

DE JURE NEXUS LAW JOURNAL

Author:

Shriya Awale

ILS Law College, Pune

5th Year.**Introduction**

“A woman is the companion of a man, gifted with equal mental capacities. She has the right to participate in all the activities of a man, and she has an equal right of freedom and liberty with him. She is entitled to a supreme place in her own sphere of activity as man is in his. By sheer force of a vicious custom, even the most ignorant and worthless men have been enjoying a superiority over women which they do not deserve”¹. -Mahatma Gandhi

These words of wisdom by the ‘Father of the Nation’ explain the condition of women in our society and the need to bring out a change in the same. Women have always been looked upon as a property of men and they never had any opinion in any of the decisions. Though these conditions are slowly changing with time and through various reforms brought about by the judicial pronouncements over the period of time; there are women who even today face problems while living in the society.

Background

The Gang-rape and murder of a woman in Delhi, this barbaric incident was one of the major reasons behind the amendment brought in the criminal justice system. This incident shocked the country and shook the conscience of the entire nation. Thousands of people protested and the public demanded stringent laws to curb the injustice. The ‘UN Entity for Gender Equality and the Empowerment of the Women’ condemned the said act and asked the Government to do everything in order to ensure justice for protection and safety of the women in the country. The Central Government in light of this incident appointed a judicial committee headed by the former Chief Justice of India J.Verma to suggest amendments in the Code and to

specifically deal with the offences of sexual assault. The Bill was introduced in the year 2012 and received the assent from both the Houses and the then President Mr. Pranab Mukherjee in the year 2013.



De Jure Nexus

LAW JOURNAL

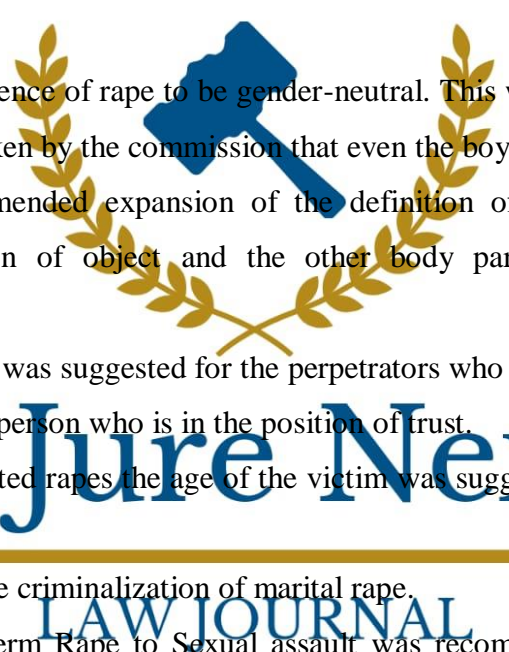
¹<https://www.azquotes.com/quote/602685#:~:text=of%20man...,Woman%20in%20the%20companion%20of%20man%2C%20gifted%20with%20equal%20mental,freedom%20and%20liberty%20with%20him.>

The Criminal Law Amendment Act, 2013

The Act amended the Indian Penal Code 1860, the Criminal Procedure Code 1973, the Evidence Act 1872, and the Protection of Children from Sexual Offences Act 2012. The amendments brought some major and positive changes in the criminal justice system.

The Indian Penal Code, 1860

There was an urgent need to amend the old Act of 1860 in light of the Gang rape incident in the nation's capital. It was a reactionary reform in the Indian Criminal Law. Recommendations were made in the 172nd Law Commission Report² of 2000 and by the Justice Verma Committee.

- 
1. It suggested the offence of rape to be gender-neutral. This was considered as the most progressive step taken by the commission that even the boys can be subjected to rape.
 2. The report recommended expansion of the definition of rape to bring under its purview penetration of object and the other body parts apart from the penile penetration.
 3. Severe punishment was suggested for the perpetrators who are in the immediate blood relations or by any person who is in the position of trust.
 4. In cases of aggravated rapes the age of the victim was suggested to be increased from 12 to 16 years.
 5. It also suggested the criminalization of marital rape.
 6. Alteration of the term Rape to Sexual assault was recommended as the term Rape strongly suggests societal condemnation.
 7. Incorporation of sexual assault under Section 354.

