

Revisiting Liberty of Woman Under Rape Laws in India with Reference to *Bhartiya Nyaya Sanhita*: A Critical Legal Analysis

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Abstract

Rape was clearly defined as an offence in the Indian Penal Code of 1860, drafted by the First Law Commission. For over a century, criminal laws relating to rape cases remained unchanged until the Mathura Custodial Rape Case prompted the Criminal Law (Second Amendment) Act of 1983. Subsequent legislative responses followed major cases, the 2012 Delhi Rape Case led to the Criminal Law (Amendment) Act, 2013, which provided for the death penalty in rape cases in which the death of the victim is caused or she is left in a vegetative state; the Unnao Rape Case of 2017 precipitated the Criminal Law (Amendment) Act, 2018, which made the punishment more strict and inserted several provisions; and in July 2024, new criminal laws were enforced. Despite these successive legislative interventions, each considered revolutionary in its time, heinous incidents have continued unabated, from the Hyderabad Rape Case of 2019 and the Hathras Rape Case of 2020 to the Kolkata Rape Case of August

2024. The cases from Mathura custodial rape to Kolkata rape have witnessed no change in the mentality of the society, which revolves around gender injustice and questions the physical appearance of a girl/woman. This paper analyses the rape laws through a critical examination of the after-effects of the 2013 and 2018 amendments of old criminal laws and the provisions of new criminal laws. It also traces the evolving meaning of the "personal liberty" of women across this period. The analysis reveals that deterrent laws have become a necessity, yet their implementation in society remains ineffective. The core cause behind these recurring cases lies not merely in legislative gaps but in deeply entrenched social attitudes that successive amendments have failed to address. Legislative reform alone cannot deliver justice when societal mentality remains unchanged. This paper employs a doctrinal-analytical method, drawing on constitutional provisions, statutory texts, Supreme Court jurisprudence, parliamentary committee reports, and National Crime Records Bureau data to critically examine the legislative and judicial treatment of rape law in India. This paper criticizes the gap between law on paper and law in action, underscoring that the personal liberty of women demands not only stronger legal frameworks but their meaningful and consistent enforcement.

KEYWORDS *Women Protection, Rape Law, Bhartiya Nyaya Sanhita, Penal Reform, India*

Introduction

When a civic community faces adverse times, it is common for them to seek a higher level of security and intolerance, which can lead to the creation of more laws. In India, the history of laws enacted in response to sexual violence incidents suggests that they are often rushed and ambiguously defined. Rather than taking a comprehensive approach to legislative reform, lawmakers in India have tended to create piecemeal changes to criminal laws dealing with sexual offenses. This limited approach can be attributed to the political pressure to respond quickly to high-profile cases, resulting in laws that are not rigorously debated or studied. While these "stringent" laws may give society a sense of satisfaction that action is being taken, they can also have counterproductive consequences for the criminal justice system.

The gang rape¹ of a young woman in 2012 was a turning point for India, as it prompted society to confront the corrupt "system" that had allowed the

¹ Mukesh and Anrs. v. NCT Delhi, (2017) 6 SCC 1 (hereinafter *Nirbhaya Rape Case*).

heinous crime to occur. Despite a culture that condoned and even supported rape, civil society responded with protests and demands for change. This outcry led to significant amendments to criminal laws and increased awareness of gender-based violence. Unfortunately, again we witnessed the highlighted Unnao² rape case of 2017, the Kathua³ rape case of 2018, the Hyderabad rape case of 2019, and the Hathras⁴ rape case of 2020. The Indian Penal Code, which was initially intended to be precise, comprehensible, and the product of parliamentary law-making, became a complex and unclear piece of legislation, and therefore, the Bhartiya Nyaya Sanhita replaced the Indian Penal Code on 1st July, 2024. Sadly, in the month of August, the horrifying Kolkata rape case occurred, which questions the new criminal laws and demonstrates that the problem of rape culture still persists in India and those perpetrators continue to act with impunity, sometimes with political support.⁵

The central problem this paper addresses is the persistent disjunction between legislative reform and substantive justice in India's rape law regime. Despite four major rounds of criminal law amendment spanning over four decades, each triggered by a high-profile incident and accompanied by public and judicial pressure, the incidence of rape, the structural inadequacies of enforcement, and the societal normalization of gender-based violence have remained largely unaltered. This paper identifies three specific legal issues at the core of this disjunction:

First, there are doctrinal inconsistencies within the amended laws themselves, including the obliteration of the distinction between simple and aggravated rape following the 2018 amendment, the gender-specific construction of rape under the IPC and BNS in tension with the gender-neutral framework of POCSO, and the incomplete adoption of the Justice Verma Committee's recommendations on consent and marital rape.

