

**INTERNATIONAL JOURNAL OF LAW**  
**MANAGEMENT & HUMANITIES**

**[ISSN 2581-5369]**

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**Volume 4 | Issue 6**

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**2021**

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# Rape Laws under Indian Penal Code, 1860: A need to revolutionize in Contemporary India

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## ABSTRACT

*The present work is on the issue over which not only India but other countries of the world are equally affected and worried i.e. 'rape'. The offence of rape is not restricted to women but has impacted almost all other sections of the society either its children or transgenders. Rape means sexual assault against the individual. It has multiple consequences including physical, emotional, financial and social. In contemporary times, it is observed that though the awareness regarding an act has increased manifolds but the effect is not directly proportional. To the contrary, it increases to great extent and has crossed all limits of inhumanity.*

*The victim of sexual assault is not victimized once rather she suffers a lot at the hands of justice system, media and society. The whole burden of the incident falls on the victim than on the accused and she is questioned at each and every stage.*

*Thus the present research will critically analyse the statutory provisions of rape under Indian Penal Code, 1860 and will try to suggest some workable solutions to the problem.*

**Keywords:** Rape, IPC, History, Loopholes.

## I. INTRODUCTION

*"A life without dignity is robbed of its meaning. Absent self-worth, life is devoid of content."*

**- Allahabad High Court<sup>2</sup>**

Human dignity is a gift of nature to humans for being associated with the clan of Homo Sapiens. The evolution of this concept is based on the fact that human being is the peerless creation of God and is separate from other living creatures due to its faculty of reason. They can analyze and understand the nature, faith and creation of God differently from other living creatures, thus it is inherent and invaluable aspect of human being.

The word "dignity" is derived from the Latin word "*dignitas*" which means "the quality or

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<sup>2</sup> Satyam Rai v/s Banaras Hindu University and others, (2020) 4 ADJ 203, Para 88

state of being worthy” or “behavior that accords with self-respect”.<sup>3</sup> The meaning of the term “human dignity” is not precise as the same is not defined in any instrument, national or international. But the same is construed by making in-depth study of cross-cultures and historical accounts. Its evolution can be studied under three heads-

- a) The initial concept of dignity is more religious than modern. Catholic scriptures provide that all Homo sapiens are offspring of God and are considered as God’s best creation. Thus irrespective of our race, birth or sin, we are bestowed with human dignity and the same cannot be taken away by anyone.
- b) The other notion considered it as privilege enjoyed only by elite class of western society. Thus it was not uniformly available to all individuals. It was a status enjoyed by a few.
- c) But with the advent of the era of international human rights, human dignity is not merely considered as one of such right. To the contrary, it is the foundation of all other human rights to which a person is entitled. Thus the same is considered as jewel adorned by each and every individual.

Thus the intrinsic value of human dignity has been revived with the dawning of the era of human rights.

The reference of the term “human dignity” can be found in various international declarations and covenants such as the Preamble<sup>4</sup> of UN Charter and Article 22<sup>5</sup> of Universal Declaration

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<sup>3</sup> Webster’s Third New International Dictionary, 632, Vol. I, 1986

<sup>4</sup> WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
- to promote social progress and better standards of life in larger freedom,

**AND FOR THESE ENDS**

- to practice tolerance and live together in peace with one another as good neighbours, and
- to unite our strength to maintain international peace and security, and
- to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples,  
**HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS**

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

<sup>5</sup> Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

of Human Rights. It is also given uniform application and thus discrimination is prohibited on any ground such as caste, religion, race, gender, color or any other. Thus it is one which cannot be granted or taken away. It is inalienable.

Being an essential ideal, it is also imbibed in various national laws. In India, the term found its place in the Preamble<sup>6</sup> of the Constitution, not in Part III (Chapter on Fundamental Rights). Thus it is not acknowledged as one of the Fundamental Rights. But the same is elevated to the pedestal of fundamental right through various judicial decisions as the Apex court in the case of **Francis Coralie Mullin v/s The Administrator; Union of India**<sup>7</sup> has held that:

*“The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.*

*The right to life includes the right to live with human dignity and all that goes along with it.*

*Every act which offends against or impairs human dignity would constitute deprivation protanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights.”*