The Parliament did not incorporate the said recommendations wholly. Only some of these were made a part of the said Act.

The incorporation of new offences was made in the IPC as follows:-

- a) **Section 326B**- where voluntarily throwing or attempt to throw acid was punishable under the said section.
- b) **Section 354A,B,C, and D**- under the said sections acts outraging the modesty of a women were held punishable. Such acts include unwelcome physical contact. Demand or request for sexual favours, showing pornography, making sexually

² <https://lawcommissionofindia.nic.in/rapelaws.htm>

coloured remarks, sexual harassment, assault or use of criminal force, voyeurism and stalking.

- c) **Section 370 and 370A**- Trafficking of a person or a minor and exploitation of the same was made illegal and punishable under the said sections.

Amendment to the Indian Penal Code, 1860

1. Definition of Consent

The term consent was embodied for the first time in the 2013 Act under **Section 90**³. It clearly conveyed the intention of the legislature to shift the focus away from the sexual history of the victim to the actus reus of the accused. Prior to amendment, the universally accepted definition of consent was given in **Rao Harnarain Singh vs State of Punjab**⁴, the court stated that the term consent would include 'voluntary participation of a woman after exercise of intelligence and a choice between assent and resistance'. The same definition was followed for decades while dealing with the offences of rape. The old Section 90 provided a negative definition that only spoke about the circumstances in which the consent would be vitiated.

The 2013 Amendment provides for a positive definition of consent which says that communication of consent to engage in sexual activity should be given by words, gestures, or through any verbal or non-verbal medium.

Further, the most essential feature of the Act was that the consent was not required only for a one-time carte blanche but also for specific sexual acts. A woman may give consent for the non-penetrative acts but that does not mean to include her consent for the penetrative acts. In this case, the penetrative act will amount to rape. The consent must be unequivocal for specific acts.

The major issue that popped up before the 2013 amendment was when a plea of non-consent was pleaded, the prosecution was asked to provide additional evidence for corroboration to ascertain whether there was consent or not.⁵

Tukaram v. State of Maharashtra⁶, is the best example for the same where the Apex Court disbelieved the statement of the rape victim. The Trial Court, however, refused to convict the

³ <https://www.iitk.ac.in/wc/data/TheCriminalLaw.pdf>

⁴ AIR 1958 pun 123

⁵ (1979)2 SCC 143

accused. The High Court reversed the findings and sentenced the accused. The Supreme Court reversed the same and held that there was no proof of injuries in the medical report, and held that the story of resistance was false and the intercourse was a peaceful affair.

The Court also held that under Section 375 only the “fear of death or hurt” could vitiate consent. This verdict was criticized nation-wide and the urge to include custodial rape was put forward.

The 84th Law Commission Report⁷ suggested a crucial point that it is not always the case that violence is committed or injuries or marks of resistance are inflicted upon a victim i.e. overt violence. Sometimes, there are cases where there is none and in such cases absence of injury should be a conclusive proof of consent for such sexual act. Such should not be made a cardinal factor

But after the amendment, the courts parted with the additional proof and the term consent clearly states that the lack of resistance does not fall within the ambit of the said definition.

2. Expansion of Definition of Rape

T.B. Macaulay for the first time in clauses 359 and 360⁸ defined the offence of rape and also determined the punishment for the same. The final version of the same was enacted under Sections 375 and 376 under the 1860 Penal Code.

Prior to the amendment, the law recognized only penal penetration as a sexual act to bring the guilt of the accused under the ambit of the said Section 375.

Now, it includes four acts;

- a. Penetration of a penis into vagina, mouth, anus, or urethra,
- b. Inserting of an object or any body part into vagina, anus, or urethra,
- c. Manipulation of any part of the body so as to cause penetration in any part of the body, and
- d. Application of the male’s mouth to vagina, anus, or urethra.