Second, there are enforcement gaps, evidenced by NCRB data showing persistently low conviction rates, rising pendency of cases, and systemic failures

² K.S. Sengar v. State of Uttar Pradesh (2018) (hereinafter *Unnao Rape case*); Later on, the case was transferred to CBI by Allahabad High Court when the victim committed suicide.

³ State of Jammu Kashmir v. Deepak Khajuria @ Deepu (Registration no. 34/2018) (hereinafter *Kathua Rape Case*).

⁴ Satyama Dubey and ors. v. Union of India and ors., WP (Crl) No.296/2020 (hereinafter *Hathras Rape Case*).

⁵ Abhishek Gupta, *Decoding 'Deterrence': A Critique of the Criminal Law (Amendment) Act, 2018*, ILI Law Rev. Summer Issue 137-138 (2018), *Decoding 'Deterrence': A Critique of the Criminal Law (Amendment) Act, 2018* by Abhishek Gupta :: SSRN.

in first-response investigation, as illustrated across the Mathura, Hathras, and Hyderabad cases.

Third, there is a constitutional deficit, the progressive judicial expansion of Article 21 to include bodily integrity, sexual autonomy, and the right to live with dignity has not been translated into coherent statutory language or institutional practice, leaving women's personal liberty formally recognized but practically unprotected. The paper critically examines whether the Bhartiya Nyaya Sanhita, 2023, having replaced the IPC without substantively revising its rape provisions, represents a missed opportunity to resolve these longstanding deficiencies, or whether it perpetuates them under a new nomenclature.

Personal Liberty

The right to personal liberty⁶ is one of the earliest notions to be safeguarded by courts in India; hence, the concept of 'liberty' has been given a far broader interpretation in India. The Supreme Court rejected its earlier notion that liberty solely refers to freedom from bodily restraint, instead holding that it embraces those rights that have been recognized as vital to free men's orderly pursuit of happiness for a long time. The Supreme Court reviewed the scope of the term "personal liberty" in the *Kharak Singh v. State of U.P. & Ors.*⁷, and the American ruling (per Field, J.) of *Munn v. Illinois*⁸ was cited, stating, "*The term 'life' meant more than mere animal existence.*" The right to personal liberty is an individual's right to be free from restraints imposed directly or indirectly on his body. Even legal imprisonment does not make a prisoner lose all his fundamental rights. He retains all of a free citizen's rights, with the exception of those that are restricted as a result of imprisonment⁹.

The Universal Declaration of Human Rights provides that everyone is born free and has the right to be treated with dignity.¹⁰ Similar to the United

⁶ Article 21 of the Constitution of India states that "*no person shall be deprived of his life or personal liberty except according to procedure established by law.*"

⁷ AIR 1963 SC 1295.

⁸ 94 U.S. 113

⁹ Riya Jain, *Article 21 of the Constitution of India- Right to Life and Personal Liberty*, ACADEMIKE (Aug. 12, 2021), <https://www.lawctopus.com/academike/article-21-of-the-constitution-of-india-right-to-life-and-personal-liberty/> (accessed on Jan. 5, 2023).

¹⁰ The Declaration was adopted as a universal benchmark of success for all peoples and all nations by the United Nations General Assembly in Paris on December 10, 1948. For further comparison, see also Sebastián Alejandro Morales, and Andrés Castillo. "The Case of Gender Violence in Mexico: Does the Judicial System Ensure Substantive Justice for Victims? El Caso de la Violencia de Género en México:¿ Garantiza el Sistema Judicial la

States Constitution, the Indian Constitution guarantees a number of rights to all citizens, irrespective of gender, including Article 14¹¹ and Article 21¹². The Directive Principles of State Policy in the Indian Constitution ensure that the state should provide its citizens, including both men and women, an equal right to an adequate means of livelihood¹³, equal pay for equal work¹⁴, that children receive free and compulsory education¹⁵, and that the state has a responsibility to improve public health¹⁶. Whereas fundamental rights are enforceable in such a way that a victim can seek legal remedy in the Supreme Court or High Court¹⁷, while directive principles are just a guiding factor, and their non-observance is not actionable in a court of law.

A vital aspect of human dignity is the right to personal liberty and security, which has been violated time and again. Slavery is one of its examples since historical times. Another example is sex trafficking, which is a complete deprivation of a woman's right to personal liberty and safety. In this, women are confined by human traffickers and kept secluded from society, unable to contact anyone for help. If they refuse sex work, they are at risk of being raped, starved, or even killed. The deprivation of this right may also be done by denying access to basic health services. The right to life guaranteed by Art. 21 has been deemed violated by rape. Consequently, all facets of life that contribute to making life meaningful and worthwhile would be covered under the right to life. "*Rape is not only a crime against the person of a woman; it is a crime against the entire society.*"¹⁸ In *Bodhisattwa Gautam v. Subhra Chakraborty*¹⁹, the Supreme Court observed, "*Rape destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is a crime against basic human rights and is*

