

Chapter-18

SEXUAL OFFENCES AGAINST WOMEN AND RIGHT TO SAFETY UNDER NATIONAL LAWS

Dr. Mohd Saleem

Associate Professor at Delhi Global Institute of
Management and Law, Faridabad

Chapter Id: ASU/NSP/EB/AGRLWC/2022/Ch-18

doi: <https://doi.org/10.52458/9789391842680.nsp2022.eb.asu.ch18>

ABSTRACT:

The crime and offences against the women are continuing in our society and the offences relating to the dignity and public life is very rampant. The offences against the women are not against the property but are specific to the body. The offences under the IPC, 1860 and special law The Dowry Prohibition, Act, 1961 define the demand of dowry and punishment for during the marriages and the right to maintenance under the Criminal Procedure has been specify and the remedies are available. The offences intended to outrage the modesty of women have been dealt with stringent punishment the world over. The offence of rape is such heinous crime that law makers sometimes have faced quite challenging environment to legislate a full proof law or statutes. The complexities of human behavior have always posed difficulties and have every now and then exposed the weakness of the law. The paper highlighted the development for the safety and protection of the women through the legislation specifically penal provisions. The development taken by the legislature and the Committees reports has been very important. The judicial guidelines for the care and protection of the women against any inhuman act and derogatory practices are the landmarks for the safety of the women.

Keywords: *Women, Sexual offences, Indian Penal Code, Protection and Punishment*

Constitutional Safeguards for Women:

The Framers of the constitution were fully familiar with the pathetic condition of women in our society and so they made some sincere efforts for bettering their condition. The preamble to the constitution of India. Which promises to all its citizens' justice in all spheres viz; Social, Economic and Political for the attainment of all these objectives, the Constitution gives certain fundamental rights. The relevant Articles conferring constitutional rights upon women are:

Article 14 mentioned the right to equality in treatment means *equality before law*- "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". **Article 15** "Prohibits discrimination against any citizen on the ground of sex, color, caste"; **Article 15(1)** prohibits gender discrimination and **Article 15(3)** lifts that rigor and permits the State to positively discriminate in favor of women to make special provisions to ameliorate their social condition and provide political, economic and social justice.

Article 16 "Provides for equality of opportunity in matter of public employment' **Article: 16** Equality of opportunity in matters of public employment";

Article 16(1): There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state.

Article 16(2): No citizens shall, on grounds only of religion, race, cast sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the state.

Article 21 enumerates *'Protection of life and personal liberty'* "Every person has right to live dignity and no person shall be deprived of his life or personal liberty except according to procedure established by law." Women are still suffering gender discrimination and sexual offences have been on rise. The laws are made in this regard but despite that Indian women are discriminated socially, economically, politically, culturally and religiously and there is no proper implementation of these laws.

Legal Provisions under Indian Penal Code, 1860

The Indian Penal Code is the main statute dealing with criminal offences in India. Section 375 of the IPC, 1860 discusses the provision relating to rape. The current rape laws were amended in 2013. This section keeps marital rape out of the purview of the punishment and sexual intercourse by a man upon his wife if she is under fifteen years of age would only be termed as rape. In **Tukaram vs. State of Maharashtra**, the session judge in this case acquitted the accused on the ground that the act committed was a peaceful affair with the consent of the women. On appeal, The High Court of Bombay distinguished between 'Consent' and 'Passive Submission'. It observes that there may be circumstances where a woman may be put to threats or coercion and she has to surrender. But this submission is totally different from consent. As the consent is given freely without fear or motive. Nevertheless, the Supreme Court reversed the findings of the Session Court. It observed that Mathura was not alone in the police station and also her family was waiting outside. She could have resisted or called out for help from the family. There was no ground to feel pressure or fear and hence passive submission was not there. She did it by her consent. The judgment of the court did not go down well and there was public resentment and strong protests. The Parliament was forced to amend the law relating to rape vide Criminal Law (Amendment) Act, 1983.

