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## LAW RELATING TO RAPE IN INDIA — A NEED FOR FRESH APPRAISAL

By

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"Rape is the ultimate violation of the self. It is a humiliating event in a woman's life which leads to fear for existence and a sense of powerlessness."<sup>1</sup>

"Rape is not merely a physical assault. It is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female."<sup>2</sup>

In spite of many a civilisation and around progress of human beings, the women as a class still suffer from many disadvantages. They are subjected to many atrocities and made victims of inhuman treatment by the men. Unfortunately, the women are still considered as conditioned to be passive, submissive and weak. Of all the atrocities committed against women, sex crimes are the most inhuman and dangerous. These sex crimes against women include aggressive acts of sexualised violence that range from obscene, intrusive phone calls and side-walk salaciousness to the massacre and murder after committing rape. Rape is the most heinous sexual offence committed against women. The incidence of rape has increased manifold in recent times, all over the world. Many solutions are being offered by different sections of

society to eradicate this evil. The hard-core feminists recommend imposition of severe punishments on rapists including imposition of capital punishment, castration and life imprisonment *etc.* Most of these solutions reflect the feminist rhetoric and appear to be impracticable in many cases. In view of the increasing atrocities against women in India and the hot debate revolving around the loopholes and reforms in rape laws, an attempt is made in this article to analyse the present rape laws, the loopholes therein and the judicial response to the same.

### (1) Legal Regime of Rape in India :—

The primary substantive criminal law that deals with the offence of rape in India is the Indian Penal Code of 1860. Sections 375, 376, 376-A, 376-B, 376-C, 376-D and 377 of the Code deal with the sexual offences. Of these Sections 375 to 376-D deal exclusively with the offence of 'rape'.

### (i) Definition of Rape :—

Section 375 defines the statutory offence of rape, as sexual intercourse with a woman under six circumstances. First against her will, secondly without her consent, thirdly with her consent obtained by putting her in fear of death or hurt, fourthly with her consent obtained under a misconception as to the identity of

1. 84th Report of the Law Commission of India, 1980.

2. The Supreme Court of India in *State of Punjab vs. Gurmit Singh*, (1996) 2 SCC 384.

her husband, fifthly with her consent obtained under the influence of unsound mind, intoxication etc. and sixthly with or without consent if she is under 16 years of age. Thus Section 375, Indian Penal Code provides a comprehensive definition of the offence of Rape. The Explanation to Section 375 states that mere penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Therefore legally it would not be necessary to prove that there was complete and full penetration.

**(ii) Marital Rape :—**The Indian Penal Code, 1860 does not recognise spousal or marital rape as an offence in all the cases. It can be seen from the Exception to Section 375 that sexual intercourse by a man with his own wife, if she is not under the age of 15 years, does not amount to rape. Another related provision regarding marital rape is the later part of Section 376 which provides that if the woman raped is the own wife and not under 12 years of age, the offender shall be punished with imprisonment of either description for a term upto two years or fine or both. Further Section 376-A<sup>3</sup> provides that, if a man living separately from his wife has sexual intercourse with her, without her consent, during such separation, he would be punishable with an imprisonment upto 2 years or fine.

An analysis of Section 375, Section 376 & 376-A shows that in India, a man would not be guilty of raping his wife if it is shown that, she is above 15 years of age. If she is above 12 years and below 15 years, he is liable to be punished with punishment upto 2 years or fine or both.

In other words having forceful sexual intercourse with the wife if she is between 12 and 15 years of age is an offence, though minor as per the punishment prescribed. The third case is where the wife is below 12 years of age and in such a case, having sexual intercourse with her is an offence by implication irrespective of her consent. Probably, the societal conditions and customs prevailing before 1860, had prompted the framers of the Code to incorporate these provisions. One serious lacuna regarding the marital rape exemption in India is the age of the prosecutrix wife, which is not in consonance with the age of a girl prescribed, for marriage under the Child Marriage Restraint Act, 1929 which is 18 years.

