

# Criminal Law Reforms & Proposed Bills: A Gender Perspective

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**T**o uphold constitutional rights and ensure justice, the Union Home Minister presented three groundbreaking Bills in the Lok Sabha on August 11, 2023 aimed at revamping criminal laws - The Bharatiya Nyaya Sanhita, 2023 (BNS) to replace the Indian Penal Code, 1860, the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) to replace the Code of Criminal Procedure, 1973 and the Bharatiya Sakshya Bill, 2023 (BSB) to replace the Indian Evidence Act, 1872. As many as 313 changes have been proposed in these three Bills with the objective of expediting court proceedings and ensuring that justice is delivered by courts within a three year timeframe, thereby preventing people from enduring the 'tareekh par tareekh' syndrome. This initiative by the government is pioneering, as it signifies the most substantial overhaul of criminal laws in the past seventy years.

Presently, the three Bills have since been referred to the relevant Parliamentary Standing Committee for review and recommendations.

## **Crimes Against Women**

Violence against women has been in the spotlight since the brutal gang rape of Nirbhaya, after which thousands of protesters took to the streets, and even today, over a decade later, heated discussions persist on the need for safety of women. According to the National Crime Records Bureau data, crimes against women have increased and almost 10% of the victims were minors<sup>1</sup>. In percentage terms, major crime heads under 'Crime Against Children' during 2020 were Kidnapping & Abduction (42.6%) and Protection of Children from Sexual Offences Act, 2012 (38.8%) including child rape.<sup>2</sup>

Crime rate under the category of Cyber Crimes had increased with 6.6% cases registered in 2020 relating to sexual exploitation. It may be underpinned that these

figures do not capture the true picture since a large number of rape and molestation cases go unreported as the police refuses to register the FIR or tries to coax the victim to settle the matter with the accused.

Further it is stated that the National Crime Records Bureau (NCRB) publishes the data on crime against women which is available for the year up to 2020. The data published by NCRB shows a declining trend in the crime against women which was 3,71,503 in the year 2020, as against 4,05,326 in the year 2019. For the first time, almost all indicators related to marital and natal violence such as dowry death (Sec. 304B Indian Penal Code or IPC), cruelty by husband or his relatives (Sec. 498A IPC), dowry harassment (the Dowry Prohibition Act), domestic violence (the Protection of Women from Domestic Violence Act) have registered decline as indicated in the following table:

<b>Marital Offence</b>	<b>2019</b>	<b>2020</b>
Cruelty by husband or his relatives (Sec. 498A IPC)	1,24,934	1,11,549
Dowry Harassment (under the Dowry Prohibition Act, 1961)	13,307	10,366
Dowry Death (Sec. 304B IPC)	7,141	6,966
Domestic Violence (under The Protection of Women from Domestic Violence Act, 2005)	553	446

The conviction rate in cases of rape stood at 39.3%, being lower than the conviction rate in cases of murder (44.1%). These statistics clearly highlight the pressing need for a comprehensive overhaul of the current law and enforcement systems. Without a doubt, it is imperative to make the criminal justice system in Bharat more responsive to the needs of women who are victims of sexual assault

## **ENDNOTES**

<https://ncrb.gov.in/en/search/node/crime%20against%20women>

<sup>2</sup> [Ncrb.gov.in](https://ncrb.gov.in) - Crime in India – 2020 *SNAPSHOTS (States/UTs)*

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and gender based violence. Numerous modifications have been incorporated into the Bills; nevertheless, this article currently assesses the reforms through a gender-focused lens.

### Concept of Zero Fir

Despite the introduction of Section 166A in the CrPC by Criminal Law Amendment Act 2013 (CLA 2013) which prescribes imprisonment of up to one year for refusing to register FIR in cases of sexual violence, including include voyeurism and stalking; yet still the practice of police declining to register the FIR still prevails, apart from intimidating the victim her into withdrawing her complaint or simply dismissing the complaint by saying it does not fall in their jurisdiction. This situation has been remedied by the BNSS which in Clause 173 (1) clearly states that information relating to the offence, can be given to the police irrespective of the area where the offence is committed.