Justicia Sustantiva para las Víctimas?." *Crítica de la Justicia Sustantiva* 1, no. 2 (2025): 205-232; Alma Beatriz Miguel, and Leandro Rafael Quiroga Santos. "Criminalization of Poverty: Police Surveillance in Impoverished Urban Areas: Criminalización de la pobreza: vigilancia policial en zonas urbanas empobrecidas." *Revista de Justicia Social en la Sociedad Urbana* 1, no. 2 (2025): 143-180; Verónica Salas Moreno, "The Struggle for Gender Equality in Human Rights: Beyond Legal Recognition: La Larga Lucha por la Igualdad de Género en los Derechos Humanos: Más Allá del Reconocimiento Legal." *Revista de Derechos Humanos Contemporáneos* 1, no. 2 (2025): 285-322.

¹¹ The State provides for the right to equality to all persons, including non-citizens, as well.

¹² *Supra* note 6.

¹³ Constitution of India art. 39, cl.a.

¹⁴ Constitution of India art. 39, cl.d.

¹⁵ Constitution of India art. 45.

¹⁶ Constitution of India art. 47.

¹⁷ Constitution of India art. 32, art. 226.

¹⁸ *State of Punjab v. Ramdev Singh*, AIR 2004 SC 1290.

¹⁹ (1996) 1 SC 490 at 500.

also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21 of the Constitution of India."²⁰

When the IPC was drafted in the 1860s, patriarchal traditions were more widespread at the time, and women did not enjoy equal legal position to men. Although times have improved, systematic patriarchy and in-built misogyny still exist. Rape is sometimes seen as a power exercise, with perpetrators raping people primarily to build a power structure rather than for sexual reasons. The right to life and personal liberty under Article 21 includes the right to live with dignity, which is taken away from a woman in every possible aspect.²¹

Right to Abstain from Sexual Intercourse

In several decisions, the Supreme Court has construed the phrase of Article 21 provided under the Indian Constitution to go beyond the explicit meaning of protection of life and liberty and widely includes the right to health, dignity, privacy, secure living circumstances, and a healthy environment. In recent times, courts have expanded their scope to include a right to refrain from sexual intercourse and to get abstain from unwelcome sexual conduct. In the *State of Karnataka v. Krishnappa*²², the Supreme Court ruled that, except for being a humiliating act, sexual violence is an unlawful encroachment into the female's right to privacy and chastity, and non-consensual sexual intercourse is considered physical and sexual violence. In the case of *Suchita Srivastava v. Chandigarh Administration*²³, the Supreme Court associated the right to make sexual activity decisions with the right to personal liberty, dignity, privacy, and physical integrity under Article 21. Further, the Supreme Court in the case of *Justice K.S. Puttaswamy (Retd.) v. Union of India*²⁴, confirmed the right to privacy as a fundamental right, which also includes privacy as to decisions, manifested by the free choices related to the intimate relations. The preceding judgments make no distinction between the rights of married and unmarried women, and there is no ruling in contrast that establishes that marital association abridges an individual's right to privacy. As a result, the Supreme Court determined the fundamental right of all women,

²⁰ K.I. Vibhute, *Victims Of Rape And Their Right To Live With Human Dignity And To Be Compensated: Legislative And Judicial Responses In India*, Vol. 41, No. 2 Indian Law Institute pp. 227-229 (1999), <https://www.jstor.org/stable/43951715>.

²¹ *Id.* at 228.

²² (2000) 4 SCC 75.

²³ (2009) SCC 1.

²⁴ (2017) 10 SCC 1.

regardless of marital status, to desist from sexual activity, guaranteed under Article 21 of the Constitution.

Criticism With Reference to Leading Case Laws

A. Mathura Gang Rape Case

The 1983 amendment was enacted in response to criticism of the judgment in the Mathura Gang Rape Case²⁵. On 26th March 1972, Mathura was reported kidnapped by her husband Laxman, Nushi, and Ashok. Police took statements from everyone involved and asked them to leave. Two constables, Ganpat and Tukaram, stayed behind with Mathura. Ganpat raped Mathura while Tukaram attempted to but was too intoxicated. Ashok and Nushi became worried and went to the police station but were told Mathura had left. Crowds gathered, and Mathura's rape was confirmed by a doctor. Charges against the police constables were later removed due to lack of physical evidence. The aggrieved party filed a special leave petition to reverse the judgment of acquittal. The Supreme Court's observation revealed that the current situation can determine a woman's consent in rape, but not the fear and coercion she may have experienced. In a particular case, the girl's agreement was seen as passive submission due to being alone at the police station with two individuals in power. It was concluded that her submission was driven by fear and force, which she could not resist independently. Therefore, Ganpat could not be convicted of rape, and Tukaram was acquitted as no charges were proved against him. Four distinguished professors wrote an open letter²⁶ to the Chief Justice of India to express their disapproval of the Supreme Court's decision on September 15, 1978, and draw attention to public outrage. The professors criticized the Supreme Court's reasoning regarding stereotypes like premarital sex and opined that police have no license to rape a woman.²⁷

Sections 375 and 376 of the IPC were amended in 1983, modifying the definition as well as punishments for rape, but the amendment did not establish

²⁵ Tukaram & Anr v. State of Maharashtra, AIR 1979 SC 185 (hereinafter *Mathura Gang Rape Case*).

