
GENDER INCLUSIVITY IN CRIMINAL LAW: A DIVE INTO THE CODE OF CRIMINAL PROCEDURE, 1973

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ABSTRACT

India faces a major predicament in tackling the issue of Rape substantively and procedurally. Post the Nirbhaya Rape Case, certain steps by the Legislature were taken to titivate the situation at hand. The purpose of this essay is to highlight the procedural issues under CrPC regarding Section 375, 376 IPC and to further explore the consequences of the same on the victim's mental health. The essay follows the chronological approach of identifying relevant sections, explaining issues in their application, and suggesting modifications to overcome those impediments in order to establish a safer, more conducive environment for victims.

Keywords: Rape - Section 164(5) - Section 164A - Mental Health - Nirbhaya Act - Sexual Violence - Fast Track Courts

Problem Statement

“Should the CrPC (specifically section 164(5) and 164A) be modified to provide a more inclusive, progressive, and safer environment for victims of abuse, especially regarding considerations of mental health?”

Introduction

"While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female." - Justice Arjit Pasaya.¹ Rape as defined under section 375 of the IPC is the fourth most common crime against women in India.² The procedures regarding the interaction of state functionaries with victims of rape are provided under Sections 164(5) and 164A of the CrPC.³ Following the horrific gang rape event on December 16, 2012, a committee led by Justice J.S. Verma was formed to offer suggestions on how citizens can be afforded greater protection both before and after an offence is committed against them. The commission's recommendations identified "lack of good governance" as the primary cause of violence against women, to rectify which The Criminal Law (Amendment) Act, 2013 (Nirbhaya Act) was passed.⁴ This, as we shall presently find out, was a turning point for the enforcement of anti-rape laws in the country.

Hypothesis

Despite recent developments in anti-rape laws, particularly through additions in Sections 164(5) and 164A, and the Nirbhaya Act of 2013, the need for providing victims of sexual violence the requisite aid (mental as well as physical) in the process of securing justice still persists.

Sections 164(5) and 164(A) explained

Even if the prosecutrix approaches the Magistrate without being suggested or moved by the Investigation Officer, the Magistrate is required by the Criminal Amendment Act of 2013 to record the statement.⁵ The Magistrate is not to use his discretion, which is provided to him

¹ Dinesh v. State of Rajasthan, reported in (2006) 3 SCC 771.

² Section 375, Indian Penal Code, 1860.

³ Section 164, 164A, Criminal Procedure Code, 1973

⁴ Kumari, Ved, and Ravinder Barn. "SENTENCING IN RAPE CASES: A CRITICAL APPRAISAL OF JUDICIAL DECISIONS IN INDIA." *Journal of the Indian Law Institute*, vol. 59, no. 1, 2017, pp. 1–25, <https://www.jstor.org/stable/26826588>. Accessed 14 May 2022.

⁵ Section 164(5A), Criminal Procedure Code, 1973.

under Section 164(5) in general, but is required by law to record the victim's statement.⁶ It may be questioned why a Magistrate is now required to record statements under Section 164(5A) (a), when the statements might equally be recorded by police under Section 162 of the Code. For the purpose of opposing a witness, Section 145 of the Evidence Act makes no distinction between comments made under Section 162 and statements made under Section 164 of the Code, and no greater weight is given to statements made under Section 164 of the Code.⁷ Statements are recorded for a variety of reasons, one of which is to prevent contradiction during cross-examination under Section 145 of the Evidence Act. Although a statement recorded under Section 162 of the Code can only be used for contradiction during the trial, a statement made under Section 164(5A)(a) serves as significant evidence and can also be used for corroboration, giving it more evidential value to the court. This is very vital in cases of Section 375 IPC as the statement of the victim must be given utmost importance in such heinous crime. This also prevents the victim to recollect and narrate such an event twice and more importantly to the police which have been historically found to be insensitive in this regard.⁸

Medical exams of rape victims and suspected sexual assault victims are crucial in the investigation and trial of criminal cases involving sexual assault or rape.⁹ Wounds, strangulation marks, and other indicators of force and hence examined for during a comprehensive medical examination as under Section 164A.¹⁰ During criminal procedures, victims of sexual assault should get a medical examination to boost the chances of identifying the perpetrator. However, in certain circumstances, drunkenness might discredit the victim, therefore testing for alcohol or drug usage is also necessary.¹¹ Additionally, Medical reports are recognised as evidence, therefore they are crucial in dictating the journey and judgement of the trial. Rape accusations are simple to make against someone but tough to prove.¹² However, as time has passed and laws have changed, the burden of proof is now levied upon the accused to prove that he is not guilty. Regardless of the change in the burden of proof, the

⁶ S164(5A), 1973.