In the investigation of crime the Bill also provides for the use of technology and forensic sciences, which play a crucial role in rape and murder cases. Forensic Science plays a pivotal role in the identification of a victim's body, utilising Advanced forensic techniques such as DNA Reports. These methods are not only critical in identifying the body, but also for analysing the crime scene and collection of evidence that offers clinching scientific support to substantiate the guilt of the accused. Keeping this in mind in Clause 176 relating to the procedure for investigation for offences punishable by imprisonment for at least seven years, it is mandatory for forensic expert to visit the crimes scene to collect forensic evidence and also cause videography of the process on mobile phone or any other electronic device. Since many States do not have forensic laboratory facilities or DNA profiling units the section has a proviso which states that where forensics facility is not available in respect of the offence, then State Government shall notify the utilisation of such facility of any other State.

The promotion of technology has been advocated to enhance the security of case records and enable quicker access. Commencing from the initial FIR, to the case diary and chargesheet, right upto the final judgement the records have to be digitally maintained. Clause 37 makes it mandatory for the State Government to establish a Police control room in every district and at State level; and designate a police officer in every district and in every

police station, who shall be responsible for maintaining the information about the names and addresses of persons arrested, nature of the offence, to be prominently displayed including in digital mode in every police station and at the district headquarters. Clause 532 make provision for trials, inquiries and proceedings to be held in electronic means, by use of electronic communication or use of audio-video electronic means. Clause 105 of relating to Recording of search and seizure through audio-video electronic means is a significant reform since often the accused uses the defence of planting of evidence and contest the seizures as being false.

### Rape

Rape is the fourth most common crime in Bharat with an average of 86 cases being registered daily (2021 Annual Report NCRB), with dalit women disproportionately being victims of this heinous crime. Since women are typically less physically strong, they may encounter challenges while attempting to defend themselves against an assailant. Nonetheless, the law provides protection for them if in

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their effort to resist the attacker results in his death or injury. In the BNS Sanhita Clause 38 corresponds with Section 100 IPC concerning the right of private defence. It has been articulated in a more detailed manner, explicitly encompassing actions like voluntary causing death or any other harm to the assailant. The exercise of this right extends to specified circumstances which include assault with intention of committing rape (c); and assault with intention of gratifying unnatural lust (d).

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## Definition

The definition of rape in the BNS Sanhita Clause 63 corresponds with Section 375 IPC, and no alteration has been made in the definition. Historically, the concept of rape primarily centred on forceful genital intercourse perpetrated by a man against a woman, in which penetration was essential ingredient of the offence. Post Nirbhaya a plethora of legal and policy reforms were initiated, however, the quest for justice for survivors of gender-based violence is far from being over; and the proposed Bills present an opportune time to revamp the law by revisiting the definition of rape.

The definition of rape was expanded in the CLA 2013 to encompass a broader range of acts, including penetration into any body part and insertion of any object; thus including non-penile penetration, penetration of the anus and the urethra, and oral sex. All of these different types of offences were consolidated under one category, attracting a minimum punishment of seven years imprisonment. This leads one to contemplate on the question of whether a brutal act of heinous rape can be equated to non-consensual oral sex, when it comes to adherence of minimum punishment requirements. It appears exceedingly unlikely that a large number of judges, influenced by ingrained sexist stereotypes about women, would consider all kinds of non-peno-vaginal rape as deserving of 10 years' imprisonment. In the process of reform and decolonisation the BNS Sanhita needs to address this shortcoming on the fundamental premise that not all crimes inflict the same degree of harm on the victim. It is essential that punishments are proportionately based on the severity or degree of harm inflicted. Acknowledging the gravity of rape during communal or sectarian violence and to convey a strong message that women should not be instrumentalized for violence, a distinct provision has been included in Clause 64 (g) with more stringent penalties ie. rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for the remainder of that person's natural life. Clause 65 proposes separate and distinct provisions for rape of minors under 16 years and under 12 years of age with an enhanced minimum punishment.

