

Sentencing Policy Changes for Rape Clause under Various Sections of Law: Perceptions and Criticism

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Abstract

Several substantial revisions have been made to the anti-rape legislation over the past decade as a result of the post Nirbhaya case aftermath. The proactive Women's Movement, raised public awareness and altered societal attitudes. It fueled the growing demand for new laws to protect women. Several high-profile rape cases, like the Mathura and Delhi cases, as well as the Unnao and Kathua rape cases, spurred changes to the criminal code in 1983, 2013, and 2018 respectively. A dedicated Committee was formed in response and was charged with recommending revisions to the anti-rape laws. There have been a number of revisions made pertaining to the definition and penalties of anti-rape laws over the years. These concentrate primarily on the changes brought about by the Indian Penal Code's rape legislation. To ensure that the circumstances and developments that are prompting the commencement of a unified rape punishment policy are examined, an investigation into these cases is necessary.

Keywords:

Delhi Nirbhaya cases, Sentencing Policy, Rape Clause, Anti-rape legislation, Anti-rape laws.

Introduction

Rape is among the cruellest and most terrible crimes. Nonetheless, there is still a need for a comprehensive definition that encompasses it as a crime against women's psycho-social autonomy, physiological integrity, and sexual autonomy. As women were traditionally viewed as nothing more than things with no rights, rape was regarded as a crime both as an individual act and as a violation of another man's property². Visible shifts in society values and concepts led to a significant revision in the definition of rape as a crime. Indian laws on rape originated with the common law of England. Regulating anti-rape laws was first included in the IPC in 1860. "A charge readily to be made and hard to prove, and harder to be rejected by the party accused, but never so innocent," was how renowned jurist Sir Matthew Hale (17th century) defined rape³. This highlights the biased treatment of the victims by the colonial courts. Because there was a possibility that the ladies might be lying, the trial courts' job was to prove the victim's credibility rather than the accused's guilt.⁴

Several substantial revisions have been made in the anti-rape legislation over the past decade years as a result of huge public involvement after the Nirbhaya case in Delhi. Several high-profile rape cases, like the Mathura and Delhi cases, and the Unnao and Kathua rape cases, spurred changes to the criminal code in 1983, 2013, and 2018, respectively. There have been a number of revisions made to the definition and penalties of anti-rape laws over the years concentrating primarily on the changes brought about by the Indian Penal Code's rape legislation. This is focused on studying the nature and import of these changes with special emphasis on the perceived impact. Unsettling rulings have occurred in which judges have shown their patriarchal and regressive mindset and exonerated defendants on ludicrous grounds.

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²Stanford Encyclopedia of Philosophy available at: <https://plato.stanford.edu/entries/feminism-rape/> (last visited May 8, 2022).

³Elizabeth Kolsky, *"The Body Evidencing the Crime": Rape on Trial in Colonial India, 1860-1947*, 22 Gender & History, 111 (2010) available at https://www.researchgate.net/publication/229448954_The_Body_Evidencing_the_Crime'_Rape_on_Trial_in_Colonial_India_1860-1947

⁴*Ibid*

The Criminal Law Amendment Act 2013

Beginning on February 3, 2013, the Criminal Law Amendment Act of 2013⁵ was in effect. Laws like the Indian Evidence Act of 1872, the Code of Criminal Procedure of 1973, and the Indian Penal Code of 1860 were changed a lot because of what the Justice Verma Committee said. A lot of important changes were made to the Act, like changing the meanings of rape crimes. Before section 375 of the IPC was added, the law only dealt with penile-vaginal rape. Now, any entry of the body is considered a crime.

To quickly respond to the nationwide protests and public outrage that followed the Nirbhayaa case, the Justice J.S. Verma committee was set up to suggest changes to national crime laws. The Committee made suggestions on a number of issues pertaining to sexual crimes. "The relationship between the accused and the accuser is not relevant to the inquiry into whether the complainant agreed to the sexual activity," the Committee said in support of getting rid of the exception for marital rape. An employment tribunal was proposed, along with criticism of the current Internal Complaints Committees, which were said to be ineffective in fulfilling the goals of the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Bill, 2012.