**(iii) Punishment for Rape :—**Section 376 of the Indian Penal Code, 1860 deals with punishments that can be imposed on the rapist under different circumstances. Except for the marital rape of a wife of less than 15 years and more than 12 years of age, where the maximum punishment is 2 years imprisonment or fine, the Code prescribes a minimum punishment of 7 years which may extend to life imprisonment. Therefore rape by a police officer within the limits of his police station, any station house, or on a woman in his custody, rape by a public servant on a woman including a subordinate in his custody, rape by a member of staff or management of a Jail, remand home on an inmate of such jail or remand home etc., rape by a member of management or staff of a hospital on a woman in that hospital, rape on a pregnant woman, rape of a woman below 12 years of age and committing gang rapes are punishable with a minimum rigorous imprisonment of 10 years which may be extended upto life imprisonment.<sup>4</sup>

3. Added by the Criminal Law (Amendment) Act of 1983.

4. Under the provisions of Section 376 (2), Indian Penal Code.

However, a discretion is given to the court to impose a sentence of imprisonment of either description for a term of less than 7 or 10 years, for adequate and special reasons to be mentioned in the judgment.

The Indian Penal Code underwent a few important amendments in 1983<sup>5</sup> Sections 376-A, B, C, & D were inserted by these amendments, which punish sexual intercourse with a woman, even if it is not 'rape' as per its statutory definition. As mentioned before, Section 376-A punishes a man for having intercourse with his wife during separation. Similarly Section 376-B punishes a public servant for having intercourse with a woman in his custody with an imprisonment up to 5 years, even though such an intercourse may not amount to rape. Similar punishment can be imposed on a superintendent of a Jail, remand home etc. for having sexual intercourse with an inmate under Section 376-C and on any member of the management or staff of a hospital for having sex with a woman in that hospital under Section 376-D. These provisions were necessitated, to prevent an offender who takes his official advantage, to have sex with a person under his influence for a period of time.

A clear analysis of the above provisions makes it clear that no uniform punishment can be imposed for all the offences of rape and the quantum of punishment would depend on the facts and circumstances of the case, apart from the discretion of the court.

**(iv) Disclosure of identity of victims of sexual offences** :—Section 228-A of the Indian Penal Code<sup>6</sup> is aimed at protecting the privacy of the victims

of rape and other forms of sexual offences. The section provides that any one who prints or publishes the name or any matter capable of making known the identity of any person against whom an offence under Sections 376, 376-A, B, C & D, Indian Penal Code is alleged or found to have been committed, is punishable with imprisonment of upto two years or fine. However there are a few exceptions to this rule like authorisation by the victim, death of the victim, unsoundness or minority of victims, permission of the trial court and publication of judgment of the court etc.<sup>7</sup>

In order to safeguard and protect the identity of the victim, another protection is provided under the code of criminal procedure, 1973 also. According to Section 327 (2) of the Code<sup>8</sup> the inquiry and trial of an offence of rape or other offences under Sections 376 and 376-A, B, C & D, Indian Penal Code, as a rule must be held "in Camera". Thus trial of a rape case, must invariably be conducted privately i.e. *in camera* and any person interested may be given access only with the permission of the court. Another safeguard provided in this regard is that it would not be lawful for any person to print or publish any matter pertaining to any such proceeding except with the previous permission of the court.

**(v) Rape of woman of immoral character** :—Under Section 155 of the Indian Evidence Act, 1872, the credit of a witness may be impeached, by the adverse party i.e. the accused or defendant with the consent of the court. Clause (4) of

5. Supra Note 3.

6. Inserted by the Criminal Law (Amendment) Act, 1983.

7. Under clause (2) of Section 228-A, Indian Penal Code, 1860.

8. Supra Note 6.

this section enables a person prosecuted for rape or an attempt to ravish, to impeach the credit of the alleged victim/prosecutrix by showing that she was of generally immoral character. This provision appears to be very unreasonable because a rapist can always claim a right to rape a woman, if she is a prostitute or adulteress.

**(vi) Presumption of Rape :—**In order to give confidence to a rape victim, a provision was inserted in the Indian Evidence Act, 1872. According to Section 114-A of the Act<sup>9</sup> where the sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent. Therefore, under this provision, the burden of proof that there was no rape, lies on the accused and it is a high burden by any standards.

Thus it could be seen that the various provisions of the Indian Penal Code, the Indian Evidence Act and the Criminal Procedure Code, which have been discussed hereinbefore, constitute the legal regime relating to rape in India.