## II. DIGNITY OF RAPE VICTIM

Woman is considered as backbone not only of the family but of the country as well. This was true in ancient times but in contemporary world, the place of woman in society has reduced to a great extent. The change can be noticed from the time of *Manu* who gave the concept of ‘protection of women’ in the society. This philosophy was taken in different notion and thus led to confinement of women into four walls and sown the seed of patriarchal society. It has resulted in preeminence of men over women. The situation has worsened to such an extent that women are being objectified and considered as “property”. It can be exemplified from Mahabharata where *Draupadi* was put on stake by her husbands in the game of ‘*chausar*’ and when the *Pandavas* lost that game, she was disrobed by her brother- in-laws in front of whole

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<sup>6</sup> WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and

to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION

<sup>7</sup> 1981 SCR (2) 516

'rajsabha'. The dignity of women has been greatly affected as she lost control over her sexual autonomy and reduced to a mere puppet of patriarchal system. In present time, the extent of harm has bypassed all limits of inhumanity.

'Rape' is the most dehumanizing act which not only affects human body but also the dignity of women and reduces her to an animal existence. It is an offence against human body under Indian law but it has multiple effects. It affects not only physically but sexually, mentally, psychologically, emotionally and financially. Thus the same has not been perceived in a right manner till today. The law regarding rape has evolved to a great extent but yet it is not sufficient to deal with the present scenario where a girl of 19 years is gang raped by four men brutally and then her back and neck is broken and tongue cut<sup>8</sup> or when a veterinary doctor was gang raped by four laborers and then burned alive<sup>9</sup> or when a medical student is gang raped in a moving bus by driver, conductor and 3 other accomplices and her private parts were cut and later penetrated by iron rod and thrown naked out of moving bus<sup>10</sup> or where a girl of mere 9 months was raped.<sup>11</sup>

The situation in other parts of the world is not much different. The World Population Review 2020 shows that South Africa has topped in the list of rape incidents in a year. India has not lagged behind as it is positioned at 117<sup>th</sup> out of 193 countries.<sup>12</sup> As per NCRB report, 33,356 rape cases were reported in India during 2018.<sup>13</sup> Thus in every 15 minutes, rape of a woman is reported. The data also highlights the fact that 93.9 % were committed by the acquaintance.<sup>14</sup>

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<sup>8</sup> "Hathras gangrape and murder case: How the case has unfolded so far" *The Times of India*, 30<sup>th</sup> september , 2020, available at <https://timesofindia.indiatimes.com/india/hathras-gangrape-and-murder-case-how-the-case-has-unfolded-so-far/articleshow/78410835.cms> (last visited on 8<sup>th</sup> December, 2020)

<sup>9</sup> "All 4 accused in Hyderabad rape-murder case killed in encounter: Telangana Police", *The Economic Times*, 6<sup>th</sup> December 2019, available at <https://economictimes.indiatimes.com/news/politics-and-nation/all-4-accused-in-hyderabad-gang-rape-murder-shot-dead/articleshow/72393178.cms> (last visited on 8<sup>th</sup> December, 2020) 1552401-2019-06-20 (last visited on 8<sup>th</sup> December, 2020)

<sup>10</sup> "2012 Delhi gang rape case: What happened on December 16", *The Hindustan Times*, 20<sup>th</sup> March 2020, available at <https://www.hindustantimes.com/india-news/delhi-2012-gang-rape-case-what-happened-on-december-16/story-GboszJckGgslhWHpRcci4K.html> (last visited on 8<sup>th</sup> December, 2020)

<sup>11</sup> "Telangana: Drunk man kidnaps 9-month-old baby from next to sleeping parents, rapes and kills her", *India Today*, 20<sup>th</sup> June, 2020, available at <https://www.indiatoday.in/crime/story/nine-month-old-raped-murdered-in-telangana->

<sup>12</sup> "Rape Statistics by Country 2020", *World Population Review*, available at

<https://worldpopulationreview.com/country-rankings/rape-statistics-by-country> (last visited on 8<sup>th</sup> December, 2020)

<sup>13</sup> National Crime Record Bureau, "Crime in India 2018" , 2, (Ministry of Home Affairs, December 2019) available at <https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202018%20-%20Volume%201.pdf> (last visited on 8<sup>th</sup> aDecember, 2020)

<sup>14</sup> Id.

### III. HISTORICAL DEVELOPMENT OF RAPE LAWS IN INDIA

#### (A) Prior to 1860

The offence of rape was introduced for the first time in the year 1860 under Section 375 of the Indian Penal Code, 1860. The Code came into force after 15 months of its enactment on 1<sup>st</sup> of January, 1862.

