or in any way disturbing what is considered as the repository of honour of the family, community and others.⁴⁵

Conceptualizing rape only as a violation of the victim's bodily integrity lends ample support to its characterization as a human rights violation, and, accordingly, ensures that its adjudication is not contingent upon the victim's social positioning, but rather entitlement to his or her body. Though the Indian judiciary tends to fall back on the notion of honour to condemn an act of rape, it did endorse a more human-rights-based approach on two occasions. In 1996, in *Bodhisatwa v SubhraChakraborty*, the Supreme Court of India opined that rape "is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21." Subsequently, in *Railway Board v Chandrima Das*, it emphasized that rape "is not a mere matter of violation of an ordinary right of a person but the violation of Fundamental Rights which is involved."⁴⁶ However, such instances have been far too infrequent to reflect an institutional shift in the interpretation of the offence. Even the decisions in *Bodhisatwa* and *Chandrima Das* do not pertain to any criminal trial, but were rendered while determining the liability to compensate a rape victim. It is thus as unfortunate as it is surprising that the Indian judiciary, otherwise known for championing human rights, has been consistently silent in this regard when it comes to rape law.

Nonetheless, one may draw support from the manner in which instances of sexual harassment at work are viewed. In *Vishaka v State of Rajasthan*,⁴⁷ the Supreme Court of India noted that each incident of sexual harassment at the workplace results in a violation of the fundamental rights, including the right to life and liberty, protected by Article 21 of the *Constitution of*

⁴⁵*Ibid.*

⁴⁶*The Chairman, Railway Board v Mrs Chandrima Das* (2000) 2 SCC 465.

⁴⁷*Vishaka v State of Rajasthan* (1997) 6 SCC 241.

India (Constitution). The Preamble to the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013* also aptly recognizes that “the protection against sexual harassment universally recognised human right Accordingly, it would be anomalous to recognize sexual harassment as a human rights violation, but treat an act of rape differently.

Even internationally, it is an accepted practice to treat an act of rape as a form of violence, instead of a crime against community or societal honour. The *UN Handbook for Legislation on Violence Against Women* encourages countries to define sexual assault as a violation of bodily integrity and sexual autonomy. The Commentary to it condones the fact that “[s]exual violence has often been addressed in the problematic framework of morality, public decency and honour, and as a crime against the family or society, rather than a violation of an individual’s bodily integrity. In fact, several human rights proponents support the idea that law reforms relating to sexual offences should be guided by states’ obligations under international human rights law. In doing so, they place particular reliance on three international legal instruments, i.e. the *Charter of the United Nations*, the *Universal Declaration of Human Rights* (UDHR), and the *International Covenant on Civil and Political Rights* (ICCPR), all of which aim to “educate both officials and the general public in these norms, place governments failing to respect human rights on the defensive, and help create and legitimate internal and external pressures for human rights improvement.”

In light of the above, the preference for an approach emphasizing the rights of rape victims, and not their social positioning, becomes obvious. Such rights include, *inter alia*, the right to life and dignity, and an assurance that these rights will be observed without discrimination on the basis of sex. Therefore, it is more appropriate to clarify the characterization of rape simply as a violation of the victims’ bodily integrity and their right to life with dignity, instead of an act imposing a sense of deathless shame upon them due to an alleged loss of societal honour. In the Indian context, this would require the legislature to define the offence of rape in a responsible manner, and the judiciary to not let their interpretation be swayed by patriarchal conceptions.

It is accepted that human rights as a practice and doctrine needs to consider the basis on which the state regulates sexuality through law, especially criminal law Although sexual norms and

attitudes have changed significantly in many countries over the last century, law is often slow to register these changes; sex law itself is notoriously resistant to change.