²⁶ Upendra Baxi, *An Open Letter to the Chief Justice of India*, <http://pldindia.org/wp-content/uploads/2013/03/Open-Letter-to-CJI-in-the-Mathura-Rape-Case.pdf> (accessed on Mar. 6, 2023).

²⁷ Tamara Abdelwahed, Stella Gaumert, and Laura Konrad, *The Influence of Public Outrage on Law Making*, Vol. 51, No. 4 Nomos Verlagsgesellschaft mbH pp. 483-485 (2018), <https://www.jstor.org/stable/10.2307/26745778>.

any drastic change in the crime.²⁸ In this case, certain gaps were observed, which are discussed as under²⁹:

1. Both the appellants got acquittal on the ground that no damage was caused to the body of a minor girl, and so the offence did not amount to rape.
2. Considering the other side, it does not create an assumption due to no injury on the girl's body that the offence was not rape but rather consensual intercourse.
3. This is an erroneous ground to believe that there may be voluntary intercourse between police personnel and a girl just because the girl did not seek assistance.³⁰
4. On the contrary, it might have happened that the girl was not in a situation to call for help or ask for rescue, and this is why the accused's acquittal on this point was equally irrational.
5. The consent given by the minor was not declared ineffective in the Session Court's decision.³¹
6. How can it be termed consensual intercourse if consent is not given? As a result, consent is required³².
7. The judiciary should take suitable action for the same nature of offences committed by either the minor or major as soon as practicable.

B. Delhi Gang Rape Case

The hangings of the four men convicted in the Nirbhaya case, infamous for the gang rape and murder of a young woman, may have offered some sense of closure for the victim's family. The mother of Nirbhaya expressed hope that women would now feel safer in society. The incident shook the nation in 2012 when the young woman was brutally raped on a moving bus in Delhi and died a month later from her injuries. After a seven-year-long legal battle, the convicts were finally executed on March 20, 2020.³³ While the victim's mother believes

²⁸ K.I. Vibhute, *Supra* note 20, at 223.

²⁹ Suchi Jain, *Critical Analysis on Mathura Gang Rape Case*, Vol. 2 ISSN 2581-5504 Pen Acclaims 7-8 (Jul. 2018), Suchi-Jain.pdf (penacclaims.com).

³⁰ Laxmi Murthy, *From Mathura to Bhanwari*, Vol. 48, No. 23 Economic and Political Weekly pp. 16-18 (2013), <https://www.jstor.org/stable/23527202>.

³¹ *Id.* at 16-18.

³² M.P. Singh, *Gender, Law and Sexual Assault*, Vol. 32, No. 11 Economic and Political Weekly p. 546 (Mar. 15-21, 1997), <https://www.jstor.org/stable/4405177>.

³³ Nirbhaya case: Four Indian men executed for 2012 Delhi bus rape and murder, BBC NEWS (Mar. 20, 2020), Nirbhaya case: Four Indian men executed for 2012 Delhi bus rape and murder - BBC News.

that this punishment will teach families to raise their boys to respect women, we must question if it is enough to ensure the safety of women in India.

Following public outcry for justice, the Justice J.S. Verma Committee³⁴ advised that the grading of sexual offences under the Indian Penal Code, 1860 (IPC), be retained. Rape, with no restrictions on the types of penetration, be it vaginal, anal, or oral, is considered a separate offence. Whenever any sexual penetration is done without the consent of women, it should be considered the offence of rape. After a month-long inquiry, the committee recommended rigorous imprisonment instead of the death penalty, as the former is more effective in punishing and rehabilitating convicts.³⁵ The Criminal Law (Amendment) Act, 2013, which came into effect after the Nirbhaya case, unfortunately implemented some of the committee's recommendations, while others, such as reform in the police system and marital rape, were ignored.³⁶

Crimes against women have not significantly decreased since the Nirbhaya case, suggesting that the death penalty might merely serve to incite repeat perpetrators to murder their victims. Therefore, we must ask ourselves what measures India is taking to protect its women. Although laws have been amended, there seems to be no significant change in the societal mindset. A society that favours male children has already predisposed the girl child to an unequal world, and therefore, no crimes against women will cease until we change our mindset to value women's dignity over gender biases.³⁷

The incident of Nirbhaya gathered an unbalanced amount of media attention in comparison to other cases, which are equally terrible in nature, but

³⁴ On December 23, 2012, in consequence of the Nirbhaya Rape case, a three-member committee was constituted to suggest amendments to the criminal law in order to provide speedy trials and enhanced punishment for offenders accused of committing sexual assault against women. The head of the committee was Justice J.S. Verma, former Chief Justice of the Supreme Court.