**(2) Judicial response to the offence of rape :—**A general analysis of the judgments rendered by the higher judiciary on rape clearly shows that the process of judicial sensitization on rape has begun only

recently. Up to the controversial judgment of the decision of *Tukaram vs. State of Maharashtra*<sup>10</sup> popularly known as the Madhura Rape case, the judiciary was not so sensitive to the plight of the rape victims in India. However after the public out cry against the acquittal of the accused police constables who raped a woman in the custody by putting fear into her, by the Supreme Court and the changes made in the rape related laws in the Indian Penal Code, the Criminal Procedure Code and the Indian Evidence Act on the recommendation of the Law Commission of India in its 84th Report, 1980, the attitude of the judiciary in India appears to have undergone a positive change.

The Supreme Court has held in a number of cases that merely because the complaint was lodged less than promptly, it does not raise the inference that the complaint is false"<sup>11</sup>, that the trial courts should deal with rape cases with responsibility and utmost sensitivity<sup>12</sup>, that the rape victim need not be a woman of chaste character and that even a woman of easy virtue has a right to privacy.<sup>13</sup>

The Supreme Court has heralded a new type of jurisprudence by formulating and laying down a number of guidelines, in order to assist the rape victims including compensating them. In *Kuntimon vs. State*<sup>14</sup> the court desired that the victim has to be compensated and that the courts must compensate her for her deprivation, as nearly as possible. In another case, the Supreme Court awarded interim compensation to the prosecutrix, during the pendency of the trial, payable by the

9. Ibid.,

10. 1978 Cri.L.J. 1864.

11. *State of Punjab vs. Gurmit Singh*, (1996) 2 SCC 384 : 1996 SCC (Cri.) 316.

12. Ibid.

13. *State of Maharashtra vs. M. Narain Mandikar*, (1991) 1 SCC 57.

14. 1998 (1) Cri. 75.

accused because he secretly married her, sexually exploited her and made her undergo abortions before deserting her.<sup>15</sup> In a recent landmark judgment, the Supreme Court has indicated number of broad parameters in assisting the victims of rape which include provision of legal representation to the victim, at the police station, provision of legal counselling to her, maintenance of anonymity of the victim, compensation to rape victims upon conviction of the offender and rehabilitation of the victim.<sup>16</sup> The court has exhibited a great judicial activism by suggesting that a Criminal Injuries Compensation Board must be constituted by the Government, to compensate the rape victims irrespective of the conviction of the accused, by taking into account the pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if the same occurred as a result of the rape. In another landmark judgment the Supreme Court has laid down a number of guidelines to prevent custodial violence including torture, rape and death in police custody or lock-up by reiterating the newly recognised constitutional principle that custodial violence including rape can be compensated as the same is an infringement of the right to life and personal liberty guaranteed under Article 21 of the Constitution.<sup>17</sup> However, the Government has not shown any matching enthusiasm in this regard, which is very unfortunate.

**(3) Loopholes in the existing rape laws :—**Eventhough, some noticeable improvement has been made in the laws relating to rape in India, in 1983, still there are many lacunae. These are in relation to the age of consent, marital exemption clause and the provision to impeach the credit of the prosecutrix apart from the lack of certainty of punishment etc.

It has already been pointed out that the age of consent under Sections 375 and 376, Indian Penal Code is not uniform and not in consonance with the other related laws like the Child Marriage Restraint Act, 1929, the Indian Majority Act, 1875 and the Indian Contract Act, 1872. Irrespective of the religion to which a person belongs, the minimum marriageable age is 18 years in case of a girl and 21 years in case of a boy, under the Child Marriage Restraint Act. Similarly a person becomes major only on attainment of 18 years of age under the Indian Majority Act and only a major can give consent to an agreement under the Indian Contract Act. While, this appears to be reasonable and proper, the Indian Penal Code, 1860 has unnecessarily retained in itself different ages for giving consent like 15 years if the woman is wife, 16 years in other cases. This lack of uniformity is one of the lacunae in the Code and needs to be rationalized along with other laws.

In relation to the marital rape, there may be two arguments as to its abolition or retention as an offence. The conservative view is that the husband has a right to cohabit with the wife and he has a right to conjugate, as sex is an essential part of marital relationship. In support of this argument one can quote any number of recitals in the mythology and history. On the other hand, the other arguement is ,as a noted feminist writer says--" in the cool judgment of right thinking men, compulsory sexual intercourse is not a husband's right in marriage, for such a right gives the lie to any concept of equality and human dignity. Consent is better arrived at by husband and wife afresh each time, for if women are to be what (we) believe (we) are - equal partners - then intercourse must be construed as an act of mutual desire and not as a wifely "duty"

15. *Bodhisatva Goutham vs. Subhra Chakraborty*, (1991) 1 SCC 57.