In India, in the aftermath of the 16 December gang rape incident, the *JVC Report* suggested widespread reforms in the criminal law. These recommendations were based on a fundamental insistence that the right to be protected from sexual assault is guaranteed by the Constitution, and is one of the pillars on which the construct of gender justice stands.⁴⁸ This assertion was made to emphasize two aspects: the *first* being that under India's constitutional framework women are equally entitled to the fundamental rights enshrined in Part III of the Constitution; and the *second* being that the state has a fundamental duty "to provide a safe environment, at all times, for women" so that a "failure in discharging this public duty renders it accountable for the lapse." However, the same insistence also subtly furthers the argument of gender neutrality in rape law.

In this regard:

gender neutrality within rape statutes means the concept that the criminal law should recognize that men and women and transgender persons can be rape victims as well as perpetrators. It reflects modern understandings of the nature, effects, and dynamics of nonconsensual penetrative and non-penetrative sex acts.

Premised on this definition, my argument for gender neutrality in Indian rape law is based on the following three distinct arguments.

HUMAN RIGHTS AND STATE OBLIGATION

As iterated above, an act of rape must be viewed solely as a human rights violation. However, such a characterization is theoretically incompatible with the gender specificity prevalent in rape law. If rape is indeed a human rights violation, then a criminal offence of rape that seeks to punish these instances cannot be selective in terms of the protection it affords, on the basis of the genders of the actors involved. Human rights, such as the right to life with dignity and equal protection of the law, are rights that *each person* is entitled to by reason of being a human being. This includes men, women, and transgender persons to equal extents.

The evidence in support of the above assertion is abundant. The Preamble to the UDHR states that "the inherent dignity and the equal and inalienable rights of *all members of the human*

⁴⁸*Ibid.*

family is the foundation of freedom, justice and peace in the world”. Article 2 of the UDHR provides that “*everyone* is entitled to *all* the rights and freedoms set forth in this Declaration, *without distinction of any kind*, including *sex* or other status.” Article 7 further states that “all are *equal* before the law and are entitled *without any discrimination* to *equal* protection of the law. *All* are entitled to *equal* protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” Crucially, Article 8 prescribes that “*everyone* has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”⁴⁹ The use of gender-neutral language in these provisions is deliberate, suggesting that the entitlement of these rights cannot be restricted by factors like sex, and that the protection granted by the legislature in furtherance of these rights must remain uniform.

Admittedly, a literal reading of the above covenants merely reflects a formal, as opposed to a substantive, understanding of equality. While the former equates equal treatment with sameness, the latter is premised on the acknowledgment that at times equal treatment requires the state to treat a class of person differently:

The focus of a substantive equality approach is not simply on equal treatment under the law, but rather on the actual impact of the law. ... As Parmanand Singh notes, “it takes into account inequalities of social, economic and educational background ...”. ... The central inquiry ... is whether the rule or practice in question contributes to the subordination of the disadvantaged group.⁵⁰

The Constitution contains provisions for both formal and substantive equality, thereby “suggesting recognition on the part of the founders that uniformly applied formal equality would perpetuate the existing structural inequalities.” In fact, “India’s equality jurisprudence has long exhibited inklings of formal equality’s limits, undertows, intransigence, and backlash potential, and it displays a vigorous sense that a more substantive notion of equality is needed.” On the one hand, Article 14 provides that “[t]he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” Similarly, Article 15(1) prescribes that “[t]he State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.” However, on the other hand, Article 15(3) states that

⁴⁹*Supra note 9.*

⁵⁰Parmanand Singh, *Equal Opportunity and Compensatory Discrimination: Constitutional Policy and Judicial Control*, 301 (Sage Publications, New Delhi, 6th edn.,1976).

“[n]othing in this article shall prevent the State from making any special provision for women and children.” Therefore, it expressly permits the State to enact any special provisions for women and children “even in violation of the fundamental obligation of non-discrimination among citizens, *inter alia* of sex”. It is on account of this provision that noted feminists such as Catharine MacKinnon seem to believe that “India’s constitutional text holds great potential for ameliorating the subordination of women to men.”⁵¹