³⁵ Report of the Committee on Amendments to Criminal Law, 2013, Justice Verma Committee Report Summary, PRS LEGISLATIVE RESEARCH, 1359132636--Justice Verma Committee Report Summary_0.pdf (prsindia.org) (accessed on Jan 6, 2023).

³⁶ Abhinav Garg, *Delhi: Gruesome crime that made rape punishable by death*, THE TIMES OF INDIA (Mar. 21, 2020), Delhi: Gruesome crime that made rape punishable by death | Delhi News - Times of India (indiatimes.com) (accessed on Mar. 21, 2023).

³⁷ *Crime and punishment: On Nirbhaya case convicts' hanging*, THE HINDU (Mar. 21, 2020, 12:28 pm), <https://www.thehindu.com/opinion/editorial/crime-and-punishment-the-hindu-editorial-on-hanging-of-nirbhaya-case-convicts/article31122483.ece> (accessed on Apr. 4, 2023).

due to a lack of limelight, they are pending for so long.³⁸ In that case, the courage of Nirbhaya's mother should be praised, for in order to ensure justice for her daughter, she kept banging at the doors of the court, but the capital punishment alone would deliver vengeance to the ambiance of her daughter. It has bent the frame of mind in favour of the death penalty across the country, and this seems to be now resonating in our courts as well. The first-ever concurrent hanging of the four men in the Nirbhaya case in the history of Tihar should hopefully terminate this catastrophic chapter. The aim of each trial is to pursue detailed investigation and prompt justice; therefore, Nirbhaya's mother keeps appealing that those men on the death row by taking resort to all legal options were hindering justice. Capital punishment is neither a way to prevent a crime nor a speedy obligation that will mend a lot for our women.³⁹

C. Hyderabad Rape Case

In 2019, the memoirs of the Nirbhaya case had not been completely faded from the minds of people; another horrific incident from Hyderabad came into the limelight where the nation bewailed another rape victim, a 27-year-old who was a veterinary doctor. She was gang-raped viciously and subsequently burnt alive. The atrocities amongst the people were incited by the instance, and they started demanding speedy justice, unlike Nirbhaya, where it took seven years to reach the ends of justice. Like the other media-covered cases, many protests and marches were organized throughout the country in demand of justice. In the meantime, news flared up that the four suspects of the Hyderabad case, who were in police custody, were killed by the Hyderabad police in an encounter.⁴⁰ This act of the Hyderabad police was undoubtedly celebrated by the people of India. Nonetheless, the whole country, including the family of the victim, was greeted by the immediate justice conveyed to the victim through such an encounter, but as per the family, the police could have been more observant and receptive. When the victim's father moved to the police station on the day of

³⁸ Debolina Dutta and Oishik Sirca, *India's Winter of Discontent: Some Feminist Dilemmas in the Wake of a Rape*, Vol. 39, No. 1 Feminist Studies, Inc p. 298 (2013), <https://www.jstor.org/stable/23719318>.

³⁹ Pankhuri Yadav, Looking at her photo, telling her she's finally got justice, THE TIMES OF INDIA (Mar. 21, 2020, 10:57 IST), 'Looking at her photo, telling her she's finally got justice' | Delhi News - Times of India (indiatimes.com) (accessed on Apr. 4, 2023).

⁴⁰ Padmaja Shaw, Facts vs. frenzy in the 'encounter' killings in the Disha gang-rape and murder case, THE HINDU (Sept. 24, 2021, 12:12 pm IST), The Justice V.S. Sirpurkar Commission is focused on finding the truth about the encounter killings in the Disha case of 2019 - The Hindu (accessed on Apr. 7, 2023).

the incident around 11 p.m., the police officials purportedly wasted time on the applicability of jurisdiction in determining the concerned police station and in postponing the investigation on groundless process. However, it is relevant to note that, in actuality, without doing a fair trial for the accused and taking law and order into our hands, there is no elucidation at all, as speedy justice can be rejoiced in for a certain period of time only. Without going through the proper investigation process, how is it possible for the police to differentiate between a convict and suspect? Every man is presumed innocent until proven guilty- the key principle of criminal law, which is important to fathom and escalate.⁴¹

D. Hathras Rape Case

In 2020, a terrible incident occurred in the Hathras district of Uttar Pradesh. The victim went to a nearby field to mow the grass with her brother and mother. But the victim was gone when the mother came back. Later on, she was discovered lying in the field. The offender was only charged with intent to murder and SC/ST Act violations by the local police, who failed to do a medical evaluation for sexual assault. The victim was admitted to the hospital without a medico-legal report, and only after her statement and a viral video did the police add charges of rape. The CBI stated that the police's neglect led to delays in crucial exams and evidence collection.⁴²