In the case of **Kaini Rajan vs. State of Kerala**, the apex court tried to define what would constitute consent. As per the judgment, "consent is a voluntary acceptance of what is proposed to be done by another. It is an act of reason accompanied by deliberation. Consent comprises of three things- A physical power to act; Mental power to act; and A free and serious use of them".

Criminal Law (Amendment) Act, 2013:

The Criminal Law Amendment Act, 2013, is a legislation passed by the Lok Sabha on 19th March 2013, this legislation provides for amendment in the Indian Penal Code, Indian Evidence Act and Code of Criminal Procedure 1973 on laws related to sexual offences. The Bill received Presidential assent on 2nd April 2013 and it came into force from 3 February 2013, in the light of protests which were made after an dreadful incident of 2012 Nirbaya gang rape case in Delhi.

Justice Verma Committee Report:

In the light of mass protest in the whole country, a three member committee under the chairmanship of Justice J.S Verma was constituted and the members were Justice Leila Seth former judge of Delhi High Court and Gopal Subramaniam former solicitor general of India.

Defintion and Punishment under the Amended Sections:

Rape. Setion 375-“A man is said to commit Rape if he:

- penetrates his penis into the vagina, mouth, urethra of woman or make her to do so with him or any other person
- Inserts any object or any other part of body into the vagina, urethra or anus of woman or make her to do so with him or any other person
- Applies his mouth to the vagina, anus or urethra of a woman or forces her to do so with him or any other person”.
- For the purpose of this section, such act must be_
 - Against her will;
 - Without her consent;
 - With the consent but the consent given was not free i.e. by putting her or any other person related to her in fear of death or hurt;
 - With the consent when the consent is obtained by deceptively appearing as her husband and the women believes that she is the man with whom she is lawfully married.
 - With her consent under the circumstances in which she was incapable of giving consent for example Unsoundness of mind, intoxication etc.

- The consent is immaterial when she is under sixteen years of age.
- Exception 1-Any kind of medical procedure or treatment 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.

Punishment For Rape(Amendment) 2013. Section 376

Except in the cases provided for in sub-section (2), any person who commits rape, shall be punished with rigorous imprisonment for not less than seven years, which may extend to imprisonment for life, and shall also be liable to fine.

Clause 2 to sec 376 provides the situations when the rape is committed by the public authorities in their official capacity. It states that when a police officer, public servant, a member of armed force, a member of management, staff of hospital or any guardian commits rape of a women which is pregnant; under 16 years of age; incapable of giving consent; mentally and physically unfit or when such officer 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.

376A-Punishment for causing death or resulting in persistent vegetative state of victim:

“Whoever commits an offence punishable under sub-section (1) or sub-section (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 imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death”.

Now the sec 376A raise a question, does the section is sufficient enough to prevent the incidence of crime or we can say is it provide enough deterrence to the offenders?

In the case of **Mithu vs. State of Punjab**, it was observed by the Apex Court that the mandatory death penalty to the person committing murder, which is already going through the life imprisonment, is unconstitutional and violative of Article 14 and 21 of the Constitution. The Constitutional validity of section 302 is being upheld in **Bachan**

Singh vs. State of Punjab due to provisions of alternative punishment in it and provisions of section 235(2) of Cr P.C.

Earlier, in case of death of victim after rape is dealt with section 302 IPC which provides punishment for life imprisonment or death. The 2013 Amendment Act provides for the imprisonment of minimum 20 years to the imprisonment for life which means till the end of natural life.

376B- Sexual intercourse by husband upon his wife during separation:

“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”

Explanation states that any of the acts mentioned in clauses (a) to (d) of section 375 constitutes "sexual intercourse".

376C- Sexual intercourse by person in authority:

“This section provides the situations when the rape is committed by the public authorities in their official capacity. It states that when a police officer, public servant, a member of armed force, a member of management, staff of hospital or any guardian commits rape of a women which is pregnant; under 16 years of age; incapable of giving consent; mentally and physically unfit or when such officer 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.

376D-Gang Rape:

“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; Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim and provided further that any fine imposed under this section shall be paid to the victim”.