One may be tempted to justify the constitutionality of Section 375 of the IPC in terms of Article 15(3). However, despite its ameliorative character, Article 15(3) may also be interpreted as merely enabling the state to provide women and children with higher thresholds of protection, without allowing it to abdicate its constitutional duty to protect its citizens from human rights violations. Further, unlike other jurisdictions, the offence of rape as defined under Section 375 is the sole offence in Indian criminal law that addresses extreme incidents of sexual assaults that violate a victim’s bodily integrity, without any alternate source of redress. Thus, viewed from this perspective, “[t]he case for treating crimes of like heinousness similarly appears to be stronger than that calling for a distinction to be made between penetration of the female body and penetration of the male body, whatever the sex of the actor.”⁵² Nonetheless, as iterated earlier, my intention here is not to question the constitutionality of Section 375 on the grounds of gender specificity. Instead, I am only attempting to point out its inadequacies in light of the State’s constitutional responsibilities.

In this regard, the State’s obligation to ensure adherence to the responsibilities arrayed above is not just theoretical. It is widely accepted that states have an obligation to ensure observance of human rights within their territory without discrimination. In fact, *General Recommendation 19 on Violence Against Women* notes that:

Discrimination under the [*Convention on the Elimination of All Forms of Discrimination Against Women*] is not restricted to action by or on behalf of Governments For example, under article 2(e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private

⁵¹*Ibid.*

⁵² Jocelyne A Scutt, *Reforming the Law of Rape: The Michigan Example* 615 *IJLI* 617 (1976).

acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

The doctrine of state obligation that emerged in *General Recommendation 19* relied on the idea of state responsibility to protect and fulfil human rights, and built the case that a State could be held accountable for abuses by non-state actors. While doing so, an emerging doctrine on state accountability was strengthened in its codification. In India, a similar stance was adopted by the National Human Rights Commission as well in an order stating that:

it is the primary and inescapable responsibility of the State to protect the right to life, liberty, equality and dignity of all of those who constitute it. It is also the responsibility of the State to ensure that such rights are not violated either through overt acts, or through abetment or negligence. It is a clear and emerging principle of human rights jurisprudence that the State is responsible not only for the acts of its own agents, but also for the acts of non-State players acting within its jurisdiction. The State is, in addition, responsible for any inaction that may cause or facilitate the violation of human rights.

As such, a State's obligation to ensure the protection of the basic human rights of its citizens within its territory appears to preclude the idea of a gendered protection of the same, thereby casting ample doubts on the appropriateness of gender specificity in Indian rape law, especially when there is no alternative of like seriousness under the Indian criminal law.

JUDICIAL PRECEDENTS

The above proposition advocating for gender neutrality in rape law is yet to be considered by an Indian judicial authority, or debated in the Parliament. However, the same is certainly not unprecedented globally.

In 1984, in *People v Liberta*,⁵³ the Court of Appeals of New York Court was faced with a challenge to the constitutionality of, *inter alia*, Section 130.35 of New York's *Penal Code*, which stated that "[a] male is guilty of rape in the first degree when he engages in sexual intercourse with a female ... by forcible compulsion". The defendant argued that since the provision was not gender neutral, it violated an individual's constitutionally protected right to equality before law. Finding merit in the defendant's argument, the court held that:

⁵³*Ibid.*

Section 130.35 of the Penal Law violates equal protection because it applies to males who forcibly rape females but exempts females from criminal liability for forcible rape of males The fact that the act of a female forcibly raping a male may be a difficult or rare occurrence does not mean that the gender exemption satisfies the constitutional test; a gender-neutral law would indisputably better serve, even if only marginally, the objective of deterring and punishing forcible sexual assaults.

Upholding the principle of gender neutrality in rape law, the court added that:

[w]hen a statute is constitutionally defective because of underinclusion, a court may either strike the statute, and thus make it applicable to nobody, or extend the coverage of the statute to those formerly excluded; in making such a decision the court must discern what course the Legislature would have chosen to follow if it had foreseen the court's conclusions as to underinclusiveness.

Thereafter, the court neutralized the gender requirement of the offence altogether.