The victim initially stated that she was raped by several individuals, with one of them causing her to lose consciousness through asphyxiation. Medical exams showed injuries to her back and neck, but no signs of sexual assault. However, the AIIMS forensic medical team noted old tears in the victim's hymen and slight bleeding one week after the incident, indicating the possibility of sexual assault. Due to delays in reporting and examination, signs of genital injury were not present when the victim died in the hospital. The police controversially cremated the victim without the family's consent, preventing further evidence from being discovered. The CBI took over the investigation

⁴¹ Amaranth K. Menon, Hyderabad Rape Case: The Horror and the Shame, INDIA TODAY (Dec. 6, 2019, 14:52 IST), Hyderabad Rape Case: The Horror and the Shame - India Today (accessed on Mar. 20, 2023).

⁴² Arvind Ojha; Milan Sharma, Hathras case: Accused was frustrated after victim ignored him, says CBI chargesheet (Dec. 21, 2020, 21:53 IST), Hathras case: Accused was frustrated after victim ignored him, says CBI charge sheet (indiatoday.in) (accessed on Apr. 12, 2023); Hathras victim was gang-raped, murdered: CBI, THE HINDU (Dec. 18, 2020, 07:46 pm IST), Hathras victim was gang-raped, murdered: CBI - The Hindu (accessed on Apr. 12, 2023).

and invoked relevant sections for gang rape and murder. A special task force was set up to investigate an alleged conspiracy to incite caste violence.⁴³

The Supreme Court granted permission to the Allahabad High Court to review all aspects of the case, including the CBI investigation. The trial was permitted to be moved out of Uttar Pradesh until the investigation is over. The High Court questioned why the State Government suspended the Superintendent of Police but took no action against the District Magistrate. Dissatisfied with the government's response, the High Court requested the CBI to present the investigation status on the next date. The victim's family expressed dissatisfaction with the CBI investigation, stating that they were being investigated for honor killing. The accused were taken to Gandhinagar for medical and polygraph tests. The CBI requested more time to complete the investigation and produce a charge sheet, with four people currently accused of gang rape and murder. The Atrocities Act has also been invoked.⁴⁴

E. Kolkata case

In the month of August 2024, the murder-rape case of a 31-year-old postgraduate trainee doctor of RG Kar Medical College, Kolkata, has again left the country in a big shock. On 9th August, after a long-stretched 36 working hours, the trainee doctor went into the seminar room to take rest, and the next morning, her batchmates and interns found her naked dead body because she was brutally raped and murdered. With the help of the CCTV footage of the people going in and coming out of the hospital, a volunteer of the Kolkata Police got arrested. The case was handed over to CBI by the Calcutta High Court. Once again, the people of this country, especially the medical professionals, came down on roads for justice. The nationwide protests of the doctors and medical staff are affecting the health facilities, but their constant demand is justice for the victim and a separate union law for the safety of medical professionals, which can curb the violence against them.⁴⁵

⁴³ Niharika Ravi, What Happened in Hathras Case when you Were'nt looking, THE LEAFLET (Dec. 21, 2020), <https://www.theleaflet.in/what-happened-in-hathras-case-when-you-werent-looking/> (accessed on May 1, 2023).

⁴⁴ *Id.*

⁴⁵ *Kolkata doctor rape-murder: RG Kar, the campus was victim's 'second home'*, THE ECONOMIC TIMES (Aug. 20, 2024, 11:50 AM IST), <https://economictimes.indiatimes.com/news/india/kolkata-doctor-rape-murder-case-rg-kar-the-campus-was-victims-second-home/articleshow/112601112.cms?from=mdr> (accessed on Oct., 2024).

The Supreme Court took suo motu cognizance of this matter, considering the systematic issues connected to the safety of doctors. The Chief Justice of India, Dr. D.Y. Chandrachud, said-

“First, on matters of safety, we are deeply concerned about the virtual absence of conditions of safety for young doctors in public hospitals, especially women doctors who are more vulnerable because of the nature of work and gender. Therefore, we must evolve a national consensus. There must be a national protocol to create safe conditions of work. If women cannot go to a place of work and feel safe, we are denying them equal opportunity. We have to do something right now to ensure that the conditions of safety are enforced.”