16. *Delhi Domestic Working Women's Forum vs. Union of India*, (1995) 1 SCC 14.

17. *D.K. Basu vs. State of W.B.* (1997) 1 SCC 416. See also *State of Maharashtra vs. Rajendra J. Gandhi* (1997) 8 SCC 386.



enforced by permissible threat of bodily harm or of economic sanctions."<sup>18</sup> In a civilized society, the latter position appears to be correct. It may not be out of place in this context to mention that most countries of the world and most of the states in the United States of America, until recently included, what is called "the marital exemption" clause in their rape laws. In the West the origin of this exemption is usually traced to the often cited argument of Mathew Hale, Chief Justice in England in the 17th Century, who wrote :

"But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto the husband which she cannot retract."<sup>19</sup>

In one English case barely more than 100 years ago<sup>20</sup> the extent to which Hale's doctrine was applied, was astounding. In this case, a woman brought her husband to trial because he had knowingly infected her with the venereal disease of *gonorrhoea*. She argued that if she had realized that he was diseased, she should have never consented to have sexual intercourse with him. Eleven judges disagreed, ruling that the husband was not guilty of harming her because "it was not illegal for him to force his wife to have intercourse even if he was knowingly hurting her." However, the present global trend appears to be and rightly so; against the exemption regarding

the marital rape. In U.S.A., as in 1992, except, North Carolina and Oklahoma, in the rest of the 48 States marital rape has been recognised as a crime. The marital rape exemption has been abolished in Canada, Israel, Scotland, New Zealand, parts of Australia and most recently in Great Britain.<sup>21</sup>

Another glaring and the most damaging legal provision against the rape victim is Section 155 (4) of the Indian Evidence Act, 1872. Under this provision, the credit of a victim of rape can be impeached in a trial, on the ground that she is generally of immoral character". In a recent judgment<sup>22</sup> the Supreme Court of India categorically laid down that laid down that the unchastity of a woman does not make her "open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to rape her and that even a woman of easy virtue has a right to privacy and no person can rape her just because she is a woman of easy virtue." However, in this decision, the Supreme Court had not referred to Section 155 (4) of the Indian Evidence Act. It is also relevant to mention in this context that the court has established the legal principle in a number of decisions that right to privacy is a fundamental right implicitly under Article 21 of the Constitution of India.<sup>23</sup>

The observations of the Supreme Court in *Madhubakar Narain's* case and the establishment of right to privacy as a fundamental right in successive judgments

18. Brownmiller, Susan : *Against Our Will* (1975), Simon & Schuster, New York, p. 381.

19. As quoted in Russel, D.E.H. : *Wife Rape*, in A Parrot & L. Bechhofer (Eds); *Acquaintance rape : The Hidden Crime* (1991, John Wiley, New York) pp. 129-139.

20. *Regina vs. Clarence*, 22 Q.B.D. 23 (1888).

21. See for a comprehensive comment, Allison, Julie A & Wrightsman, Lawrence S., *Rape, the misunderstood crime*, (1993, sage publications, London : New Delhi) pp. 88 ff.

22. *State of Maharashtra vs. Madhubakar N. Mardikar*, (1991) 1 SCC 57.

23. See as to the right of privacy, *Kharak Singh vs. State of U.P.* AIR 1963 SC 1295, *Govind vs. State of M.P.* (1975) 2 SCC 148, *Malak Singh vs. State of P & H*, (1981) 1 SCC 420, *R. Rajagopal vs. State of T.N.* (1994) 6 SCC 632 and *'X' vs. Hospital 'Z'*, (1998) 8 SCC 296.

render Section 155 (4), Indian Evidence Act obsolete and redundant. The dignity of the rape victim would suffer, if this provision is retained any further.

Another loophole in the Indian Penal Code relating to rape is the discretion given to the court to award punishment lesser than the minimum mandatory punishment, prescribed under Section 376 of the Indian Penal Code. Prescribing a minimum sentence would be without any utility and effect, unless it is made mandatory. Therefore there must be the minimum punishment without any exception thereto. Then only it will have deterrent effect on the potential rapists.