This decision came as a surprise as it was preceded by the decision of the US Supreme Court (SCOTUS) in 1980 in the case of *Michael M v Superior Court of Sonoma County*. Therein, the SCOTUS was required to determine whether a California rape statute that punished only males violated the principles of equal protection. By a majority of five to four, the court found the statute to not be unconstitutional for discriminating on the basis of sex as young men and women were not similarly situated with respect to the problems and the risks of sexual intercourse. Considering the state's strong interest in preventing illegitimate pregnancy, it reasoned that:

Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. It is hardly unreasonable for a legislature acting to protect minor females to exclude them from punishment. Moreover, the risk of pregnancy itself constitutes a substantial deterrence to the young females. No similar natural sanctions deter males. A criminal sanction imposed solely on males thus serves to roughly "equalize" the deterrents on the sexes.

However, in his dissenting opinion, Justice Brennan duly acknowledged that while the objective of preventing teenage pregnancies is credible, the same could also be achieved by a gender-neutral statute without discriminating on the basis of the sex of the offender. He thus found it difficult to reconcile the gender-specific protection afforded by the Californian statute with the SCOTUS's previous opinion in *Orr v Orr*.

In *Orr v Orr*, the SCOTUS held a statutory scheme imposing alimony obligations on husbands, but not wives, to be unconstitutional as it violated the equal protection principle. The court's reasoning was that where:

the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies, and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex.

In the United States, this dictum is regarded as the guiding principle stating the role of gender in legislative classification.

Outside the United States, in 1985, the European Court of Human Rights (ECtHR) had an opportunity to comment on state accountability in the context of human rights, albeit in a slightly different situation. In *X & Y v The Netherlands*, the ECtHR found the Netherlands to have breached its responsibilities under Article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, which, *inter alia*, provides that "everyone has the right to respect for his private and family life, his home and his correspondence. Noting the prosecutor's refusal to initiate criminal proceedings against a man accused of raping a mentally handicapped woman and recognize her father as a substitute complainant, the ECtHR held that Article 8 did:

not merely compel the State to abstain from [arbitrary] interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life These obligations may involve adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.

Accordingly, since effective deterrence in this regard could only be achieved via the criminal law, it concluded that the Netherland's failure to enact an appropriate criminal law addressing the rape of a mentally handicapped woman violated its obligation under Article 8 of the *European Convention*.

Recently in the 1994 case of *Nicholas Toonen v Australia*, the applicant challenged Sections 122(a)-(c) and 123 of the *Tasmanian Criminal Code*, which criminalized various forms of sexual contact between men, against Articles 2, 17, and 26 of the ICCPR. During these proceedings, the State of Tasmania conceded that Section 123 of the *Criminal Code* clearly draws a distinction on the basis of sex as it prohibits sexual acts only between males. However, the UN Human Rights Committee found that the challenged provisions violated Articles 2 and 17 of the ICCPR, and

thus did not consider it necessary to discuss whether the statute discriminates on the basis of sex in violation of Article 26. Nonetheless, the key concession made by the State of Tasmania in this regard is sufficient to further my assertion.

The purpose of citing these decisions is not to insist that a gender-specific definition of rape is necessarily unconstitutional, though, as stated in the previous section, the possibility cannot be discarded. Instead, it is to assert that a state's responsibility to ensure the observance of human rights within its territory for persons of all genders must factor in when framing its criminal laws. In the absence of the same, a differential or selective protection of human rights on the basis of gender of either the victim or the perpetrator of rape would be incompatible with the very idea of human rights, as well as gender justice. As highlighted by the Supreme Court of India in its judgment in *NALSA*, the “[r]ecognition of one’s gender identity lies at the heart of the fundamental right to dignity” and that “discrimination on the basis of ... gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution”.

Thus, the objective of gender equality need not always be inconsistent with recognizing non-female victims of rape.

This notwithstanding, my response to the first argument against gender neutrality in rape law is twofold.