Hence, the Court decided to create a “National Task Force” for doctors from all over the country to give their suggestions on the models that can be followed across the country for the safety and well-being of the medical professionals.⁴⁶

As a consequence of being lashed out at by the protestors and questioned by the Supreme Court, the West Bengal government presented the anti-rape bill named the “Aparajita Woman and Child Bill 2024” in the assembly. The bill aims to impose a life sentence for the convicts in rape and gang rape cases and a death sentence for those rape convicts whose actions result in the death of the victim or leave her in a vegetative state. The government also proposed the Special Task Force, Special Court at the district level, along with the investigation team. Therefore, the proposed bill aims to amend the newly introduced criminal laws, i.e., the Bhartiya Nagrik Suraksha Sanhita, 2023; Bhartiya Nyaya Sanhita, 2023; and the POCSO Act, 2012.⁴⁷

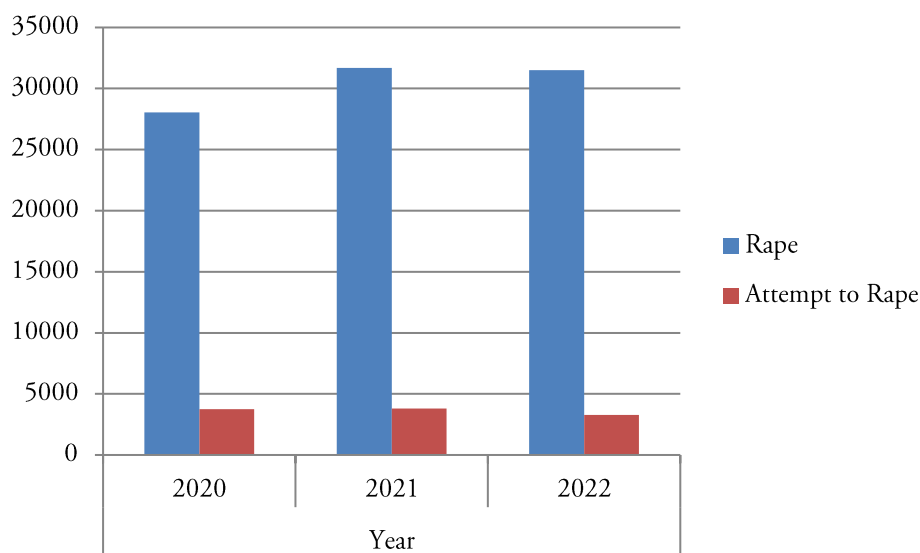
⁴⁶ In Re: Alleged Rape and murder of trainee doctor in RG Kar Medical College Hospital Kolkata and related issue (SMW (Crl) 2/2024) <https://www.livelaw.in/top-stories/rg-kar-hospital-case-cant-wait-for-another-rape-for-things-to-change-supreme-court-forms-task-force-on-doctors-safety-267101> (accessed on Nov. 02, 2024).

⁴⁷ Kolkata rape murder case: West Bengal government tables anti-rape bill, what are provisions, THE TIMES OF INDIA (Sept. 03, 2024 13:10 IST), <https://timesofindia.indiatimes.com/india/kolkata-doctors-rape-murder-west-bengal-government-tables-anti-rape-bill-what-are-provisions/articleshow/113013031.cms> (accessed on Oct. 10, 2024).

Statistical Interpretation of Rape Cases in India as Per NCRB Data

The annual "Crime in India" report⁴⁸ published by the National Crime Records Bureau (NCRB)⁴⁹ provides detailed statistics and analysis on various crimes, including rape. These reports are designed to provide insight into the frequency, patterns, and trends of rape cases across the country. A detailed analysis of crimes related to rape cases for the three consecutive years, i.e., 2020, 2021, and 2022, has been done herewith.

a) All India Report

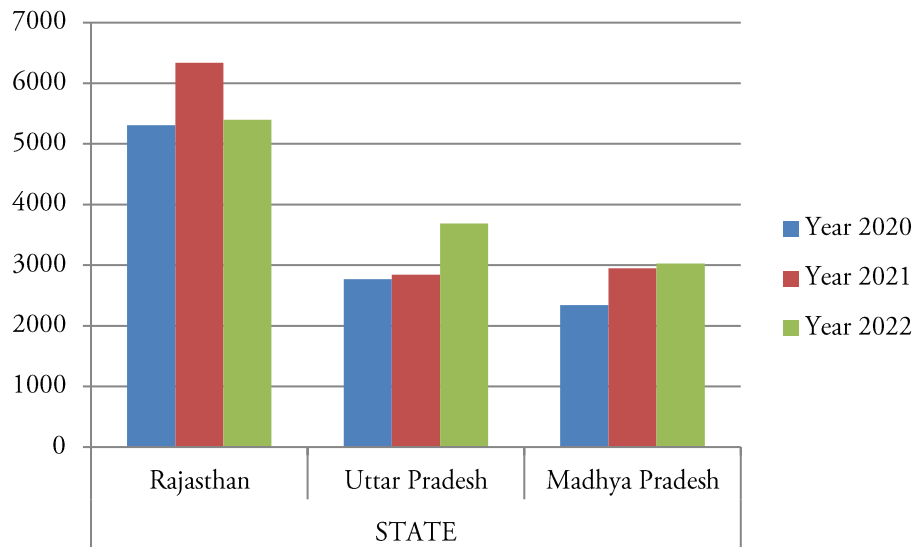


From the above graphic representation, it can be seen that the All-India reporting of rape and attempted to rape cases has increased from the year 2020 to 2021. Whereas in the year 2022, there was a good decrease in the number of attempted to rape cases from the previous year, while in the rape cases, there was only a slight decrease, which does not create a big difference.