The committee believed that rape offences should be assigned a grade in relation to their penalties. "There are situations where the victim/survivor is still in a position from which she can overcome the trauma and lead a normal life, with some support from society," the Committee declared. Put another way, we do not claim that such a circumstance is less morally reprehensible, but rather that the degree of harm to the individual may be significantly lower and does not call for capital punishment." It considered the Working Group on Human Rights' opinion that "despite the halt in the execution of death sentences since 1980, the murder rate has dropped continuously in India over the previous 20 years." Therefore, the committee felt that there might not be any deterrence to the death penalty for rape. The committee also considered the opinions of most academics, women's organisations' leaders, and other relevant parties, who firmly said that "the seeking of death punishment would be a regressive step in the sphere of sentencing and reformation."

The Committee proposed to amend the penal code to include offences including voyeurism, deliberate touching, and stalking. The "two-finger test" was also examined, and it was suggested that it be discontinued because the size of the vaginal introitus has no bearing on a sexual assault case, and "*a test to determine the laxity of the vaginal muscles, which is commonly referred to as the two-finger test, must not be conducted.*" *Conclusions or judgements such as "habituated to sexual intercourse"* should not be made based solely on test findings because doing so is against the law.

The Committee created a distinct Bill of Rights for women, saying that "*Every woman shall be entitled to respect for her life as well as the integrity and security of her person*" and emphasising the importance of gender equality. Harmful, severe, or dehumanising punishment or treatment of women is prohibited, as is the use of violence against them.

Empirically Tested Ground Realities

The underlying truths around rape cases appear to have remained unchanged. A decade after the mind-numbing Unnao and Kathua rape trials, as well as the Delhi rape case, the judiciary and legislators realised that sentence had to be made standard and mandatory in all of these cases.

India's Penal Code, the Indian Evidence Act of 1872, the Criminal Procedure Act of 1973, and the Protection of Children from Sexual Offences Act 2012 were all changed by the Criminal Amendment Act 2018. In response, the IPC added sections 376AB, 376DA, and 376DB and changed sections 166A, 228A, and 376. From 10 years to life in jail and a fine, subsection-1 of Section 376 now has the harshest punishment for rape. To reach this goal, a new section 3 was added that defines raping a woman younger than sixteen and punishes offenders with up to life in prison and a

⁵[https://www.law.cornell.edu/women-and-justice/resource/the_criminal_law_\(amendment\)_act_2013#:~:text=The%20Criminal%20Law%20\(Amendment\)%20Act%2C%202013%20was%20passed%20in.and%20the%20Criminal%20Procedure%20Code.](https://www.law.cornell.edu/women-and-justice/resource/the_criminal_law_(amendment)_act_2013#:~:text=The%20Criminal%20Law%20(Amendment)%20Act%2C%202013%20was%20passed%20in.and%20the%20Criminal%20Procedure%20Code.)

fine. Section 376A⁶, which stipulates that a woman who is raped must serve a minimum of twenty years in jail, but may also be sentenced to life in prison, a fine, or even death. Section 376AB⁷ was added after this.

A new section 376DA has been added to the existing 376D⁸, which addresses the punishment for the crime of gang rape. It stipulates that a woman under the age of sixteen who has been raped by one or more members of a group or who acted in support of a shared goal faces a life sentence in prison and a fine. According to Section 376DB, anyone found guilty of gang raping a juvenile will face a life sentence in jail, a fine, or perhaps death.

Survey Findings

The perceptions of the people regarding sentencing policy on rape cases by conducting empirical research through the mixed method approach. The research work results are presented in the form of graphs to highlight the salient features of the perceptions of people on sentencing in rape.