First, a gender-specific definition of rape based on the male-on-female paradigm not only associates the victim and the perpetrator with a specific gender, but also the various stereotypes associated with it. There are countless theories of gender which further the idea that “gender and sex are fixed notions that are inherently linked: men are, or should be, masculine, and women are, or should be, feminine.” This creates a perception wherein a male perpetrator is not only a man, but someone who demonstrates masculine aggression, and a female victim is associated with a sense of passive feminine subordination. Therefore, in addition to belonging to specific genders, rape victims and perpetrators are expected to behave in accordance with their gendered roles for any sexual assault to constitute rape. This is identical to Zsuzsanna Adler’s description of an ideal rape, where each participant to an act of rape is required to behave in a particular manner, conforming to the expectations from each gender. For instance, while rape victims must be sexually inexperienced and possess good character, rape perpetrators must use physical force.

In India, several attempts have been made to address the aforementioned concerns, and limit the frequent references to gender-based stereotypes. As noted in the JVC Report, “evidence of the victim of rape is on the same footing as the evidence of an injured complainant or witness. Her testimony alone is sufficient for conviction.” Additionally, in certain cases of aggravated rape under Section 376(2) of the IPC, the burden of proving “consent” is placed upon the accused. However, notwithstanding these efforts, the dangers of stereotyping roles continue to plague the Indian criminal justice system even today.

The constant association of the victim/perpetrator framework with gendered roles encourages a legal system to label rape perpetrators as “beasts” or “sex-starved wolves”. This particular risk was noted even by the SCOTUS in *Orr v Orr*, when it opined that:

legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the “proper place” of women and their need for special protection. Thus, even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored.

At first, the said tendency appears harmless. However, over time, it creates a situation where if either participant to an act of rape does not conform to his or her role, then one finds it difficult to recognize the incident as an act of rape or attach blameworthiness to the perpetrator. The judicial decisions reflecting this tendency are plenty. In my opinion, if the wisdom of the judges falls prey to such stereotypes rather frequently, then not many can be considered immune. In this light, the first argument against gender neutrality may well be a product of the sheer inability or reluctance to acknowledge the occurrence of rapes beyond the traditional notion, where actors do not demonstrate the expected behaviour. Indeed, Alletta Brenner fears that “[s]uch a finding seems surprising only because the victim/perpetrator framework simultaneously constructs male sexual desire as ever-present and aggressive, female sexual desire as absent or passive, and the male/female sexual relations as defined by male dominance and female subordination.” It would not be unreasonable to extend her opinion to the Indian scenario where various other power structures which are not based on gender continue to ply with great force. As acknowledged by Laxmi Murthy women too are capable of perpetrating sexual assault on men and also on other women. Such instances are more possible in situations of custody or situations of caste/communal violence etc. , where women may collude, or actually initiate sexual assault on men of lower castes/ minority communities.

Accordingly, gender neutrality may allow us to abrogate sex stereotypes, and move beyond an understanding of men as the natural aggressors and women as the perennial victims.

Second, it cannot be denied that there are likely to be no statistics in India to evidence sexual assaults beyond the traditional notion of rape. This, however, does not lead to a conclusion that such instances do not occur. The absence of any official statistics is explainable on three counts.

CHAPTER 5

CONCLUSION

CONCLUSION

The National Crime Records Bureau reports a rape rate of 2 per 100,000 people in India. The figure for the US is 27, and for Sweden, it is 64. It is well known that India's low figure is not because of the low incidence of rape, but its huge under-reporting. When a rape victim decides to remain silent, the perpetrator is left off the hook. He remains anonymous and anonymity lets him commit further crimes.

The famous psychologist Philip Zimbardo, in his book *The Lucifer Effect: Understanding How Good People Turn Evil*, explained the concept of de-individuation. According to this, anything or any situation that makes people feel anonymous reduces their sense of potential accountability, thereby creating the potential for evil action. Anonymity can be conferred on others not only with physical objects such as masks, but also by the way people are treated in a situation. In most cases of sexual violence, the perpetrator is someone known to the victim. However, despite the knowledge of who the perpetrator is, the victim decides to remain silent about the incident and does not report it to the authorities. Why does the victim keep silent about this heinous crime?