⁷ Section 145, Indian Evidence Act, 1872,

⁸ Barn, Ravinder, and Ved Kumari. "UNDERSTANDING COMPLAINANT CREDIBILITY IN RAPE APPEALS: A CASE STUDY OF HIGH COURT JUDGMENTS AND JUDGES' PERSPECTIVES IN INDIA." *The British Journal of Criminology*, vol. 55, no. 3, 2015, pp. 435–53, <http://www.jstor.org/stable/43819291>. Accessed 14 May 2022.

⁹ Barn, Ravinder, and Ved Kumari- 2015, pp. 435–53,

¹⁰ Section 164(A), Criminal Procedure Code, 1973.

¹¹ Kumari, Ved, and Ravinder Barn. "SENTENCING IN RAPE CASES: A CRITICAL APPRAISAL OF JUDICIAL DECISIONS IN INDIA." *Journal of the Indian Law Institute*, vol. 59, no. 1, 2017, pp. 1–25, <https://www.jstor.org/stable/26826588>. Accessed 14 May 2022.

¹² Kumari, Ved, and Ravinder Barn- 2017, pp. 1–25.

conviction rate is still lower than thirty percent in rape cases in India.¹³ The victim's medical examination had always been a prerequisite for evidential purposes, however, accounting to Section 53A of the Act, the medical examination of the accused is also now a mandatory requirement.¹⁴

Stereotyping by the Indian Judiciary

The dehumanising treatment of rape victims by the courts is quite concerning. Stereotypes about how an Indian woman should act abound not just in the Indian society, but also in the legal system, particularly in cases involving sexual offences.¹⁵ Even though the Supreme Court and the legislature have implemented a host of regulations meant to minimise the significance of a rape survivor's prior sexual experience in rape prosecutions during the last 40 years, Judges' prejudices against rape victims are something that is regularly employed while dealing with these situations instead of applying the law.¹⁶

The recent Tarun Tejpal decision¹⁷ demonstrates how stereotypes and patriarchy continue to colour judges' decisions. Throughout the course of the case, the victim was placed on trial rather than the accused. For a month, the victim was interrogated and cross-examined about her previous relationships, as well as the specifics of her WhatsApp chats and email communications, all in order to discredit her as a witness and make her testimony untrustworthy. The court questioned the complainant about her actions and considered it untrustworthy that she couldn't recount the occurrence to a friend she met afterwards, despite having clearly conveyed her feelings at the time. This demonstrates the brutal and unfriendly environment in which a rape victim must face a trial. Furthermore, the judge acquitted the accused based on the judge's decision to trust the contradicting statement of a defence witness over the complainant's statement making the decision of acquittal ambiguous and disregarding previous Supreme Court decisions that have declared that investigating the character of a rape victim and examining her sexual past is not permitted.¹⁸ The Goa bench of the Bombay High

¹³ "India Sees 88 Rape Cases a Day; Conviction Rate below 30% ." Times of India October 7, 2020.

¹⁴ Section 53(A), Criminal Procedure Code, 1973.

¹⁵ Gangoli, Geetanjali. "Controlling Women's Sexuality: Rape Law in India." International Approaches to Rape, edited by Geetanjali Gangoli and Nicole Westmarland, 1st ed., Bristol University Press, 2011, pp. 101–20, <https://doi.org/10.2307/j.ctt9qgkd6.9>. Accessed 14 May 2022.

¹⁶ Kumari, Ved, and Ravinder Barn. "SENTENCING IN RAPE CASES: A CRITICAL APPRAISAL OF JUDICIAL DECISIONS IN INDIA." Journal of the Indian Law Institute, vol. 59, no. 1, 2017, pp. 1–25, <https://www.jstor.org/stable/26826588>. Accessed 14 May 2022.