Table 1: Awareness on Forms of Rape and Sentencing for each form

Sr. No.		Percent
1	Yes	42
2	Don't Know	38
3	No	20

Source: Compiled by Researcher

It is significant that a sizeable proportion of the sample (38 percent) had no idea about different forms of rape and could not say whether there were different types of sentences for the various forms. There were also 20 percent who did not know at all and 42 percent reported that they were having some awareness about the same.

Table 2: Awareness about Types of Rape

Sr. No.	Type of Rape	Percentage
1	>10 years old	5
2	POSCO > 18 Years Old	7
3	Gang Rape	47
4	Custodial Rape	32
5	Marital Rape	16

Source: Compiled by Researcher

The participants in the survey were asked about the types of rape they were aware of. There were 47 percent who said they knew about gang rape and 32 percent knew about custodial rape and also 16 percent knew about marital rape. There were 7 percent who knew about rape of under 18 years old and another 5 percent reported that they were aware of instances of rape of victims under 10 years of age. They stated these as being different forms of rape

Table 3: Sentencing for Criminal Activities

Sr. No.	Awareness of Sentencing	Percentage
1	Stalking	2
2	Acidic Attack	15
3	Voyeurism	17

⁶ <https://devgan.in/ipc/section/376A/>

⁷ <https://devgan.in/ipc/section/376AB/>

⁸ <https://www.legalserviceindia.com/legal/article-13265-a-brief-of-rape-law-i-e-section-376-indian-panel-code.html>

4	Sexual Harassment at Workplace	56
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Source: Compiled by Researcher

The respondents were asked if they were aware of the sentencing for any of the forms of offensive actions other than rape. There were only 2 percent who were aware of stalking, 15 percent knew of Acid Attacks and 17 percent knew of voyeurism as being punishable. However, there were 56 percent who knew about sexual harassment at workplace. Thus, this was the most widely known about offence.

Table 4: Justice System is Time Bound For Addressing / Hearing / Sentencing Rape Case

Sr. No	Addressing / Hearing Sentencing Rape Case	Percentage
1	Yes	12
2	No	60
	Don't Know	18

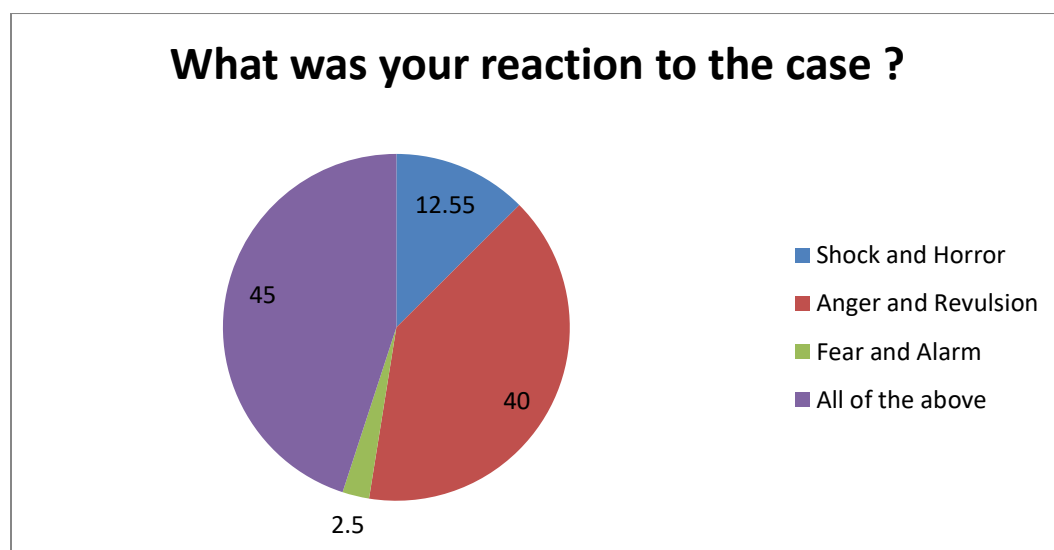
Source: Compiled by Researcher

The participants in the survey were asked if they felt that the justice system is time bound when addressing issues like holding hearings and sentencing for rape, the responses showed that only 12 percent agreed and 18 percent did not know. There were, however, 60 percent reported that the justice system was currently not time bound for addressing and scheduling hearings for rape.