The perpetrator is subjected to punishment if he makes a woman to commit any of the above acts with a third person.

In **State of Maharashtra v. Chandraprakash Kewalchand Jain**,⁹ the Court held that it is not the Rule of Prudence to look for corroboration in all the cases except the rarest one. It

⁷ <https://lawcommissionofindia.nic.in/51-100/report84.pdf>

⁸ https://www.researchgate.net/publication/272300931_Macaulay's_Penal_Code_Adam_Smith_and_the_Jurisprudence_of_Resentment

noted that the prosecutrix is the victim of the sexual abuse and not an accomplice. It believed that to ask for corroboration in all other cases would equate a woman who is the victim of the other person's lust to that of the accomplice which is an insult to her injury. The Court laid down that the standard of proof expected must be according to the understanding that in such cases rarely any evidence is available except that of the prosecutrix and that a woman would not stake her reputation by filing a false charge.

The Supreme Court though held that no proof of injuries was necessary still the courts insisted on the same.

3. Age of the Sexual Consent

The age of consent was the major point of disagreement between the Verma Committee and the Parliament. Prior to the 2013 Act the age of consent for sexual intercourse was 16 years of age but in 2012 POCSO Act prescribed 18 years as the age of consent as 'child' under the Act is defined as a person below the age of 18 years. Here arose a contradiction between the IPC and POCSO Act. The Verma Committee suggested not increasing the age of consent from 16 to 18 years but the Parliament did not consider the said recommendations.

4. Scope of Actus Reus

The scope of Actus Reus was expanded to include all the other acts of the accused apart from the penetration as suggested by the Justice Verma Committee. The earlier definition of rape focused on a male understanding of sex and the same does not account for the victim's bodily integrity and sexual autonomy. This obsession with penetration prevents gender just and inclusive conceptualization of rape. It is impossible to visualize a man as a victim and a woman as a perpetrator. The harm which is to be addressed while criminalizing rape should be the destruction of the sexual autonomy and the bodily integrity of a victim. Today an explicit act done other than penetration without the consent of the victim is held on the same footing as the penetration under the said provision. The gradation of punishment would vary from case to case based on the facts and circumstances of each case. The reconceptualization of the definition will give voice to all the men and women victims who have so far found no redress in law.

⁹ (1990) 1 SCC 550 87

5. Marital Rape

The Verma Committee and the Law Commission Reports constantly stressed the criminalization of marital rape as it is the worst form of sexual abuse. It is a crime against the bodily integrity of a woman. The Parliament did not consider the said recommendations and marital rape remained as an exception to the Section. The Committee's two-fold suggestions were as follows:

- a. The marital status between two people should not act as a defence in cases of rape.
- b. The same should not be valid while analysing the consent for the same or any other mitigating factor.
- c. The gradation of sentence for the husband should be the same as that of the accused. The Parliament instead extended the scope of the exception to bring under its ambit non-penile acts of the husband under Section 377.

6. Insertion of Section 167A IPC

Rape being a cognizable offence it is mandatory for the Police Officials to register the complaint. It was suggested that the station officer should be held liable when he/she denies registering the same. Such refusal shall be a clear violation of Section 154 CrPC.

Amendment to The Criminal Procedure Code

The major changes were also brought in the CrPC in light of changes in IPC.

The 84th Law Commission made certain recommendations and the same were considered by the Justice Verma Committee.

1. **Section 160-** A special provision was for recording the statement of the victims of sexual assault under the age of 12 under the POCSO Act was included. Such a statement should be recorded by a woman police officer.
2. **Section 53(1) -** The medical report of a rape victim is a crucial piece of evidence and if the medical examination is delayed then the investigation and the subsequent trial is delayed. Hence the committee suggested that immediate examination of an accused be conducted ¹⁰by a registered medical practitioner. Such medical practitioner shall after examination prepare a report ¹¹and also state reasons¹² for the conclusion. Further, it

¹⁰ Section 53(1) (A) Criminal Procedure Code, 1973.