¹⁷ Tarun Jit Tejpal vs The State Of Goa, (2019) Criminal Appeal No. 1246 of 2019

¹⁸ Katju, Arundhati. "Why Scrutiny of Survivor's Sexual History in Rape Trials, as in Tarun Tejpal Case, Infringes on Her Right to Fair Trial." The Indian Express, 5 June 2021.

Court, while serving notice in the Goa government's appeal against the ruling, noted sarcastically that "the judgement purports to give a guidebook on how rape victims should act."¹⁹ The court has every reason to be worried. Rape charges are severe, and the accused's right to a fair trial with all available defences should be preserved. Acquittals based on assumptions about rape survivors and their prior sexual histories, rather than the prosecution's inability to establish its case beyond a reasonable doubt, do not serve justice. The amount of toll on the mental health of the victim to be cross questioned about her past in court after an offence of rape cannot be fathomed! The Judgements cast a very fundamental question on the sensitivity of the very same judges to whom the first narration of the offence of rape is to be given to under section 164(5).

The prior sexual history of a rape survivor was previously admissible under Section 155(4) of the Indian Evidence Act, which allowed a rape accused to establish that the rape survivor was of "usually immoral character" and hence agreed to the sexual activities.²⁰ The survivor's past sexual history was exploited to suggest that she was "loose" or "immoral," and hence untrustworthy as a witness.²¹ This effectively strips any woman with an active sexual life or women practicing prostitution the right to defend themselves against rape. The clause was removed in 2003 in response to suggestions in the Law Commission of India's 172nd report, although it continues to put a pall over rape cases.²²

Medical Challenges

To standardise healthcare practitioners' assessment and treatment of sexual assault survivors, the Ministry of Health and Family Welfare released guidelines for medico-legal care for survivors of sexual abuse in 2014.²³ The recommendations include factual medical knowledge and procedures to help debunk common misconceptions associated with acts of sexual violence. It rejects the "two-finger test" by limiting internal vaginal inspections to those that are "medically indicated," as well as the use of medical findings to make unscientific and demeaning judgments about whether the victim was "habituated to sex."²⁴ As Health Care is a

¹⁹ Tarun Jit Tejpal vs The State Of Goa, (2019) Criminal Appeal No. 1246 of 2019

²⁰ Section 155(4), Indian Evidence Act, 1872,

²¹ Katju, Arundhati - 5 June 2021

²² SEN, RUKMINI. "Law Commission Reports on Rape." *Economic and Political Weekly*, vol. 45, no. 44/45, 2010, pp. 81–87, <http://www.jstor.org/stable/20787533>. Accessed 14 May 2022.

²³ REGE, SANGEETA, et al. "Responding to Sexual Violence: Evidence-Based Model for the Health Sector." *Economic and Political Weekly*, vol. 49, no. 48, 2014, pp. 96–101, <http://www.jstor.org/stable/24481086>. Accessed 14 May 2022.

²⁴ REGE, SANGEETA - 2014, pp. 96–101.

state issue in India's federal framework, state governments are not legally obligated to follow the 2014 standards. Medical practitioners, even in jurisdictions that have approved the rules, often do not follow them.²⁵ States' rules are frequently out of date and lack the clarity and sensitivity of the 2014 federal recommendations.²⁶

Parallely, State healthcare services have largely failed to offer therapeutic treatment and counselling to rape survivors, even as authorities seek to systematise the collecting of forensic data.²⁷ The intersection of sexual assault and psychotherapy is complicated. Even though it is included within the ambit of the medical examination, the same has not been executed at the grass roots level. As of 2018, only nine states have adopted the national guidelines related to sexual assault and only some states, such as Delhi, Goa, Haryana, Kerala, Madhya Pradesh, Maharashtra, Meghalaya, Orissa, and Uttar Pradesh have taken some initiative to train health professionals on use of these guidelines to tackle mental issues stemming from Intimate Partner Violence or domestic violence.²⁸ In the absence of clear policies and widely implemented clinical guidelines, the health systems response will remain checkered and unsystematic.²⁹

Need for Procedural Modifications

The amendments made to substantive laws pertaining to sexual assault are indeed laudable. The advancement of the understanding of sexual violence under the Indian Penal Code has aided the prosecution of heinous acts victims were earlier helpless against. It must be brought to light, however, that progress in the understanding of what constitutes a sexual offence does not guarantee the justice it seeks to provide. This advancement must be supplemented with equally progressive and protective procedural laws that ensure that the law underlined by Statute is effectively carried out until its culmination in justice.