When asked if the sentence was awarded for rape with or without consent or even under threatening circumstances. There were 32 percent who said that they were aware of the fact but 21 percent said that they were not aware of this while 47 percent said that they did not know about the implications of this finer point. Thus, the larger proportion of the respondents had no idea about there being varied sentencing and permissibility of rape with or without consent.

The respondents were asked if they knew about the sentencing in cases where the victim is raped by a close relative like father, brother, teacher, boss, doctor, police etc. there were 30 percent who said that they knew the sentencing was different in cases where the victim is raped by a close relative. There were 60 percent who said that they did not think there was any different form of sentencing in such cases. Also there were 10 percent who did not know and were not aware of the existence of any differences in sentencing under such circumstances.

Fig 1:- Reactions to the 'Nirbhayaa' Rape and Murder Case

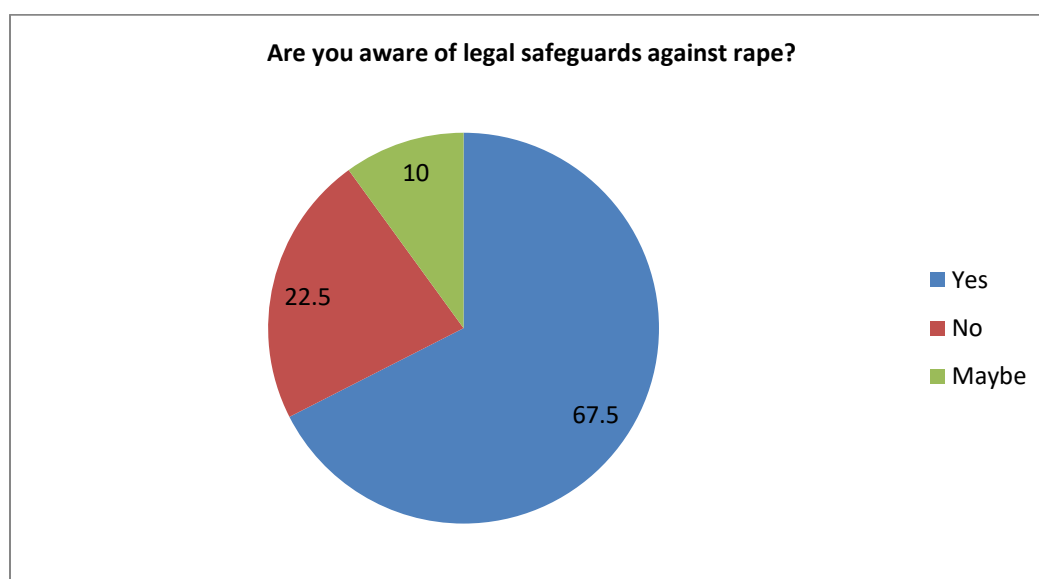


Source: Compiled by Researcher

When asked to give their reaction of the 'Nirbhayaa case', there were 45 percent of the respondents who gave vent to their mixed feelings of shock and horror, anger and revulsion, fear and alarm and all of them together. There were 40 percent who felt anger and revulsion while 12.5 percent felt shock and horror. There were a small proportion who felt fear and alarm.

Thus, overall respondents expressed total shock at the revelation of the case. The case proceedings dragged on for so long and justice was delayed while the perpetrators lives took such twists and turns that there was a feeling of enough not having been done to assuage the deep injury done to the status of women in the country. The Nirbhayaa case awakened the judiciary to an earlier lesser known path of law.

Fig 2:- Awareness of Legal Safeguards Against Rape



Source: Compiled by Researcher

The research went on to ask if the respondents were aware of the legal safeguards against rape. The responses were enlightening, while there were 67.5 percent of the survey participants who were reporting that they were aware of the legal safeguards for women, there were a significant 22.5 percent negatives and 10 percent who were unsure and said that they were probably aware of the legal safeguards but could not say with surety.