¹¹ Section 53(1) (B) Criminal Procedure Code, 1973.

is mandatory to record the exact time of commencement and completion of the report and then the same shall be transferred to the Police Official who later shall forward it to the Magistrate.¹³

3. **Section 417A**- Taking into consideration the safety factor of women offenders the Commission, as well as the Committee, recommended keeping women offenders in the custody of institutions specially made for care and protection of women when there is no sufficient place available in the detention centres.

Amendment to the Indian Evidence Act, 1872

Some positive changes were brought about in the Evidence Act after the 2013 amendment.

Section 53A was inserted which held that the character and the previous sexual experience are not relevant where the question of consent or quality of such consent is in issue.

Section 114A was substituted as a new section which laid down a presumption as to absence of consent of the prosecutrix when offence is committed under Section 376 of IPC. It was held that where a woman states in her evidence before the court that she has not consented for the sexual act then the court can presume her non-consent.

Section 146 was amended to include that if an offence is committed under Section 376 against the prosecutrix the same cannot be questioned during cross examination of such victim in the court of law with respect to general immoral character or previous sexual experience to prove her consent.

De Jure Nexus

LAW JOURNAL

Amendment to POCSO Act 2012

Section 42 was inserted in the said Act which provides for an alternative punishment where an offence is committed under Sections 354, 375, and 376 of the IPC where the offender is liable to be punished under the IPC or this Act.

Criticism

The most important recommendation suggested by the 172nd Law Commission Report was to enact Section 375 in way to make it a gender neutral provision. Today not only women but even men are victims of sexual harassment. The said recommendation was totally neglected by the Indian Parliament. The words in the first part of Section 375, "A man is said to commit

¹² Section 53(1) (C) Criminal Procedure Code, 1973.

¹³ Section 53(1) (D) Criminal Procedure Code, 1973.

rape” the provision reflects the traditional notion of rape rejecting the fact that men can also be subjected to sexual abuse. The Penal Code has been amended multiple times but this recommendation was never implemented in the Code. A holistic view is taken by the Government unrealized the serious threat to constitutional promise which is recognized as a human right of gender justice. The Apex Court in **State of West Bengal v. Anwar Ali Sarkar**,¹⁴ the fundamental right under Article 14 was upheld which runs as follows:- “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” It is the duty of the State to protect the rights of every citizen irrespective of their gender. The question of gender neutrality was first dealt in the year 1996 in **Smt. Sudesh Jhaku vs K.C.J. and others**,¹⁵ where the court held that even men can be sexually assaulted and they also should be protect as the female victims. In **Sakshi v. Union of India**,¹⁶ the whole gender neutrality issue was referred to the Law Commission by the Apex Court. Accordingly the Law Commission suggested changes in its 172nd Report. A survey was conducted by PUCL Karnataka to find the violation of human rights especially in the transgender community and it was found that 10.5% of men were raped and there were attempts of rape on other 10.5% men.¹⁷ Sexual assaults are prevalent in their community. In contrast there have also been instances where even women commit offence of rape against men. The National Intimate Partner and Sexual Violence Survey conducted recorded that out of 28.6% of men were sexually assaulted, among which 54.8% females were found to be the perpetrators.¹⁸ In 2006 in **Priya Patel vs State of M.P. & Anr**,¹⁹ the court denied that a female can commit rape against another female as there is no penile-vaginal penetration which is bad in law as the definition under Section 375 also brings other acts under its ambit. The said judgment is totally flawed.

The National Intimate Partner and Sexual Violence Survey also observed that out of 43.8% lesbians victims of sexual assault, 67.4% reported females as perpetrators.²⁰

¹⁴ 1952 SCR 284

¹⁵ <https://indiankanon.org/doc/1525708/>

¹⁶ <https://indiankanon.org/doc/1086919/>

¹⁷ http://pucl.org/sites/default/files/reports/Human_Rights_Violations_against_the_Transgender_Community.pdf

¹⁸ https://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf

¹⁹ <https://indiankanon.org/doc/1555191/>

²⁰ https://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf

Hence, while enacting the laws the bodily dignity and the sexual autonomy of the victim should be considered and not the gender of the victim. Every victim of sexual assault should be protected by the law irrespective of their gender.

