



# RAPE: A CRITICAL ANALYSIS OF LAWS & JUDICIAL ATTITUDE

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**Abstract**—This era may be called era of human rights. We are recognizing and demanding third generation human rights. Number of conventions have been drafted and signed by the States. But this is a harsh reality that, nearly half population of the World i.e. women are often denied the right to live with dignity, which is first generation human right. Crime rate against women throughout World is on increase and sexual offences constitute a great proportion of crime against women. Rape can be considered most heinous crime, where the victim is denied her right of self determination. This is an offence where the victim is generally accused as abettor by her dressing style and friendly behavior. The attitude of the society towards the victim is not up to the expectations. As a result the victim suffers not only physical, physiological but also mental pain. Various laws have been made to punish the offences and various amendments have been made to these laws, but the question arises as to the effectiveness of these laws.

**Key Words**—Crime, Rape, Victim, Women

## INTRODUCTION

In India, women are described as 'Laxmi, Durga and Sarswati (the Hindu Goddess). Small girls are worshiped as 'devies', during 'Navratni' .On one hand we equate women with 'Goddesses' on the other hand they are subjected to the most heinous crime 'Rape'. This is an offence which not only affects women physically but also socially, psychologically, and economically .Rape can be the most terrorizing events in woman's life. The fear of rape affects all women. It inhabits in their actions and limits their freedom, influencing life as a whole.<sup>1</sup> Right from the childhood, the fear of rape is infused in every woman in the society, which conditions the personality of women and her choices regarding her conduct.<sup>2</sup>

The word 'rape' is derived from the Latin word 'RAPIO', which means to snatch, hence it literally means forcible seizure and this element has become the characteristic feature of the offence.<sup>3</sup> Taking the broader view, Susan Brown miller has described rape as 'Sexual invasion of the body by force/on incursion into private personal inner sense without consent.<sup>4</sup>Rape is an act of aggression in which the victim is denied her right to self-determination. The traditional concept of male and female sexuality is that a male being sexually aggressive and female sexually passive paves way for the assumption that rape is a natural fact, the occurrences of which cannot be stopped. On the contrary, it is a matter of fact that the animals in their natural habitat do not rape. So in that sense human beings are worse than animals. It is quite unfortunate and a matter of concern that respect of women throughout the world is decreasing and the cases of sexual assault, mostly rape and molestation, are steadily increasing. According to the reports of crime in India, there is a constant rise of rape cases in India.

Despite having many laws and punishment for rape, this offence is being committed against the women of every age. The report of the National Crime Record Bureau, 2016 shows that incidents of rape of children have increased by over 82% compared to 2015. It is for the first time that such a sharp increase in the sexual assault on the children has been registered. Overall all rape cases saw an increase by 12.4% from 34,651 cases in the country in 2015 to 38, 944 in 2016. It is a matter of concern that our national capital Delhi has reported the highest crime rate against women i.e. 160.4 against national average of 55.2<sup>5</sup>

In December 2016, Delhi Gang rape case had shaken the whole Indian society, police and judicial system. But this incident has not stopped the reoccurring of such incidents. Although few steps were taken by the Government by amending the provisions relating to rape by the Criminal Law Amendment Act, 2013, but it has not proved enough. In 2017, in Shimla, in Guria rape and murder case, almost in the similar manner a girl of 15 years was gang raped and murdered. The horror of Kathua and Unnao rapes has once again brought into question the safety of the women in India and especially that of children. Now. In 2016, India has recorded 106

<sup>1</sup> Lorene Clark and Debra Lewis, Rape-The Prize of Coercive Sexuality, 1977, P. 23.

<sup>2</sup> Vandana, Sexual Violence against Women, Lexis Nexis, P.67.

<sup>3</sup> Geeta Sahu, Sachindanad Mohenty, Vulnerable Victims, of Sexual Assault, Medical Science, Law (2005) Vol. 45, No.3, P. 256.

<sup>4</sup> Susan Brownmiller, Against her Willmen, Women and Rae, 1990, P. 442.

<sup>5</sup> Crime in India, National Crime Record Bureau, 2017.



rapes a day and four out of every ten were minors. The most shocking fact according to the report<sup>6</sup> is that in 94.6% cases perpetrators were none other than victim's relatives including brothers, fathers, grandfathers, sons or other acquaintances.