376E- Punishment for repeat offenders:

“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”.

Ingrédients:

As per section 376-Sexual intercourse must be by a man with a woman and that sexual intercourse must be under the circumstances falling under any of the seven clauses of section 375.

Sexual Intercourse:

A landmark case that led to definite amendments in the section is **Sakshi vs. Union of Indian and Ors.** Sakshi, an NGO working for violence against women file a petition before Supreme Court to declare that the offence of ‘rape’ under IPC must include all forms of forcible penetration. The Supreme Court upheld the existing definition of rape under IPC, thereby refusing to include other forms of penetration within the ambit of definition of rape as provided under IPC. The Court’s decision however advances the cause stated by the NGO and asked the Parliament of India to change the law, stating: “The suggestion made by the petitioners will advance the cause of justice and are in the larger interest of society. We hope that the Parliament will give serious attention to the points highlights by the petitioner and make appropriate legislation with all the promptness which it deserves”.

Against Her Will:

An act is done against a woman’s will when she is in her senses and is aware of what is being done and resists. The term ‘Without the consent’ means that the woman is incapable of knowing the nature of the act and thus unable to give consent. A woman has given consent when she has agreed to submit herself with free mind. Consent is a voluntary acceptance of what is proposed to be done by another. Consent is an act of reason accompanied by deliberation.

Consent obtained by misrepresentation, fraud or under mistake is no consent:

Consent obtained by misrepresentation, fraud or under mistake is no consent. In **Queen vs. Flattery**, in this case victim was 19 years old who went to doctor as she was suffering from fits. The doctor on the pretext of performing an operation did a sexual

intercourse with her and it was held by the Apex Court that the consent of girl was obtained under misconception of facts and the doctor was found guilty of rape.

Exception to section 375:

1. The exception to sec 375 stated that the medical examination of a rape victim will not amount to the offence of rape. In **Lillu @ Rajesh vs. State of Haryana**, the Supreme Court issued guidelines to the central government to provide for better medical tests that do not violate the dignity of the victim and thus preventing the victim from the trauma of second rape by way of medical examination.
2. Since child marriage is not void in India. It is only voidable and this exception is necessary to put a check on the dominant power of man over his wife. However this exception is somehow incomplete as it does not take into account the marital rapes when wife is over the age of 16 years.

A brief comparison of the Verma Committee Recommendations and the Criminal Law (Amendment) Ordinance, 2013

1. The Justice J. S. Verma Committee recommended 20 years imprisonment for gang-rape and life imprisonment for rape and murder and also recommended criminalization of marital rape but the ordinance rejected it and keep the marital rape outside the purview of offence.
2. As per the Justice Verma Committee report there should be a restriction on the politicians charged with sexual offence or facing charges from contesting elections. Ordinance rejected this recommendation.
3. The Justice J. S. Verma Committee wanted to make the mandatory provision for recording the statement of victim in camera but the ordinance made it optional.
4. The Justice J. S. Verma Committee suggested the definition for sexual offences as rape but the ordinance replaced it with the word “sexual assault”.

Criticism of Criminal Law Amendment Act, 2013 on Grounds of:

- **Gender Neutrality:** Under the Indian Penal Code, 1860 only women are the victims of the sexual offences. Only a man is punishable for doing sexual offence against a woman only. The gender neutrality has to be seen in the following aspect:-
- **Neutrality in Context of Victim:** Transgender is also the victim of the sexual offences but they did not get the protection of laws because of this gender

biasness. The recent case of Pinki Pramanik, “where her partner filed a case of rape against her shows the very real possibility of female to male transgender persons or male to female transgender persons (either pre- or post- transition) causing sexual assault on a woman”.

- **Marital Rape:** There can be no denial of the fact of marital rape. In spite of making rape an offence punishable with capital punishment; the Parliament is yet to include marital rape within the ambit of punishable form of rape. The Verma Committee made recommendations to penalize marital rape. The report held that marital rape stems from the notion that wife is considered as a property of husband. The Committee suggested that existence of relationship is no defence against sexual violence. But the Amendment Act 2013 does not recognize marital rape as a crime unless wife is below 16 years of age or the rape is committed during separation.