Apparently the sensationalism of the media can tend to create a hyped up atmosphere among the lay public. It was thought prudent to ask if the interest in rape cases had been maintained post the 'Nirbhayaa' Case⁹ in 2012. There was a remarkable decline observed as the awareness of rape cases after the 'Nirbhayaa' Case in 2012 plummeted from 100 percent to 92.5 percent. Significantly enough there were several respondents who were either unaware or did not want to be aware of rape cases after the 'Nirbhayaa' Case.

Conclusion

There was a time when the government only did something about rape when shocking new cases made people angry. This means that our system still doesn't do enough to give people a safe place to stay. The Justice Verma Committee found that even though laws have changed some things, they still need to be fixed right away. For example, gender balance in rape laws and rape in the marriage relationship need to be fixed right away.

⁹(2017) 6 SCC 1

The courts' ambiguity and inconsistency have come to light in a number of cases, highlighting the need for reform. The Farooqui case¹⁰, for example, thwarts decades of progress and brings us back to the Mathura case. This shows our society's deeply ingrained patriarchy. As a result, the way people judge and treat women today is still influenced by colonial values and norms.

Many cases are unreported for fear of being stigmatised by the rest of society. Every step of the way, from the police station to the courtroom, the victim is subjected to abuse. Victims' pain is compounded throughout the process of obtaining justice, from the insufficient healthcare system through the criminal enforcement system. The society in which we live is a significant factor in making it difficult to attain justice. As a result, the full impact of laws will not be realised until and unless social change is accompanied by legal adjustments

References

- Amnesty International Calls for Restriction of the Role of Male Guards in Female Facilities, USA (New York State), August 2000. AI Index : AMR 51/124/00 at <http://www.amnesty.org>.
- Amnesty International-India-Torture, Rape and Death in Custody, Amnesty— International Publications, New York (1992).
- Basu, N.D. Indian Penal Code, ed. by Sudhir Kumar Bose, 6th ed., Published by P.S. Basu, Nalin Sarkar Street, Calcutta(1966)
- Chandra, A. (2014). Capricious Noose: Comment on the Trial Court Sentencing Order in the December 16 Gang Rape Case. *Journal of National Law University, Delhi*, 2, 124-139
- Desai, Neera and Maithreyi Krishna Raj, *Women and Society in India*, Ajanta Publications, Delhi(1987)
- Freedom From Violence –Women's Struggles From Around the World, ed. by Margaret Schuller, (1992).
- Gender and Justice, ed. by Ngaire Naffine, Dartmouth Publishing Company, Ashgate Publishing Ltd., England(2002)
- Hildebrand, M.M., & Najdowski, C.J. (2014). The Potential Impact of Rape Culture on Decision Making: Implications for Wrong Acquittals in Sexual Assault Trials. *Alabama Law Review*, 78, 1059-1088.
- Kamthan, M. & Choudhury, P. (2011). Enforcement of Rape Laws in India: Gender Justice or Gender Sensitive. *Nirma University Law Journal*, 1(1), 145-166.
- Monir, M., *Law of Evidence*, revised by H.S. Ursekar, 6th ed., The University Book Agency, Allahabad(2002)
- Raj Gopal, P.R., *Social Change and Violence — The Indian Experience*, Uppal Publishing House, New Delhi(1987)
- Rhode, Deborah L., *Justice and Gender*, Harvard University Press, Cambridge, Massachussets, London, England(1989)
- Sexual Violence — The Reality Form Women*, The London Rape Crisis Centre Hanbook Series, The Women's Press, London (1984).
- Warner, K., Davis, J., Spiranovic, C., Cockburn, H., and Freiberg, A., (2017). Measuring Jurors' Views on Sentencing: Results from the Second Australian Jury Sentencing Study. 19(2) *Punishment and Society* 180 at p 189.

¹⁰ CRL.A.944/2016