Before 1860, the law was scattered. It was majorly governed by personal laws. By the Charter Act of 1833, a Law Commission was set up under the chairmanship of Lord Macaulay for the codification of law for India. Resultantly, the Indian Penal Code was enacted in 1860. The law is substantive in nature as it defines offences and prescribes punishments for the same. In the year 1861, the Criminal Procedure Code was enacted which consolidates the law regarding procedural aspect of Criminal Justice System.

#### (B) The Criminal Law (Amendment) Act, 1983

The law remained unaltered for 123 years. The first amendment was introduced in the year 1983. It was an outcome of Mathura Rape Case in which a young girl was raped within the four walls of police station by police personnel. All the offenders were set free on account of absence of injury on victim's body and thus held that the act was peaceful and with consent. The court also went to the extent that she might be the one who incited the cops to indulge in sexual act. The decision was severely criticized and led to commotion across the country. Consequently, presumption regarding absence of consent and the concept of custodial rape found its place in Indian Evidence Act and Indian Penal Code respectively.

#### (C) The Indian Evidence (Amendment) Act, 2002

In the year 2000, a PIL was filed by an NGO named *Sakshi* which highlighted the plight of the rape victim which she undergoes at the time of trial particularly during her encounter with the accused or during cross examination by defense counsel. The Apex Court directed the Law Commission to review the law regarding rape comprehensively.

On the recommendations of the Law Commission, the Indian Evidence (Amendment) Act, 2002 put restrictions on the power of cross examination and bars the character assassination of the victim and impeaching the credit of the victim.

#### (D) Enactment of Protection of Children from Sexual Offences Act, 2012

In 2007, a study on Child Abuse was conducted by Ministry of Women and Child Development, Government of India on 13000 children in 13 states. It brought to the fore facts that nearly 53.22% children were sexually abused and 50% of them were abused by some

near or dear one. The NCRB report of the year 2010 and 2011 also accentuate the extremity. Thus to curb the problem of sexual abuse among children, an Act was promulgated in 2012 titled Protection of Children from Sexual Offences Act, 2012. It introduced a child friendly procedure and provides a comprehensive statute to deal with various forms of child sexual abuse.

Before 2012, limited form of child sexual abuse was covered under Section 375, 376 and 377 of IPC, 1860.

#### **(E) The Criminal Law (Amendment) Act, 2013**

A humongous modification and development was brought into force in criminal law by 2013 Amendment Act. The change is the result of the turmoil over the atrocious incident of Delhi gang rape of 23 year old paramedical student. The recommendations were proposed by 3 member committee chaired by Justice J.S.Verma. The Committee has reviewed the law regarding sexual abuse in length including the adequacy of death penalty, role of khap panchayats and others.

Resultantly, the Criminal Law (Amendment) Act, 2013 has brought changes in Indian Penal Code, Criminal Procedure Code, Indian Evidence Act and Protection of Children from Sexual Offences Act. Though it failed to give implement all the suggestions of the Verma committee.

#### **(F) The Criminal Law (Amendment) Act, 2018**

The recent heart wrenching occurrences of Unnao where a rape of 17 year old girl was committed by a politician in the year 2017 who was also further traumatized in illicit manner and of Kathua where an eight year old girl was raped and murdered demanded enactment of stringent laws. Thus, the government passed the Criminal Law (Amendment) Ordinance, 2018 in haste to pacify the ruckus. Later the same has been passed by the Parliament. The Act is majorly engrossed in providing rigorous punishment for the offence of rape and gang rape of girls below 12 and 16 years. Secondly it reduced the time of investigation in the case of child rape provided under Section 173 of Criminal Procedure Code, 1973 from three months to two months.

#### **(G) The Protection of Children from Sexual Offences (Amendment) Act, 2019**

The amendment is made in Protection of Children from Sexual Offences Act, 2012 which enhanced the punishment for the offences of child pornography and aggravated sexual assault. The intention was to do away with the gap created by the Criminal Law (Amendment) Act, 2018 and thus to provide a gender neutral law and to check the rising cases of child

pornography.

#### IV. DEFINITION OF RAPE

The term “rape” is derived from the Latin word “rapier” which means to seize. In Indian law, the term was defined for the first time under Section 375<sup>15</sup> of Indian Penal Code, 1860 as ‘sexual intercourse’ by man with woman under given circumstances. Thus the scope has been limited to penetration of vagina by penis. Other sexual acts were excluded from the definition of the term ‘rape’.