Gradation of Punishment Offence for Penetrative Sexual Assault (Penetrative):

Under the section 375 of IPC, all offences whether penile oral penetrative have equal punishment. There must be an increase in the punishment for penile penetration as it affects the victim’s life by causing sexual diseases and unwanted pregnancy. If we talk about medical evidence in rape cases, it holds a crucial role in rape trials. Many a times, absence of physical injury due to delay in reporting gets support by doctor’s opinion and in a way hampers the case of the victim. The types of questions asked from the rape survivors are most of the time intended to outrage the modesty of an already tarnished victim. In the case of **Narendra Kumar vs. State (NCT of Delhi)**, the Apex Court dealt with a case where accusation was made on the victim of rape herself about her being an unchaste and immoral lady. The court held “so far as the question of prosecution is concerned, mere statement of the prosecution is enough to record a conviction if her evidence is read in its totality and found to be worth reliance”.

Loopholes in the Investigation:

The Law Commission in its 84th report tried to distinguish the terms ‘consent’ and ‘submission’. As per the report all consents are submissions but vice versa are not true. Because of the report of Law Commission, the Indian Evidence Act 1872 was amended and section 114A was added according to this section, “the accused is presumed to be guilty of rape if the victim gives statement to that effect and the maxim of innocence of the accused does not work in that situation”. This provision in the Evidence Act leads to more often than not, a flimsy investigation by the police. As per 160 (1) of the Cr. P. C., “attendance of the persons acquainted with the facts of the case is

essential before investigating officer". However; this provision is very often misused by the police when it comes to deal with sexual offences. There is literally a second rape of the victim in police custody by the type of words and questions. But there is no provision of any punishment for the guilty officers who violate section 160(1) of CrPc. Likewise section 195 of IPC provides "punishment for fabricating false evidence with intent to procure conviction of offence punishable with life term", but unfortunately the conviction rate in criminal cases is very low because of perjury as the witnesses many a times in arrangement with the accused falsely depose.

Article 72,161 of Indian Constitution "vests various authorities with constitutional power to grant remission or commutation of sentences on various grounds". A very liberal exercise of this provision allows many offenders to get away from harsh and severe punishments. Positive change in our attitude would be the fundamental following points:-

1. The 172nd report of the law commission of India recommended to make rape laws gender neutral. Even almost all the developed nations have gender neutral rape laws except India.
2. The investigating procedure followed in India needs a drastic overhauling especially section 114A of the Indian Evidence Act, 1872 which sets presumption in rape cases and thus a flimsy investigation by the police. The victim is subjected to humiliation in the police station when it comes to narrate the incidence and disappointingly no check has been offered by the Legislature in this regard for violation of section 160(1).
3. Police reform should be given appropriate attention with stricter laws. Our police force is far from efficient and is very often inadequately supervised. In the general view of common people, it is regarded as corrupt and it lacks cordial cooperation of the people.
4. The presumptive provisions of the Indian Evidence Act, 1872 needs a serious overview. Even after 2013 amendment there is no standardized policy or guidelines to regulate medical treatment and gathering information of forensic evidence in cases of sexual offences.
5. Last but not the least; the provisions must be made under IPC 1860, to criminalize marital rape. Even the 2013 Amendment does not recognize it as crime unless wife is below 16 years age. A rape is a rape whether a woman of 16 years of age or 30 years. This age bar has to be removed so as to provide justice to all.

The current laws, if conscientiously and fastidiously implemented by determinative law enforcement agencies, are sufficient for maintaining law and order in the country and also to protect the safety and dignity of the women, and to punish any offenders who commit any crime. Speedy justice is quintessence for effectiveness of the law and also for preventing the violation of the same. Lastly stated the words of grieve and sorrow as

“A murderer kills the body but a rapist kills the soul.”

-Justice Krishna Iyer