The above sections highlight how despite the barrage of amendments made by the Nirbhaya Act, victims are often unable to achieve the justice they deserve. While problematic judicial

²⁵ MK, Khan. "Doctors and Medico Legal Examination of Victims of Sexual Offenses." *International Journal of Forensic Science & Pathology*, 2015, pp. 136–138., <https://doi.org/10.19070/2332-287x-1500032>.

²⁶ MK, Khan - 2015, pp. 136–138

²⁷ Downing, Tracey K. "Medical Documentation in Intimate Partner Violence Cases." *Sexual and Gender-Based Violence*, 2020, pp. 215–232., https://doi.org/10.1007/978-3-030-38345-9_12.

²⁸ Downing, Tracey K. - 2020, pp. 215–232

²⁹ REGE, SANGEETA, et al. "Responding to Sexual Violence: Evidence-Based Model for the Health Sector." *Economic and Political Weekly*, vol. 49, no. 48, 2014, pp. 96–101, <http://www.jstor.org/stable/24481086>. Accessed 14 May 2022.

interpretations of these sections are one arena of concern, our focus lies in addressing the procedural aspects of law enforcement in India.

Suggested modifications

The process of justice does not begin in the courtroom. It commences right when an offence is committed. When a victim is sexually violated, their first point of contact with State machinery is either the police or medical institutions (in a few cases, victims have also first approached local Magistrates). Thus, highlighting the importance of providing robust procedures for police and medical officials' conduct right from first contact with the victim until the end of their duties as witnesses of the state.

Reports from sexual assault victims from across the world, both men and women, have revealed that police officials' behaviour is often ignorant of the survivors' trauma.³⁰ Considering that the victims may feel ashamed of what has transpired and that it is difficult for them to approach the police, it is of utmost importance that officials treat survivors sensitively. Issues like aggressive body language, undue remarks, and general reluctance to register complaints by officials need to be addressed during the training of these officials.

As primary caregivers to the victim, the roles and duties of police and medical institutions are also intertwined. In light of the same, it is pertinent to establish certain ground rules, which the *GUIDELINES & PROTOCOLS: Medico-legal care for survivors/victims of Sexual Violence* guidelines prescribed by the Ministry of Health and family welfare³¹ seeks to do.

To begin with, considering the therapeutic role of the health sector, the victim must be ensured confidentiality of information and privacy throughout the course of the examination. Hence, while they should be duly apprised of all necessary information later, the police should not be allowed to be present while details of the incident of sexual violence, examination, evidence collection and treatment are being sought from the survivor. It is important that the police not interfere with the duties of a health professional. Taking custody of the survivor immediately after evidence collection must be denied until the required treatment and care is provided. In the instance that an unaccompanied survivor is brought by the police for examination of sexual

³⁰Canada, Research and Statistics Division, et al. *Male Survivors of Sexual Abuse and Assault: Their Experiences*, Department of Justice, 2013.

³¹ Republic of India. *GUIDELINES & PROTOCOLS: Medico-Legal Care for Survivors/Victims of Sexual Violence*, Ministry of Health and Family Welfare, 2014.

violence, in the best interests of the survivor, a senior medical officer or any health professional and not the police should sign as a witness in the medico-legal form. Further, health professionals must refrain from entertaining questions from the police such as “whether the survivor is capable of sexual intercourse” or “whether rape occurred”. Instead, endeavouring to explain the nature of evidence and its limitations to answer such questions without doubt.