Several societies, including India, put a lot of emphasis on women's virginity. A girl who is raped is seen as someone who has lost hers. There is a social fear that if the news of her rape is known to the outside world, the victim's marriage prospects are doomed. However, the rapist doesn't face any such value decline in the marriage market. In some settings, he is even condoned for his crime. The negative impact in the marriage market makes many a girl and her family keep quiet about rape.

Even if the victim speaks up, the perpetrator often expects to turn the tables on her by telling everyone that it happened because the girl tempted him—say, with her attire. Suddenly the perpetrator becomes the "victim" and the real victim becomes the bad girl who tempted this "hapless" guy. Even the law enforcement authorities are willing to believe such stories, unfortunately.

More than 93% of rapes in India are acquaintance rapes—rapes by people known to the victims. Many a time, the rapist occupies a respectable position within the family or society. That position of respectability can turn out to be the biggest protection for the rapist. Even if the victim speaks up, it could be very difficult to make even close relatives or law enforcement authorities believe that such a respectable person committed such a shocking crime. So many victims think several times before complaining against such rapists.

Even if the victim manages to convince close relatives of the assault, the tendency of the family may be to keep the incident under wraps. Lame excuses such as protecting the honour of the family are used to make sure that the outside world, more so the law enforcement authorities, do not get to hear of the crime.

It is not easy for the rape victim to file a complaint with law enforcement authorities. Many of these authorities have no empathy for the emotional turmoil the victim has undergone. Even in a court of law, in the name of cross examination, the victim is sometimes forced to relive the emotional turmoil of rape several times over. A recent instance of defence lawyers laughing while the victim was giving her testimony highlights the insensitivity of authorities to the plight of a rape victim.

The perpetrator of a rape begins his sexual harassment journey at a young age. In his book, *Evil Men*, James Dawes gets into the minds of Japanese soldiers who participated in the Nanking Massacre, one of the worst episodes of rape and violence in history. He emphasizes that the capacity for genocidal violence involves cultural training that starts young. Similarly, a person who violates the rights of a woman usually begins his abominable journey at a young age with small acts of sexual violence. The silence of the victim gives the perpetrator the confidence that there will be no consequences for what he does. With silence from the next victim, the perpetrator feels even more emboldened to commit further acts of crime.

To put an end to the problem of rape, we need to break the shackles that keep a victim of sexual violence silent. As Deepa Narayan, the author of the book, *Chup: Breaking The Silence About India's Women*, says, "Indian women will have to retrain themselves to speak up in a culture that defines a good woman as a silent woman."

To deal with the problem of sexual harassment, small children are taught to shout a loud "No" as soon as they experience a bad touch. Similarly, as soon as a girl experiences even the slightest instance of sexual harassment, she should make her objection loud and clear. As perpetrators of

sexual violence see and hear these protests from victims, they will get clear signals that women are no longer going to suffer in silence. Perpetrators will realize that they will not go scot-free.

The government should take steps to make it easy to file sexual molestation cases. Every police station should have trained police personnel— ideally women officers—to record the statements of victims. All legal procedures should be conducted on camera, so that the victim's privacy is protected. Governments should create a complementary system of independent sexual violence advisors (ISVAs) to support the police system. The easier we make it for victims to break the silence that surrounds sexual harassment, the faster will we be able to deal with the problem of rape.

SUGGESTIONS

In spite of several Constitutional safeguards and enactment of women oriented laws, the crime against women is not reduced to certain extent. During the Course of study on the theme and reading about the laws and factors responsible for crime against women the researcher would suggest following measures to control the crime against women –

- Today's women have proved her in every sphere of life. They excelled in every field and face every difficulty in realising their dream. She has played every part in life which she is required to play to become equal with man, in the eyes of law she termed equal but the crime against her proved
- otherwise. The feudal mind set of the society doesn't treat her at par with her counterpart. Women are not safe anywhere from home to work or any other place; she is subject to violence by the man. Women deserve equality in every sphere of life. Unless and until we provide equal status to women and our patriarchal thinking doesn't become gender neutral till then we can't have civilized world. The Indian Society can't progress until we provide equal opportunity to women in every walk of life. All bodies of government must treat women in equal manner and respect their rights.