The present rape laws in India, do not take cognizance of the dreadful disease of AIDS and its probable impact on a victim, raped by an AIDS Patient who is tested HIV positive. Since this dreadful and cureless disease is mainly transmitted through sexual contract, the possibility of inflicting an innocent woman with AIDS is very high. The present law is not effective and adequate to meet this situation<sup>24</sup> There is a need for stringent punishment for any person who rapes an innocent victim and afflicts her with AIDS.

Another contentious issue regarding rape is the punishment prescribed under the present law. The Indian Penal Code in Sections 376 and 376-A, B, C & D prescribes a minimum punishment of 2 years and a maximum of life imprisonment apart from fine. In recent times, demand to make rape punishable with capital sentence is gaining momentum. The protagonists of this argument, contend that unless rape is made a capital offence, rapes cannot be prevented. This argument seems to be a little far stretched because, while

sentencing an accused the courts are supposed to look at many factors associated with the accused. In this context it may be mentioned that there are many factors which may be instrumental in the making of a sexual offender like, the childhood background, incestuous relationship, racial prejudice and various economic, social and psychological factors. Therefore imposing death penalty on every rapist would be unjustified and may not withstand the scrutiny of law.

**Suggested reforms in Rape laws :—**In the light of the aforementioned factors and developments the following suggestions can be made to reform the rape laws in India.

- (1) Sections 375 and 376 of the Indian Penal Code, 1860 may be amended, so as to bring uniformity in the age of consent under those sections, in conformity with the Child Marriage Restraint Act, 1929 and the Indian Majority Act, 1875 etc. Therefore the age of consent should be 18 years in all the cases of rape;
- (2) The exemption to marital rape given under Section 375, Indian Penal Code must be deleted. This amendment would be quite essential to abolish "marital rape exemption" which reduces a wife to a mere sex-object. Marital rape henceforth should be regarded as any other rape. Accordingly the punishment prescribed under Section 376-A, Indian Penal Code must be enhanced so as to make it uniform with other instances of rape;
- (3) An additional provision must be made in Section 376 and 376-A, B, C & D, Indian Penal Code to

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24. Sec. 319 Indian Penal Code states that who ever causes bodily pain, disease or infirmity to any person is said to cause hurt and it is made punishable under Section 323 with an imprisonment upto one year. However, it does not specifically refer to the disease of Rape.

provide for statutory compensation to every rape victim, as an additional relief apart from awarding the prescribed sentence;

- (4) The discretion given to the court to award a sentence less than the prescribed minimum, under Section 376, be removed;
- (5) Death penalty as the highest sentence be prescribed for child rape, gang rape, and rape of pregnant woman;
- (6) The punishment for an AIDS affected rapist who knowingly rapes a woman be provided as a separate measure and such an offence must be treated as capital offence;
- (7) Adequate legislative measures be taken to provide for legal counselling,

legal aid and rehabilitation, to every rape victim at every stage, at the cost of the State;

- (8) As suggested by the Supreme Court, the Criminal Injuries Compensation Board be set up in every state to compensate the rape victims; and
- (9) The procedural delays be reduced while ensuring that speedy trial takes place at least in rape cases.

The aforementioned few suggestions coupled with effective enforcement of the existing laws, would be sufficient to counter the evil of rape. It is high time that the Parliament has amended the rape related laws in India, to ensure that 'rape' which has had a past, is denied its future, to ensure the protection of the dignity of women.

## RISK IN FIRE INSURANCE

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Fire was a valuable element even before the beginning of human society for the maintenance of life itself and the primitive society tried in various ways to preserve it in active form by giving a religious character to such preservation. It is equally valuable to the modern society also which has utilized its properties for innumerable purposes. But inspite of the close contact established with it modern man has been unable to achieve complete mastery over it and a full control over this element of nature still remains to be attained by science which were so much proud of. In the

mean time a great destruction by fire insurance is only a device to compensate for the loss consequent upon such destruction.

**Object :—**The object of the fire policy is to protect the insured against the consequences of negligence. The assured is entitled to recover in all cases of negligence whether it is attributable to a servant or a stranger of the assured himself.

**Law governing fire insurance :—**There is no statutory enactment governing fire insurance, as in the case of marine insurance