## CONCEPT AND HISTORY

According to the Encyclopedia of Crime and Justice, rape is an act of power, anger and dominance over another person. Rape not only violates women's integrity but her feelings of safety and control over her life. Although the legal definition of rape varies from nation to nation, rape is generally defined as forced or non-consensual sexual contact. Rape is forced, manipulated or coerced sexual contact by a stranger, friend or acquaintance. It is an act of aggression and power combined with some form of sex. In law rape is defined as vaginal or anal penetration in the absence of lawful consent.<sup>7</sup> Rape is a very serious crime. Rape is defined under section 375 of the Indian Penal Code and the punishment is prescribed in section 376 of the code.

In the ancient history, rape was viewed less a type of assault on the female, than a serious property crime against the man to whom she belonged; typically the father or the husband. The loss of virginity was an especially serious matter. The damage due to loss of virginity was reflected in her bride price. In such cases the rapist was ordered to pay compensation payable to the women's household, whose 'Goods' are 'damaged'. From the classical antiquity of Greece and Rome into the colonial period, rape along with the arson, treason and murder was a capital offence. Those committing rape were subjected to wide range of capital punishments that were seemingly brutal frequently bloody and at times spectacular. In England in early 14<sup>th</sup> century, a victim a rape might be expected to gauge out the eye or sever the offender's testicles herself.<sup>8</sup> Despite the harshness of these laws, actual punishment were usually for less severe; in the late medieval Europe, cases concerning rapes of marriageable women, wives, widows of the members of the lower class were rarely brought forward and usually ended only with a small monetary fine or marriage between the victim and the rapist.<sup>9</sup>

## IMPACT OF RAPE ON VICTIM

Rape is a sudden, arbitrary, unpredictable event. The victim has no time to prepare. Rape leaves a permanent scar on the life of a victim and therefore a rape victim is placed on a higher pedestal than the injured witness. Rape is a crime against the entire society and violates the human rights of the victim. When a girl becomes the victim of rape, she passes through mental, social and physical difficulties. The effects of rape can include both initial physical trauma as well as deep physiological trauma. Although rape victims commonly report injuries and issues with their reproductive health after the sexual assault, rape does not always involve physical force. The most common and lasting effect of rape involve mental health concerns and diminished social confidence. The emotional trauma caused by rape can be severe and long lasting.<sup>10</sup>

## PHYSICAL IMPACT

Physical effects of rape can arise from both forced sexual assault and those not involving forcible submission, such as drug assisted drug rape. Forced sexual assault frequently causes visible bruising and bleeding in and around vaginal area and bruise on other parts of the body from coercive violence. Painful intercourse may result in urinary infections, uterine fibroids, non-cancerous tumors in muscle wall, pregnancy, sexually transmitted diseases (STO, s) HIV, genital warts, syphilis, Chlamydia etc.<sup>11</sup> However these days the records are showing that the rapists in order to destroy the evidence of the crime try to murder the victim and in many cases succeeds, so that there will be no one to complain or give statement or evidences against the rapist.

<sup>6</sup> Ibid.

<sup>7</sup> Ahmad Shakeel & Azan Akhlaque, Rape: Law reforms and Victims' Rehabilitation, C & M L J, Vol 50, No. 4, December 2014, P. 379.

<sup>8</sup> Trisha Olsan, " The Medieval Blood Sanction and the Devine Beneficence of pain ,22 JL REL 63 (2006)1100-1450.

<sup>9</sup> Eickman, Joe, "An Oppressive Silence : The Evaluation of Raped Women in Medieval France and England". Historian: Journal of Under Graduate History Department ,New York University, 50(2009) PP. 68-77.

<sup>10</sup> Ahmad & Azan : Rape ; Law Reforms and Victim's Rehabilitation, Civil & Military Law Journal, Vol 50, Dec 2014, P. 388.

<sup>11</sup> Ibid p, 388.



## SOCIAL IMPACT

Many victims who go through traumatic event may find that it is quite difficult to re-adjust and cope for a period after the commission of rape. In the Indian society, the virginity of a woman is considered necessary. This is the only offence where the victim is treated as abettor of the crime herself. She is held responsible for this offence, by her dress up, friendly behavior or her being out in late hours. From the society generally she does not get the kind of support which is required to deal with trauma of this event. For some, there are severe effects in the immediate aftermath of an assault that may or may not be lost. The chance of the rape victim to get a life partner of her choice becomes fade. So in many cases either the victim of rape herself or her family members chooses to remain silent about the incident. The other reason of remaining silent about the incident is that when rape survivors are exposed to victim blaming behavior or attitudes, the experience may be like a second rape.<sup>12</sup>