As for medical examination, the provisions contained in Section 164A, while substantially helpful, are not sufficient. It plainly provides for the examination of a victim by a health official without making any remarks regarding *who* should be the examining official. To address such lapses in the procedure code, and following in the lead of the Ministry of Healthcare and Family Welfare, the government of Kerala designed the *Kerala Medico-Legal Protocol for Examination of Survivor of Sexual Offences* guidelines of 2019.³² These guidelines draw attention to the fact that in such a situation, victims of sexual assault may feel uncomfortable with someone, especially someone of the same sex as the offender, touching and examining their person. For the same reason, it is advisable that the examination of women survivors should *generally* be conducted by a female registered medical practitioner unless where such an examiner cannot be arranged within a reasonable time or waiting for such an examiner is not advisable for reasons like the life-threatening condition of the survivor. If, however, the victim is examined by a registered male medical practitioner, for the aforementioned reasons, consent of the survivor regarding the conduction of said examination by a male official should be obtained and the examination should be done in the presence of a female bystander. In case such a female bystander is not available, a female hospital staff, preferably a staff nurse should be made present at the time of examination, and her signature to that effect should be recorded.

Other categories of victims that, although excluded from the ambit of Section 375 of the IPC, require our attention, are male and transgender survivors. Male survivors should be examined by the casualty/duty medical officer on duty. However, the survivor should be given the choice as to the gender of the examiner and in the case of transgender survivors, a choice as to the gender of the examiner may be provided to the survivor. Heads of these medical institutions should make necessary arrangements to effect these examinations by such doctors as requested by the survivors, in the absence of exceptional circumstances as noted above.

³² Republic of India. Kerala Medico-Legal Protocol for Examination of Survivor of Sexual Offences, Government of Kerala, 2019.

The sole pre-requisite for a medical examination of a victim of sexual violence should be the written informed consent obtained from the victim themselves or someone in their stead. Furthermore, since time is often of the essence in such cases, the registered medical practitioner should not consider it a prerequisite, that a requisition from the police or a Judicial officer or that registering a case is mandatory for examination of such a victim.

A welcome change to the procedure for providing first-aid to victims of sexual violence was the addition of Section 357C to the CrPC by the Criminal Law (Amendment) Act, 2013.³³ It prescribed that all hospitals, public or private, shall immediately provide first-aid and medical treatment free of cost to the victims of sexual offences, also providing for punishment under Section 166B of the IPC. It, however, also provides for immediately informing the police about such incidents, without considering whether the victim desires the filing of charges, which may be problematic for reasons we shall discuss in the following section.

Delayed Reporting

Another common phenomenon observed especially in cases of sexual violence is that of delayed reporting by victims. Reporting an individual for sexual assault is a risky and often traumatic venture.³⁴ Many sexual assault victims delay reporting³⁵, which often results in the victim's credibility being questioned³⁶. This reluctance to report tends to sprout from the fear that they won't be believed and considering the aggressive nature of cross-examinations by defence counsels, they want to avoid the revictimization of living through what happened³⁷. Victims may wait until they are more comfortable, psychologically, before coming forward with the allegations. However, although a delay in reporting is commonplace in cases of sexual assault, authorities tend to view it more negatively when compared to a delay in reporting

³³ 357C. Treatment of victims.—All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under section 326A, 376, 376A, 376B, 376C, 376D or section 376E of the Indian Penal Code (45 of 1860), and shall immediately inform the police of such incident.]

³⁴ Dolkart, J. L. (1992, March), Working paper on legal reform in the area of sexual harassment: Procedural and evidentiary reform. In Northwest Women's Law Center, Sex and power in the workplace: An interdisciplinary approach to understanding, preventing, and resolving harassment; Conference proceedings. Seattle, WA: Northwest Women's Law Center

³⁵ Clay-Warner, J., & Burt, C. (2005). Rape reporting after reforms: Have times really changed? *Violence Against Women*, 11, 150-176. <https://doi.org/10.1177/1077801204271566>

³⁶ Ellison, L., & Munro, V. (2009). Reacting to rape: Exploring mock jurors' assessments of complainant credibility. *The British Journal of Criminology*, 49, 202-219. <https://doi.org/10.1093/bjc/azn077>

³⁷ Campbell, R., & Raja, S. (1999). Secondary victimization of rape victims: Insights from mental health professionals who treat survivors of violence. *Violence and Victims*, 14, 261-275.

physical assault.³⁸ To help support victims and ease their mental trauma, it is also essential to include considerations of victims' mental health into the provisions of the CrPC. Incorporating into investigatory proceedings, multidisciplinary teams of trauma-informed medical practitioners trained in psychotherapy and/or psychiatry, and allowing such counsellors or anyone the victim may be comfortable sharing intimate details with, to testify/report on behalf of the victim so that concerns of victims' re-victimisation and re-living of trauma are quelled.