Further the age of consent was increased from 16 to 18 years and the reason behind enacting the said provision was to reduce underage sexual activity. I believe that increasing the age would never reduce underage sexual activity. Adolescents do engage in consensual sexual acts both penile-vaginal and non-penile-vaginal. But now even consensual sexual activities below the age of 18 years would be penalized. The effect of which was clearly seen in the country's capital when 460 cases of rape were registered in 2014 out of which 189 cases dealt with consenting couples.²¹

The right kind of approach is needed to deal with the cases of sexual acts between the consenting minors which are suggested by **Michelle Oberman** in the year 2000. He stated that teenagers indulge in sexual acts and it is unimaginable to prosecute each one of them. Hence, the concept of 'proximity clause' was recommended where if the age difference between the parties is according to the legislation and the act is consensual then such cases would be dealt with differently from the ones where the age difference is huge or if the act is non-consensual. In Canada, the USA, and the UK the age of consent is 16 years. But India clearly kept itself away from the said formula and decided to increase the age limit.²²

The other suggestion was to define a punishment of a lower grade. There should be two categories, rape, and sex. It stated that one should be able to distinguish between problematic sexual behaviour and normal adolescent sexual exploration. Therefore it would be incorrect to penalize the innocent and mutually desired expression of adolescent sexuality.²³

More and more youngsters are getting married not because they are physically and mentally prepared for the marriage and the commitment it entails, but because the institution of marriage allows them to have "legitimized sex".

Interestingly, while the POCSO Act prohibits marriage below the age of 18 years, it does not make a child marriage null and void unless either of the parties seeks an annulment. But today, while rising the age of sexual consent to 18 the legislators have clearly allowed the

²¹ <https://www.thehindu.com/data/the-many-shades-of-rape-cases-in-delhi/article6261042.ece>

²² <https://www.tribuneindia.com/2012/20120521/edit.htm#6>

²³ <https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=1410&context=buffalolawreview>

sexual intercourse between an underage wife and husband to be booked for a criminal act of sexual abuse.²⁴

According to the 2010 research report by the Indian Institute of Population Studies, 42% of men and 26% of women admitted to engaging in pre-marital sex. Hence, it is ridiculous to rise the age of consent from 16 to 18 as we are trying to deny the fact that adolescents do have sex.

Perhaps, the government cannot afford to turn a blind eye to the social reality that minors do engage in consensual sexual activity and the law ends up criminalizing youngsters on unfair grounds.

There has always been a curious silence surrounding sexual abuse towards wives. The traditional definition of rape states forceful sexual intercourse without the consent of a woman other than wives i.e. 'spousal exemption'. This concept was derived from British jurist Lord Matthew Hale in 1680 where the marriage was looked at as a license for rape. It was proclaimed that the husband cannot be held liable for committing rape against his lawfully wedded wife as there are mutual consent and contract between them. The marital vow is a presumption of consent and the wives cannot retract. It was regarded as whether the intercourse is consensual or not it is a husband's right and a wife's duty. The doctrine made its place in the US criminal code and marital rape was made legal till the 1980s. Marital rape is a rare breed of crime where the victim has no say when violence is committed against them. Hence, there is no possibility of holding a husband liable for the same.²⁵ The major reason given for the non-criminalization of the same is preventing the sanctity of marriage and there are alternate remedies under IPC and the other special laws to prevent sexual harassment against women. Also, it is considered as a private sphere between a husband and a wife where the Government is not supposed to penetrate. A wife under hence does not have recourse under criminal law if a husband rapes her.