## PSYCHOLOGICAL IMPACT

Victims of rape experience both short and long term effects of rape. The most frequently observed symptoms following rape are fear and anxiety. The emotional and Psychological scars remain deep and there is need to be understood and analyzed within the socio-economic, political and cultural dimensions.<sup>13</sup> The rape victims across the globe suffer from some common problems. Post traumatic stress disorder is one of such problem. The victim feels destitute, lonely, her self-esteem is generally affected. The rape victims in a great number suffer depression. Many of the victims may take assistance of the alcohol and drugs in order to forget the incident. However this crime leaves such a scar in the mind of the victim which rarely diminishes. The way in which the families and friends respond to the survivors may have a profound effect on victim's well-being. For example, a supportive informed and empathic response from a close friend may be quite healing, whereas blaming the victim could be extremely hurtful. The physical consequences are still easier to enumerate in comparison to the psychological, emotional and spiritual impact. In case of sexual violence occurring within the family, the important functions and viability of family as an institution may get threatened. Sexual dysfunctions are amongst the most long lasting problem experienced by the rape victims. They may lose interest in sex as it reminds them of the crime committed against them which as a result affects the personal life the victim's lifelong<sup>14</sup>.

## LEGAL PROVISIONS

Rape is sexual intercourse with women against her until or without her consent. Rape is a very serious crime, in order to punish the accused it has to be proved beyond all reasonable doubts that he had forcible sexual intercourse with the women in question. Indian Penal Code under section 375 defines explicitly the offence of rape. The section not only includes the sexual intercourse committed by way of force, but also includes the acts, which are committed by taking the consent fraudulently or against the person who is in capable of giving consent. Section 376 of the code has prescribed the punishment for the offence, which is minimum 7 years imprisonment which may extend to imprisonment for life. The code however prescribes the minimum punishment of 10 years, where the rape is committed in the police station or by the public servant or by the staff of jail or by the person being in the management or staff of the hospital. The section also imposes the same punishment on the person who commits rape on a pregnant woman or where she is under the age of 12 years or a gang rape is committed on the victim.

The Criminal law (amendment) act, 2013 had made significant changes in the laws relating to rape. This Amendment Act was passed by the parliament after Gang Rape case of Delhi, in December 2016, when the general public raised the voice against this heinous crime and demanded death penalty to the rapists. Although death penalty was not inserted under section 376 of the Code, but a new section 376 D was inserted where the minimum punishment for gang rape was 20 years. While the earlier definition of rape was confined to peno-vaginal intercourse between a male and a female, the new definition by the Criminal Law Amendment Act has

<sup>12</sup> Courtney E. Ahrens, Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape,, Am J Community Psycho. (2006), 38 PP. 263-271 P. 264.

<sup>13</sup> Vandana, Sexual Violence against Women, Lexis, Nexis, P.19.

<sup>14</sup> Resick, Psychological impact of rape Journal of inter personal violence, June 1993,P.233



brought the following acts into the ambit, commission of which under the circumstances prescribed by section 375 would constitute rape;

- a) Penile- Oral/anal/urethral intercourse between a male and female.
- b) Insertion of a foreign object or any parts of the body other penis into the vagina, urethra or anus of a woman.
- c) Manipulation of 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 women.
- d) Application by a man of his mouth to the vagina, anus, urethra of the women.<sup>15</sup>

A new section, 376A has been added in the code, which states that 'if a person committing the offence of sexual assault, " Inflicts an injury which causes death of the person or causes the person to be in persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall mean the remainder of that person's life or with death. The age of consent in India has been increased to 18 years, which mean any sexual activity irrespective of the presence of consent with women below the age of 18 years will constitute statutory rape. The new Amendment Act defines 'consent' to mean an unequivocal agreement to engage in a particular sexual act. The convict will also have to meet he reasonable medical expenses of the victim and rehabilitation of the victim. After the Kathua Rape case in J&K in 2018, where a girl of 8 years was allegedly raped and killed, the media and social media highlighted the matter. The Union Cabinet approved an Ordinance for the investigation and trial of rape cases. By this Ordinance now, in cases of a gang rape of a girl below the age of 12 years, punishment of life or death penalty will be granted. Under the Ordinance, investigation of all cases has to be mandatorily completed within two months. The time limit of trial of all cases has also been prescribed and it has to be necessarily completed in two months.