In the year 2000, an NGO named Sakshi questioned the restricted meaning of the term and prayed to the Apex Court in **Sakshi v/s UOI**<sup>16</sup> to give it a wider meaning and asked to include the acts such as oral sex, penetration of foreign objects as it degrades the sexual autonomy of the woman. The court while upholding the prevailing scenario refused to give definition of ‘rape’ a wider meaning. While exercising the doctrine of ‘self-restraint’, the court held that the task to change law is the sole authority of the legislature. So the required change can be brought by the Parliament and not by the court. But the court asked the Law Commission to review the law governing rape in India. Resultantly, 172<sup>nd</sup> report<sup>17</sup> was submitted which

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<sup>15</sup> Rape.—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:— 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.

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.

<sup>16</sup> (1999) 6 SCC 591

<sup>17</sup> Law Commission of India, 172<sup>nd</sup> Report on Review of Rape Laws (March 2000)

upheld the view of ‘Sakshi’ and observed that the definition needs to be broadened to include other sexual acts.

But nothing turned up till 2013. The historic event of Delhi Gang Rape, 2012 led to drastic change in the criminal law of India. One such change was brought in the definition of ‘rape’. Now the term rape includes-

- Penetration of vagina, anus or urethra by penis and other body parts
- Oral sex
- Insertion of foreign objects to anus, vagina or urethra.
- Manipulation of body parts in order to cause above mentioned penetration

The above acts amount to rape if the same is committed under seven circumstances mentioned in Section 375 of the code. It can be broadly classified or categorized under following heads for indepth study –

- a) Without Consent                      b) Against her Will                      c) Under certain Age

#### **(A) Consent**

The term ‘consent’ is not defined either under IPC or CrPC or IEA. Though Section 90<sup>18</sup> of IPC has enumerated circumstances under which it is considered as ‘no consent’. Thus it merely enumerates circumstances when it is considered that person has not consented. It covers the “negative” aspect. Whereas Section 375 of IPC emphasizes on “positive” aspect. Thus for that it is necessary to determine the meaning of the term “consent”.

The dictionary meaning of the term ‘consent’ is “agreement, approval or permission as to some act or purpose esp. given voluntarily by competent person”.<sup>19</sup>

As per **Law Lexicon Dictionary**<sup>20</sup>, the word “consent” is a “much stronger word than knowledge because it implies conscious assent”.

A thorough analysis of these terms along with Section 90<sup>21</sup> has been understood that a

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<sup>18</sup> 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  
Consent of insane person.—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 Consent of child.— unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

<sup>19</sup> Black’s Law Dictionary, 300, 7<sup>th</sup> ed., 1999

<sup>20</sup> Law Lexicon Dictionary, 396, 3<sup>rd</sup> ed., Vol. I, 1982

<sup>21</sup> Supra 17

‘consent’ is one where the decision to allow or not to allow the act is taken with full knowledge of the facts and its consequences. Therefore, it must be an informed decision.

By the Criminal Law (Amendment) Act, 2013, Explanation 2 was added to define the term ‘consent’<sup>22</sup>. The essentials of the term consent are –

- a) Unequivocal
- b) Voluntary
- c) Agreement
- d) Communication
- e) Willingness to participate
- f) Specific sexual act

From the above said, it is evident that consent must be clear and unambiguous. If it is ambiguous then there is no consent. ‘Willingness’ shows that the person wants to indulge in the act wholly and there is no sign to refute it. The consent is given for specific act only. If a person indulges in another act than the one for which consent is given then it amounts to an act without consent.

For example- if a woman allows a person to kiss her or to touch her, then the permission does not safeguard him against any sexual act.

Ultimately, the explanation inculcated “positive” aspect of consent.

In the case of *Mahmood Farooqui v State (Govt. of NCT of Delhi)*<sup>23</sup>, the High Court of Delhi failed to give meaning to this definition. In this case, the prosecutrix was acquainted with the accused and had flirted with him before. On the date of incident both were intoxicated and had casual conversation when the accused asked for sex to which the lady refused. He forced himself upon her to which the prosecutrix submits in the fear of violence. The court held that the sexual act does not amount to rape as they were acquainted and flirted with each other and thus in those cases even a ‘feeble no means yes’.