The United Nations General Assembly established the concept of the state's commitment to safeguard women's human rights with "due care."³⁹ This is the foundation upon which international forums hold nations responsible, not just individual rapists. Thus, the state inadvisably has an obligation to take actions to prevent rape. The inadequacy of the country's rape legislation can be attributed to a lack of forensic labs, quick-track courts, and insufficient investigation. The core of criminal justice is a quick trial, which is the cornerstone of delivering justice. If a party has been wounded and a legal remedy is available, but it is not supplied swiftly, it is effectively the same as having no redress at all. The protracted trial, which is aggravated by the lack of fast-track courts and the strength of the judges, causes the victim's justice to be delayed significantly. As seen by the low conviction rate over the previous decade, even waiting does not ensure justice for the victim.

Fast track courts (FTCs) were formed in 2000 after the 11th Finance Commission proposed them to speed up the settlement of long-standing disputes.⁴⁰ Aside from legislative reforms, the J.S. Verma committee recommended a fast-track procedure and more police knowledge. The POSCO Act of 2012 mandated that rape hotlines be created in each district.⁴¹ Despite this, state officials did not make any serious attempts until the horrific Delhi gang-rape case, which shook the whole country and prompted quick state response. The Nirbhaya Act amended Section 390 of the CrPC, requiring daily processes and trials of offences under Sections 376 and 376-D to be completed within two months of the charge sheet being submitted.⁴² As required by law, rape cases must be adjudicated within two months.⁴³ Lower courts were also

³⁸ Pica, Emily. Clarksville, Ottawa, 2021, *The Impact of Delayed Reporting, Assault Type, Victim Gender, and Victim-Defendant Familiarity on Mock-Jurors' Judgements*.

³⁹ Walby, Sylvia, et al. "Law and the Criminal Justice System." *Stopping Rape: Towards a Comprehensive Policy*, 1st ed., Bristol University Press, 2015, pp. 111–72, <http://www.jstor.org/stable/j.ctv4g1rd0.9>. Accessed 14 May 2022.

⁴⁰ SEN, RUKMINI. "Law Commission Reports on Rape." *Economic and Political Weekly*, vol. 45, no. 44/45, 2010, pp. 81–87, <http://www.jstor.org/stable/20787533>. Accessed 15 May 2022

⁴¹ The Protection Of Children From Sexual Offences Act, 2012

⁴² The Criminal Law (Amendment) Act, 2018

⁴³ The Criminal Law (Amendment) Ordinance, 2018

urged by the Supreme Court to "strictly adhere" to present norms and to rule out any possibility of "manoeuvring" through overly long adjournments. Every inquiry or trial should be performed as fast as possible, according to Section 309 of the Criminal Procedure Code (CrPC), and once witness questioning begins, it should be continued on a daily basis until all witnesses have been interrogated.⁴⁴

Conclusion

Despite recent modifications in law through the Criminal Law (Amendment) Act 2013, the condition of victim-protecting procedural Rape laws in the country remains abysmal. This can primarily be attributed to the faulty implementation of laws and the absence of the consideration of victims' mental health. For tackling the same, we conclude that laws should encompass sensitivity in both spirit as well as function, and should further facilitate technical and institutional changes in the State's Rape-redressal machinery. Furthermore, the burden of stringent implementation of the laws should not be relaxed and the onus of the same must be borne by all three pillars of the state: Legislature, Judiciary and the Executive, to ensure victims are not left stranded in the process of securing justice and are duly provided with the necessary care they deserve.

⁴⁴ Section 309, Criminal Procedure Code, 1973.