In those cases where the age of victim is below 18 years then the provisions of the Protection of Children from Sexual Offences Act, 2012 will be made applicable. Section 3 of the said Act defines the "penetrative sexual assault", which is similar to the clause (d) of section 376. However under section 3 of the Act, no descriptions and exceptions have been mentioned because child being minor is incapable of giving consent. So every such act will be considered as forcible. Section 4 of the Act, prescribes punishment for 'penetrative sexual assault' which is minimum 7 year imprisonment to maximum life imprisonment. However this punishment is now increased from minimum life imprisonment, to death in case the child is below the age of 12 year by the Ordinance of Union Cabinet. In cases of minors form 13-18 the punishment of section 4 of this act will be applicable.

### JUDICIAL APPROACH

The judiciary has played a very active role in implementing the anit-rape laws. In *Bhupinder Sharma v/s State of Himachal Pradesh*<sup>16</sup> The Supreme Court observed that in the judgments, be it of High Court or the lower courts, the name of the victim should not be mentioned and her name should be replaced by ' the victim'. This is very helpful in retaining the privacy of the victim. In the offence of rape consent of the women is very important. The word 'Consent' can change a shape of the offence in case of rape or sexual assault . In *Mango Ram's case*<sup>17</sup>Supreme court held that "submission of body under the fear or terror cannot be construed as consensual sexual act, consent for the purpose of section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge and moral quality of the act but after having fully exercised the choice between resistance and accent". Most importantly the Supreme Court in a case<sup>18</sup> held that : "consent given by a women believing the man's intention to marry her would fall within the expression "without her consent" vide clause (iii) to section 375 of the Indian Penal Code, only if it is established that from the very inception the man never really intended to marry her and the promise was mere hoax". But if the man intends to marry the girl but, could not due to some unavoidable circumstances then it would not amount to rape. In *Deepak Gulati v/s State of Haryana*<sup>19</sup> the Supreme Court held that a man cannot be prosecuted for rape for being in a relationship with his

<sup>15</sup> Ahmad Shakeel, Rape: Law Reforms & Rehabilitations, C& M.L.J., 2014, Vol 50, P. 383

<sup>16</sup> Bhupinder Sharma v/s State of H.P. (1983) 8 SCC 3566.

<sup>17</sup> State of H.P. v/s Mangoo Ram (2000)7, SCC 224.

<sup>18</sup> Deelip Singh @ Dilip kumar v.s State of Bihar AIR 2005, SC 203.

<sup>19</sup> (2013) 7 SCC 675



major women friend, if he intended to marry her but the wedlock could not take place due to some circumstances.

In the Indian Society, Commission of rape is considered as such crime, which brings shame and disgrace to the family, so in many cases; the victim may be scared and reluctant to report the case. In such cases delay in filing FIR is not considered fatal for the case. In *Santosh Moolya v/s State of Karnataka*<sup>20</sup> the Supreme Court dismissing the appeal of the two accused, for raping two victim sisters held that 42 days delay in lodging FIR when properly explained and corroborated by the mother of the victim was not fatal. In case of *Rajinder v/s State of Himachal Pradesh*,<sup>21</sup> It was held that the courts must, while evaluating the evidence, remain alive to the fact that in case of rape, no self-respecting women would come forward in court just to make a humiliating statement against her honor, such as in involved in the commission to rape on her.

As far as the punishment for the offence of rape is concerned, it was held in *Madhya Pradesh v/s Balu*<sup>22</sup> that section 376 of Indian Penal Code imposes an obligation on the part of the court to impose a minimum sentence of 7 years of imprisonment in case of rape. It is therefore the duty of the court toward sentence having regard to the nature of the offence and the manner in which it was executed or committed etc.<sup>23</sup> However Harsh reality is that despite many stringent laws and the guidelines of the Supreme Court, large number of criminals go unpunished thereby increasingly, encouraging the criminals and in the ultimate making justice to suffer by weakening the system, credibility. The imposition of appropriate punishment is the manner in which the court responds to societies cry for justice against the accused person.<sup>24</sup>

## REHABILITATION OF RAPE VICTIMS

Rape is a traumatic experience that affects every aspect of a women's life. An Individual's self-esteem, self-evaluation, hopefulness, thought process, social intersections and the way in which they view the world are all impacted. Everyone process rape and sexual assault differently, some may face difficulty in social adjustment, and other may suffer post-traumatic stress disorder. Many rape victims lose their jobs; some lose their family as a result of this. So the second important thing after punishing the offender is to rehabilitate the rape victims.