The decision has been severely criticized as the court failed to fully appreciate the meaning of the term “consent”.

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<sup>22</sup> 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.

<sup>23</sup> 243 (2017) DLT 310

### **(B) Against her Will**

The first circumstance under Section 375 talks about ‘against her will’. It provides that if the act is done against the will of the victim then it amounts to rape. Thus an act is considered against the will of the person if there is no desire to indulge in it. But the question arises how other person will come to know about the desire or interest of the victim? Whether mere absence of will is sufficient for conviction or the same must be communicated to the other person? Thus the concept of will is vague and ambiguous. Whether “will” has relevance when “consent” is opted as criteria?

Whether a person can be punished for the act if the same is done against the will of the victim even when she expressed her consent for the same? Or in another instance when the woman has expressed her unwillingness then it amounts to non-consent. Thus when the will is communicated it falls in the definition of consent given under explanation 2 of section 375. Thus the concept of will is an ancient concept which has lost its relevance in the presence of ‘consent’. The need to keep the concept of “will” is questionable.

## **V. GENDER EQUALITY**

Article 15(1)<sup>24</sup> of the Constitution of India prohibits discrimination on the ground of sex, caste, religion and others. Clause (3)<sup>25</sup> allows making laws in favor of children and women. The objective behind this provision is to support the marginalized and the most vulnerable section of the society.

Section 375 of Indian Penal Code(IPC), 1860 is gender specific as the offence of rape can be committed only against women (irrespective of age). Thus no man or transgender can be raped as per Indian law.

Law should always be dynamic as the same can't be stagnant. So with the change in conditions, the law should also be altered. In the present time, there is no field untouched by women. She is holding dominant positions in various sectors. This has given her the power to take advantage of that position. Now there are instances where the woman abuses man by mis-using her position. Although the same has not been highlighted due to absence of law.

Not only legal but social myths have also created hurdles for man to get justice. Some of the hurdles are:-

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<sup>24</sup> The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

<sup>25</sup> Nothing in this article shall prevent the State from making any special provision for women and children.

**(A) Will be Fatal for women**

Law makers are of the view that if gender neutral law is made then it will make it difficult for women to get justice as counter case can be filed against the woman. So the burden of proof upon women will be heavy as they not just have to prove that she is assaulted by him but also that she is not the offender.

But isn't it irrational to protect one gender at the cost of another? In 172<sup>nd</sup> Law Commission Report<sup>26</sup>, it has been recommended to make the offence of rape a "gender neutral" law and the same was again supported by 2013 Justice Verma Committee Report<sup>27</sup> and it was also recommended that the term 'rape' be altered by the term 'sexual assault'.

To avoid misuse of the provision against women, there is need to impose certain parameters.

**(B) Section 377<sup>28</sup> v/s Section 375**

The other obstacle against enactment of gender neutral laws is Section 377 of IPC, 1860. It penalizes unnatural offences i.e. intercourse which is against the course of nature. The jurisprudence available on this subject held that natural intercourse is penile-vaginal intercourse as the same is done for procreation. Any sexual act which is done for any purpose other than this is considered as unnatural such as oral sex. Section 377 is gender neutral as it is equally applicable on man, woman and Trans genders.

But the issue arises in those cases where woman imposes herself upon man or transgender and indulges in carnal intercourse. Now the act does not fit in the criteria laid down under section 377 of the act and thus a women can be set free due to deficiency in the law.

Further, the support mechanism available to rape victim such as compensation, camera proceedings, recording of statement by magistrate under Section 164(5)<sup>29</sup> of Criminal Procedure Code, 1973 are not available to the victim of unnatural offence.

The similar hurdles were there before recognizing the fact that male child can be sexually

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<sup>26</sup> Law Commission of India, 172<sup>nd</sup> Report on Review of Rape Laws (March 2000)

<sup>27</sup> Justice Verma Committee Report, *Amendments to Criminal Law*, (January 2013)

<sup>28</sup> Unnatural offences.—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 2[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

<sup>29</sup> Any statement (other than a confession) made under sub- section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

assaulted or raped and making it an offence under Protection of Children from Sexual Offences Act, 2012. Thus it is not right to juxtapose Section 375 with Section 377 or social myths to become stumbling block in reforming law.