The 42nd Law Commission Report²⁶ was the first one to deal with the said issue. The report made crucial suggestions as it noted instances where the husband and wife were judicially separated, and held that in such cases the exception would not apply. Later a major argument that came up in the consultation concerning the 172nd Law Commission Report was that if the husband was held guilty for committing other offences then why not for rape.

²⁴ <https://www.tribuneindia.com/2012/20120521/edit.htm#6>

²⁵ https://www.bwjp.org/assets/documents/pdfs/marital_rape.pdf

²⁶ <https://lawcommissionofindia.nic.in/1-50/Report42.pdf>

Around 1891 in **Queen Empress v. Haree Mythee**,²⁷ it was held that marriage is not a license that gives an absolute right to a husband to enjoy of his wife without taking into consideration her safety. The case limits the acts of the husband to the extent of her safety and not otherwise which is totally against the whole notion. The will of the wife should equally be respected in such cases and at all times and not only to the extent of her safety.

In 2012 the Justice Verma Committee for the first time held rape as a heinous crime and held that the immunity granted under the said exception to the perpetrator husband is the old notion of a woman being husband's property and irrevocably consents for sexual intercourse at the time of marriage. Acceptance of the modern concept of marriages between equals is very essential.²⁸

International Scenario

Europe

In **C.R. v UK**,²⁹ the European Commission of Human Rights concluded that a rapist will remain a rapist regardless of his relationship with the prosecutrix. This change was acknowledged in common law keeping in mind the objectives laid down by the Human Rights Convention where there is immense respect for human rights, freedom and dignity. The same was statutorily recognised in the year 1994 under the Criminal Justice and Public Order Act. Section 142 of the said Act abolished marital rape as an exception to rape.

Canada

Even in Criminal Code of Canada marital rape was an exception till the year 1983. Later it was repealed³⁰ where even a husband can be booked under the offence of rape.

South Africa

Speaking of South Africa marital rape was criminalized in the year 1993. The court departed from the common law principle where a husband was absolved from the criminal liability even after raping his wife. Now under Section 5 of the Prevention of Family Violence Act 1993 a wife was protected against the sexual abuse by a husband.

The crucial question that arose was regarding the sentencing policy where a husband is convicted. There was a risk that judges may show leniency while dealing with such cases³¹.

²⁷ (1891)1LR18cal49

²⁸ <http://nujlawreview.org/wp-content/uploads/2018/01/11-1-Raveena-Rao-Kallakuru-Pradyumna-Soni.pdf>

²⁹ Publ. ECHR, Ser.A, No. 335-C; see Palmer Feminist Legal Studies Vol.V no.1 [1997] pp. 1-7

³⁰ R.S.C. 1985, c. C-46

Hence, the South African Criminal Law (Sentencing) Act of 2007 was amended to include a provision where the relationship between a victim and accused cannot be justified while deciding the sentence.

Australia

Even the Australian High Court in 1991 held that the common law concept of irrevocable consent of wife for sexual intercourse at the time of marriage was held bad in law. According to Justice Brennan, the said concept is offensive to dignity of a human being and at the same time incompetent of receiving a legal status.³²

Most of the leading countries have criminalized marital rape and has held it against the essence of human dignity under the Human Rights Convention.

Rape not only causes a bodily injury but also violates the sexual autonomy as well as the bodily integrity of a woman and hence, it is essential to bring marital rape in the ambit of the said section.



Conclusion

The major amendments to the criminal law are reactionary as these were in light of the major incident that shook the conscience of the country. The lawmakers should not wait for a particular incidence to happen in order to bring changes in the said Act. They should adapt to the changing circumstances and bring reforms accordingly.

The Amendment Act of 2013 brought some of the remarkable and positive changes under the entire four Acts taking into consideration the protection and safety of the women but none the less the Parliamentarians have missed opportunities in light of these hasty decisions of not implementing certain important provisions recommended by the Committees. The need for amendment concerning marital rape, gender neutrality of the rape, and the age of consent are crucial.

³¹ S v Modise [2007] ZANWHC 73.

³² R v L [1991] HCA 48; (1991) 174 CLR 379 at p. 402