By the directions of the Supreme Court to the National Commission for women, a “*scheme for the relief and rehabilitation for victims of rape, 2005*” has been evolved. Under this scheme criminal injuries relief and rehabilitation board will be constituted in every district of every State. The board will be headed by the District Magistrate, who shall be president and will be assisted by 4 other members appointed by the State Government. The board shall while determining the compensation and other relief be guided by the following parameters.

### I. Where death results as a consequence of rape

- (a) Non-earning member of the family-1, 00,000/- towards relief after post mortem report establishes a prima facie case.
- (b) Earning member of the family-2, 00,000/- payment after the post mortem report establishes a prima facie case.

### II. In other cases:

- (a) Type and severity of the bodily injury suffered by the victim and expenditure incurred or likely to be incurred on medical treatment and physiological counseling of the victim.
- (b) Expenditure consequential on pregnancy, if resulting from rape, including expenses connected with abortion, if it is resorted to in consequences of the rape.
- (c) Expenses incurred or likely to be incurred in connection with any education or professional or vocational training or training of self-employment of the victim.
- (d) Non-pecuniary loss or damage, suffering mental or emotional trauma, humiliation or inconvenience.
- (e) Expenses likely to be incurred in connection with the court trial, the board and DMC shall arrange the legal aid under the legal services Authorities Act, 1987

<sup>20</sup> AIR 2010, SC 2247.

<sup>21</sup> AIR 2009, SC3022.

<sup>22</sup> AIR 2005 SC 222,

<sup>23</sup> *Sevak Perumal v/s State of Tamil Nadu*. AIR 1991SC 1468.

<sup>24</sup> *Dhananjay Chatterjee v/s State of West Bengal* (1994) 3 SCC 221.



(f) While determining the financial or other relief, the board shall have due regard to the victim being a child or mentally challenged and may consider higher financial relief and specific relief to be provided.

On many occasions there has been a question mark on the practical application of the scheme. The rehabilitation process many a times fails to answer the true Concept of justice from victim's point of view. The scheme is clear about the women's need to pursue the criminal case, no mention is made of what happens to this interim relief, if she decides to withdraw the case or the case is quashed or the rapist is acquitted.<sup>25</sup> The State Governments has opened rehabilitation homes for victims of physical & sexual abuse. However the condition of these homes needs urgent improvement. But, under the Nirbhya fund established in 2013, the Ministry of women and child development has formulated a scheme for setting up one stop centers. These are intended to support women affected by violence, sexual abuse, and psychological abuse. The centre provides, medical assistance, assistance to women in lodging complaints, counseling and social support to the rape victims, legal aid and shelter to the aggrieved women. These centers have been opened in 10 states and there are plans to open 100 centers all over India. Apart from the Governmental Organizations, there are number of non- governmental organization, which help the rape victims in their rehabilitation by providing them, Medical, legal assistance, counseling and help them in self- employment .Sneha, a Mumbai based non-governmental organization is one of such organization.

#### CONCLUSION

Rape is one of the most heinous crimes where the victim's right to life and personal liberty is snatched and the basic human rights are denied to her. This is a crime which affects the victim not only physically, but also mentally, socially, economically and psychologically. Although a number of laws are passed and amended from time to time, but the gravity of the situation remains the same. The need of the hour is that all the law enforcement agencies should come hand in hand to tackle this situation, the recent incidents of Kathua case and unnao cases in India shows the involvement or assistance of police agencies in the commission of crime, which makes the situation worst. So strong steps are required to be taken against those who misuse their official positions.

The society is going through a radical change. The old values and traditions are fading, the respect, which was given to the woman in the society, is diminishing. In the changed era, this is the high time to restore those old values and to educate our sons to respect the women. The Indian society, considers the virginity of women essential for the marriage prospective, But it is not necessary for men. We as a society should understand that purity of women lies in her character and not in her virginity. If the society is liberal, the rape victim will not have to face the social stigma. In order to prevent such type of offences, apart from the other measures, self defense programmes should be introduced at school, college level and it should be made mandatory. Gender sensitization workshops are needed in workplaces, schools, Universities where the people should be told, how ,as a community ,we can help sexual abuse survivors. Children should be made well aware of the good touch & bad touch, so the children at home or outside can protect themselves by raising the alarm on proper time.

<sup>25</sup> Ahmad and Azan, Rape: Law Reforms and Victim's rehabilitation, C & M.L.J,Dec 2014, P.392