## VI. MARITAL RAPE

Rape is a heinous crime which destroys the very existence of women. It is worst when the same is committed by the one who is considered as the protector of women i.e. her husband. It has long term effect as it affects the psyche of women.

As per study conducted by World Health Organization in collaboration with London School of Hygiene & Tropical Medicine and South African Medical Research Council in the year 2013, the frequency of intimate partner violence is highest in the region of Central Sub-Saharan Africa which amounts to 65%.<sup>30</sup> As per World Health Organization, 1 in 3 women face physical or sexual violence worldwide at the hands of an intimate partner.<sup>31</sup> In India, there is no official data as the same has not been recognized as an offence.

The exemption to partner rape/ wife rape / marital rape has found its origin in Common Law system and India being its colony has inherited the same. In England, marital rape was exempted. This immunity/ exemption was based on the theory propounded by Lord Hale where he observed that there is an implied consent of wife for sexual intercourse which is given at the time of marriage. As marriage, being a contract, continues, the consent will also continue. Wife cannot retract it. but the court in the case of *R v/s Clarke*<sup>32</sup> for the first time prosecuted husband for raping his wife and it was provided that wife is not bound to co-habit with her husband and she is also entitled to retract her consent and thus can refuse sexual intercourse. In later decisions, court also developed other exceptions where husband can be convicted for raping his wife such as when wife obtains injunction against her husband for molesting her or on obtaining a decree nisi of divorce.

In the year 1991, House of Lords in *R v/s R*<sup>33</sup> has abolished the immunity and recognized marital rape as an offence.

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<sup>30</sup> World Health Organisation, “Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence”, (2013)

<sup>31</sup> “Violence against women” *World Health Organisation*, 20<sup>th</sup> November, 2017, available at <https://www.who.int/news-room/fact-sheets/detail/violence-against-women#:~:text=Global%20estimates%20published%20by%20WHO,violence%20is%20intimate%20partner%20violence> (last visited on 8<sup>th</sup> December, 2020)

<sup>32</sup> [1949] 2 All ER 448

<sup>33</sup> [1992] 1 AC 599

In India, marital rape is exempted by Exception 2<sup>34</sup> of Section 375 of IPC which provides that the husband, where wife is above 15 years, is not liable for raping his wife. Thus Indian law has partially recognized the marital rape and can convict husband for rape if the age of wife is less than 15 years. The basis of the exemption is that the law considers that a wife below 15 years is not capable to give consent. Though the age of consent for the offence of rape has been raised eventually from 14 to 16 years and then to 18 years but there was no change in the age for marital rape till September 2018. In the year 2018, the apex court has taken up this issue in the case *Independent Thoughts v/s UOI*<sup>35</sup>. The court observed that in India, the age for marriage is 18 years for girls and the age of consent for sexual intercourse is 18 years under Indian Penal Code, 1860 and as per Protection of Children from Sexual Offences Act, 2012. Thus to bring uniformity in law and to remove anomaly, the apex court has held that the age in exception two of section 375 of IPC, 1860 will be read as 18 years.

Section 375C<sup>36</sup> (now 375B after 2013 amendment) is another exception to the general rule of marital rape. It provides that if the husband has sexual intercourse with his wife without her consent during judicial separation then he will be liable for sexual assault and the punishment for it is imprisonment up to 2 years. Though the exception is created but the act is not treated as rape under section 375 but as a separate offence of sexual assault punishment for which is far less than the offence of rape.

A development was made in the case of *Jospeh Shine v. UOI*<sup>37</sup> where the court while decriminalizing the offence of adultery has observed that under Section 497 of IPC the woman is considered as the property of the husband and adultery amounts to theft of that property which is not relevant in the present times where woman has her own individuality and thus upheld the sexual autonomy of married women.

The law has changed in countries like UK, USA, Mexico, South Africa, Canada and others<sup>38</sup> as marital rape is now recognized as an offence.

Keeping in view the substance of the offence of rape and the progressive view of *Jospeh*

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<sup>34</sup> Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

<sup>35</sup> [2017] 10 SCC 800

<sup>36</sup> 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 - In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

<sup>37</sup> 2018 SC 1676

<sup>38</sup> Shalini Nair, "Marital rape a crime in many countries, an exception in many more", *The Indian Express*, 31<sup>st</sup> August, 2017, available at <https://indianexpress.com/article/explained/marital-rape-a-crime-in-many-countries-an-exception-in-many-more-4821403/> (last visited on 8<sup>th</sup> December, 2020)

*Shine* judgment, it is necessary to address that marriage is not the rational basis to give immunity to marital rape or recognize it partially (Section 376 B) and to provide far lesser punishment than the offence of rape. Thus the time has come to bring that change in India to nip this problem before it becomes a real challenge.