- The law has already been passed that all the marriage solemnized in the country should be registered in the marriage registrar office but the implementation of the law is lacking there is no penalty prescribed under the law for couples who does not register their marriage. There should be penalty as well punishment for the couples who doesn't register their marriage.
- The administration of criminal judicial system should be overhaul. The police in India are not sensitive towards the victims of sexual crime because they belong to same patriarchal mind set. But as an authority they need to uphold the rule of law without influenced by any person or politician or his superior etc. For speedy curative action for the crimes committed against women, an appropriate system would have to be created. The Apex court has provided certain guidelines but the implementations of these guidelines are still pending. The police officers to be made accountable and time bound for their work so that they can restore the faith of citizens. There must be an independent oversight body to ensure that the police are fulfilling their obligations and duties in the law. This is vital to improve the relationship between public and police. There have to be police complaint authority in
 - which the people will complained against the errant officers who doesn't do their duties and misconduct on their part should be monitored independently in all cases or complaints. We have to work towards modernization of police force and have to make sure that the people will feel free to approach police and file their complaint. The Fundamental rights provided to the citizen of this country can only be secured if the police force of this country is effective. The police force has to be service oriented and deal with citizen efficiently and in scientific manner and resolve their grievances speedily. The police force shall work with the community to remove gender bias. There has to be more women in police force and there has to be volunteers from public or community to who are trained to perform their duty as citizen.
- The Number of court in our country needs to be increased to deal with the burden of backlog cases. With systematic change in the infrastructure, it will reduce half the burden of arrears in courts contributing to delays in enforcing the law of the land. There is need to increase the strength of the Judge to reduce backlog and provide speedy Justice to the aggrieved. The lower court should not apply the old fashioned method to deliver justice they should adhered to the direction issued by apex court for speedy disposal of the cases.

BIBLIOGRAPHY

BOOKS

- Rebecca Walker “Becoming the Third Wave”, from Ms. Magazine, in Leslie L. Heywood (ed.), *The Women’s Movement Today- An Encyclopedia of Third –Wave Feminism* 6 (Greenwood Press, U.S.A., 2006)
- N. Menon *Seeing like a Feminist* 118 (Zubaan and Penguin Books India Pvt. Ltd. 2013).
- F. Agnes *Law, Ideology and Female Sexuality* 844-847(Oxford Press, Chicago, 6th edn.,2002).
- Stephen, *Criminal Law* 262 (ABH Publishing House, Chicago, 9th edn.,1999).

STATUTES

- The Criminal Law Amendment Act 2013 (Act no.13 of 2014)
- The Criminal Law (Amendment) Act, 2013(Act no.13 of 2013).
- Indian Penal Code 1860 (Act 65 of 1860).
- Indian Penal Code, 1860(Act no. 45 of 1860).

ARTICLES

- *Smith v. City of Salem: Transgendered Jurisprudence and an Expanding Meaning of Sex Discrimination Under Title VII*” (2005) 28 Harvard Journal of Law & Gender 207 at 215

REPORT

- 172nd Report: Review of Rape Laws (New Delhi: Ministry of Law and Justice, Government of India, 2000).
- 167th Report on the Criminal Law (Amendment) Bill, 2012.

WEBSITES

- <http://www.timescrest.com> (Visted on April 20, 2020).
- <http://online.wsj.com/public/resources/documents/DelhiRape.pdf>
- <http://www.firstpost.com/india/cbi-files-charges-against-seven-tn-cops-in-gruesome-custodial-rape-case-1748681.html>
- https:// wiki/Mathura_rape_case,(Visited on April 20, 2020).
- <http://citeseerx.ist.psu.edu/>
- <http://www.canadiancriminallaw.com>
- <https://www.leaf.ca/the-law>
- <http://kafila.org/2013/03/08/gender-just-gender-sensitive>

MAGAZINES

- Economic and Political Weekly