A criminal trial for rape revolves around multiple narratives, presented by both the prosecution and the defense, and ultimately culminates in the narrative crafted by the final judgment. The case facts are usually presented in a manner invoking stereotypes in terms of female consent, communication, and desire. Illustrating this point is the case of Mahmood Farooqui vs State (Govt of NCT of Delhi): CrI.A.944/2016<sup>3</sup>, wherein the High Court acquitting the appellant, relied on sexist stereotypes about consent. In her testimony the prosecutrix stated that she had said 'no' multiple times before and during the act. The High Court, observed that “78. Instances of woman behaviour are not unknown that a feeble no may mean a

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ye””. Questions to be decided were framed from the accused's perspective, rather than the victim ie. “83. The questions which arise are whether or not there was consent; whether the appellant mistakenly accepted the moves of the prosecutrix as consent; whether the feelings of the prosecutrix could be effectively communicated to the appellant and whether mistaking all this for consent by the appellant is genuine...” The High Court giving the benefit of doubt to the appellant concluded, “102. But, it remains in doubt as to whether such an incident, as has been narrated by the prosecutrix, took place and if at all it had taken place, it was without the consent/will of the prosecutrix and if it was without the consent of the

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<sup>3</sup> In one of the first cases of non-peno-vaginal rape under the amended Section 375 IPC, the appellant was convicted for oral rape by the trial court, and sentenced to 7 years imprisonment. Subsequently in appeal he was acquitted by the Delhi High Court. The Supreme Court dismissing the case declined to interfere with the High Court judgement.

prosecutrix, whether the appellant could discern/understand the same.”

Judgments like these serve as a reflection of the factors contributing to the low conviction rates in rape cases, including the reason why women hesitate to report sexual assault. Not surprising women’s reluctance to report often stems from the fear of being disbelieved by the police, and the challenge of substantiating the sexual assault because criminal law requires ‘proof beyond reasonable doubt, apart from being stigmatised and shamed. It is important to acknowledge that due to the same reasons many women choose not to report sexual harassment, a factor that further emboldens the perpetrator. The definition of Assault or criminal force to woman with intent to outrage her modesty, Sexual harassment and punishment for sexual harassment, Assault or use of criminal force to woman with intent to disrobing, Voyeurism and Stalking in Clauses 73, 74, 75 and 76 respectively is the same as in IPC Sections 354, 354A, 354B, 354C, 354D, and no change has been made.

**Marital Rape** – The topic of marital rape has been a subject of heated debate in the recent times; and it has not been criminalised in the BNS Sanhita for Clause 63 states - Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape. This clause corresponds with the exception carved out in Section 375 (IPC), which exempts non-consensual sexual intercourse between a legally wedded husband and wife from the definition of rape. There are opponents as well as proponents of the criminalization of marital rape. Those in favour of the exemption contend that this provision safeguards the sanctity of marriage, asserting that implementing marital rape legislation may pose a risk to the institution of family. Whereas, on the other hand it is argued that the non-recognition of the offence marital rape is a blatant violation of women’s rights, and infringes the fundamental rights of equality and dignity enshrined in the Constitution. Non-criminalising marital rape encourages male dominance and lends legal sanction to patriarchy, which in turn exacerbates domestic violence and sexual abuse.

To alleviate the concerns of those who believe it may legitimize sexual violence within marital relationships, it is clarified that the current legal framework already protects

married women. In case the woman wants her marriage to subsist but the sexual violence to ebb, then she has the option of resorting to The Protection of Women from Domestic Violence Act (PWDV Act) 2005. She has the right to approach the police station directly and register a complaint, or file a complaint to a Protection Officer or Service Provider, or go to court (Magistrate). The Act gives a very expansive definition to the term “domestic violence”, and includes ‘sexual abuse’ as a form of violence. According to Section 3 of the PWDV Act -(ii) “sexual abuse” includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman. The law provides a number of reliefs ranging from

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counselling of both parties and monetary compensation, to protection order restraining respondent from committing act of violence. All in the hope of enabling the woman lead a peaceful marital life. Section 31 of the PWDV Act imposes penalty for breach of protection order by respondent, which includes imprisonment or fine. In case the woman wants her husband punished in the first instance itself, she has the option to use an alternate route of criminal action against her husband as proposed under Clause 85 which corresponds with Section 498A IPC, relating to husband or relative of husband of woman subjecting her to cruelty, and attracts a three year imprisonment.