## VII. NON-DISCLOSURE OF IDENTITY

When we talk about the offence of rape, the plight of rape victim is not different than in 1980s. The society and the various entities and institution of criminal justice system either its police or judiciary, still blame victim for the occurrence of such heinous crime irrespective of the fact that it wrecked the very existence of the women.

In the historic Mathura Rape case, the judge disbelieved the testimony of the prosecutrix on flimsy grounds such as lack of resistance on the part of victim, indulgence in pre-marital intercourse and others and does not hold out from passing remarks on woman's character.

With the objective of curbing the hostility and harassment of rape victim, the legislature has inserted Section 228A in IPC which penalizes the disclosure of the identity of the rape victim.

The term "identity" as used under Section 228A has not been defined either in IPC or CrPC or in any other criminal law. Thus the gap has been used by the media houses recklessly and restricted/limited its meaning to the "name of the victim". The Apex Court in the case of *Nipun Saxena and Another v. Union of India and others*<sup>39</sup> has widened its ambit and observed that the term "identity" does not confine only to the name of the victim but incorporates any fact or substance from which the identity of the victim can be inferred or disclosed either it is the information of an exam which she has cracked or the pictures of the relatives, neighbors or of the locality or village.

The exception allows the disclosure of identity "in the interest of the victim". But nothing has been categorized/ classified which can be considered as "interest of the victim". The court while discussing Section 24(5) of Protection of Children from Sexual Offences Act, 2012 has allowed the publication of the picture of the victim when the identity of the victim cannot be established by any other cogent means provided the nature of the offence committed against the child should not be disclosed. The court also discussed the aspect of disclosure of identity for the purpose of raising 'public opinion and sentiments'. The court answered it in negative and held that disclosure to raise public opinion or sentiment is not considered as "interest of the victim" and thus the same is not allowed during lifetime or after the death of the victim.

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<sup>39</sup> (2019) 1 RCR (Criminal) 334

Section 228A is also silent on the aspect of disclosure of name of the victim while filing appeal memo under proviso of Section 372 of Criminal Procedure Code, 1973. The Supreme Court in the above mentioned case<sup>40</sup> has harmoniously construed Section 228A of Indian Penal Code and appeal procedure so that the objective behind non-disclosure of identity can be sustained and thus provides that the victim can choose pseudonymous name in appeal memorandum but in such manner that the same should not be identified with other person. Along with appeal memo, an application for non-disclosure of name should be attached. The documents where it is mandatory to disclose the name of the person as per rules such as affidavit, in that case a person should send those documents in enclosed envelope along with appeal memorandum and application. Further it is the bounden duty of the court that those documents should not be put into public domain.

Under Section 228A an exception is carved out in favor of Supreme Court and High Court judgments. Thus the name of the victim can be disclosed by constitutional courts. But in the case of *Bhupinder Sharma v. State of Himachal Pradesh*<sup>41</sup>, the Apex Court observed that even the Constitutional Courts should not disclose the identity of the rape victim in judgments as the whole purpose of the provision will become redundant.

## VIII. CONCLUSION AND SUGGESTIONS

It can be concluded that we have come a long way since 1860. The law regarding rape has evolved in number of layers to a great extent.. Earlier due to social stigma and gaps in law, women did not report the offence of rape. But now the women in India feel more empowered and its effect can be seen by rise in reporting of cases. But till today, we have failed to make India a safe place for women. Thus there is a need to do a lot to minimize the occurrences of this heinous offence. This can be achieved in a following manner :-

1. The offence of rape should be made gender neutral so that justice can be accessed by a larger section of society.
2. The ambiguous concept of “will” needs to be omitted.
3. The exception of marital rape be omitted and be considered not only as an offence but the aggravated form of it and thus be punished severely.
4. The ambiguity with regard to application of Section 377 of IPC needs to be clarified.

To achieve the objective behind Section 228A of IPC, it is requisite that the exception created

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<sup>40</sup> Nipun Saxena Case

<sup>41</sup> (2003)8 SCC 551

in favor of Supreme Court and High Court judgments be omitted.

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