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## Adjudication, Sentencing & Judgement

As stated above no alteration has been made in the definition of rape, but the punishment has been raised from minimum seven years to 10 years or life imprisonment. In Clause 65 the punishment for rape on a girl under 16 years of age is minimum 20 years which may extend to imprisonment for the remainder of person's natural life; and if the girl is under 12 years of age the punishment includes death penalty. There is a concern that when punishments become so severe, then Courts may be reluctant to award conviction in sexual offence cases, taking into account the shortcomings in both, investigation and prosecution. This could potentially result in a further decline in conviction rates. Enhancing punishments may end up providing a perverse incentive for courts to acquit the accused. For example in Criminal Appeal 61 of 2022: *Rahul v State of Delhi*, the Supreme Court reversed a well reasoned High Court judgement<sup>4</sup> of death penalty (dated 26.08.2014) to acquittal on grounds of doubting the circumstances under which the accused were arrested, discovery of incriminating articles, DNA evidence on record and raised serious doubts regarding the story put forth by the prosecution. Notable is the fact that the fact that the Supreme Court took seven years to adjudicate a special fast track court matter and the judgement was pronounced after laying reserved for seven months (07.11.2022). Pertinent in this context is the landmark case of *Anil Rai vs. State of Bihar* :MANU/SC/1586/2001 5 wherein the Apex Court opined “..Unfortunately, the Judges concerned had no concern until one of them reached near the date of his superannuation. They then reminded themselves of the obligation of delivering the judgment. It was thus that the impugned judgment had come out, at last, from torpidity.” “...6 . If delay in pronouncing judgments occurred on the part of the Judges of the subordinate judiciary, the whip of the High Court studded with supervisory and administrative authority could

be used and it had been used quite often to chide them and sometimes to take action against the erring judicial officers. ... But unfortunately, the later years have shown slackness on the part of a few Judges of the superior Courts in India with the result that once arguments is concluded before them, the records remain consigned to hibernation. Judges themselves normally forget the details of the facts and niceties of the legal points advanced. Sometimes the interval is so long that the Judges forget even the fact that such a case is pending with them expecting judicial verdict. Though it is an unpleasant fact, it is a stark reality.”

In the light of the aforesaid, and with the intention to reduce the pendency in the judicial system, the pronouncement of judgment has been made time-bound with the introduction of Clause 258 in the BNSS. It states, “After hearing arguments and points of law (if any), the Judge shall give a judgment in the case, as soon as possible, within a period of 30 days from the date of completion of arguments, which may for specific reasons extend to a period of 60 days”.

### Recommendation

The CLA 2013 broadened the definition of the crime of rape, however, faltered in recognising the full spectrum of sexual offences and need for graded punishment. The BNS Sanhita should on the lines of the Protection of Children from Sexual Offences (POCSO) Act prescribe graded punishment as per the gravity of the offence; and accordingly amend the definition of rape in Clause 63, so that it distinguishes between different forms of penetration, rather than grouping them all into a single category of gravity for the purpose of minimum punishment. Secondly, to fully accomplish the process of reform, it is imperative to change the terminology used and discard archaic terms such as ‘rape’, and ‘outraging the modesty of women’; instead within the category of ‘Sexual Crimes Against Women’, different offences and their corresponding punishments can be classified. 

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<sup>4</sup> Trial was conducted by a Special Fast Track Court, Dwarka Courts, New Delhi conducted the trial and all the three accused vide order dated 13.02.2014 were convicted for having committed the offences punishable under Sections 365/34 IPC; 367/34 IPC; 376(2)(g) IPC; 302/34 IPC and 201/34 IPC. By later Order dated 19.02.2014, the Ld. Trial Court imposed the sentence of death subject to confirmation by the High Court as provided under Section 366 Cr.P.C. Criminal Appeal No. 563/2014, 726/2014 and 1036/2014 were file which were heard by the High Court along with Death Sentence Reference No. 01/2014. By a common judgment and Order dated 26.08.2014 passed in the aforesaid Criminal Appeals and the Death Sentence Reference, the High Court affirmed the conviction of the accused persons, so also, affirmed the sentence of death and other sentences imposed upon the accused persons by the Ld. Trial Court.