⁴⁸ Government of India, Ministry of Home Affairs, *Crime in India*, Statistics, National Crime Records Bureau, Crime in India Year-wise | National Crime Records Bureau (accessed on Apr. 25, 2023).

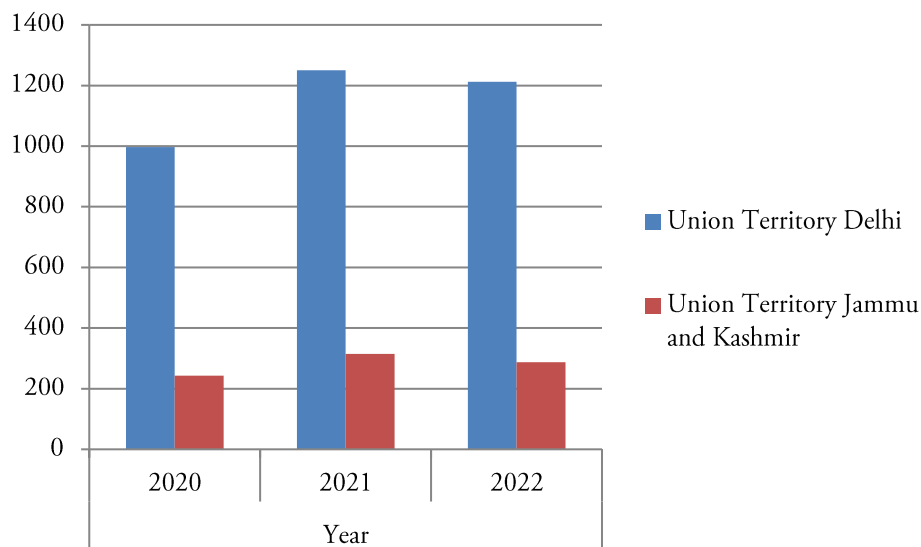
⁴⁹ National Crime Records Bureau (NCRB) assembles and publishes data on crimes, including crime against women, in its publication "Crime in India".

b) State-wise Data



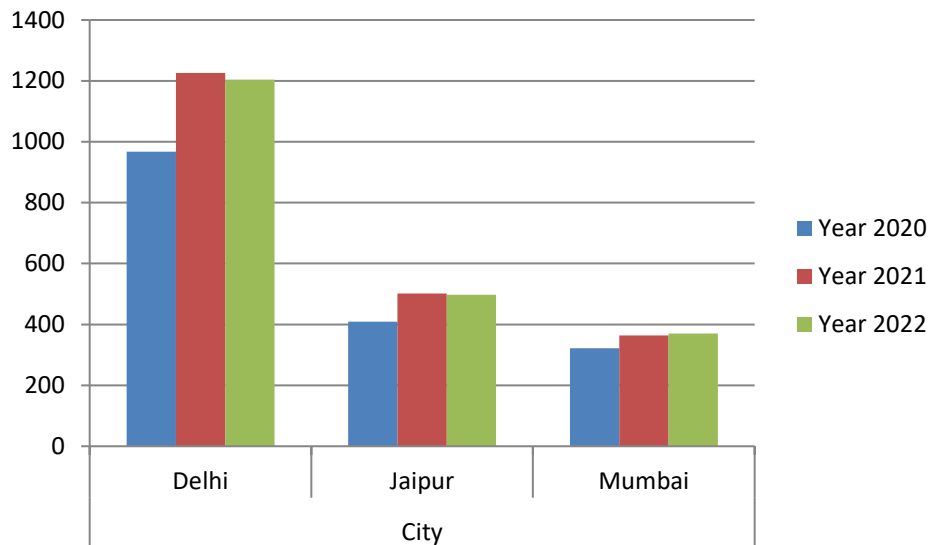
Considering the state-wise statistics, Rajasthan recorded the highest number of rape cases amongst all states from 2020 to 2022, followed by Uttar Pradesh and Madhya Pradesh. In all these years, Rajasthan had the highest number in 2021, and the numbers for 2020 and 2022 were very close but lower as compared to 2021, while Uttar Pradesh and Madhya Pradesh reported the highest number in the year 2022, and their number has been increasing gradually.

c) Union Territory data



Among the Union Territories, Delhi recorded the highest number of rape cases, followed by Jammu and Kashmir, from the year 2020 to 2022. Delhi and Jammu Kashmir both had the lowest number in 2020, which increased in the year 2021, followed by a slight drop in the year 2022.

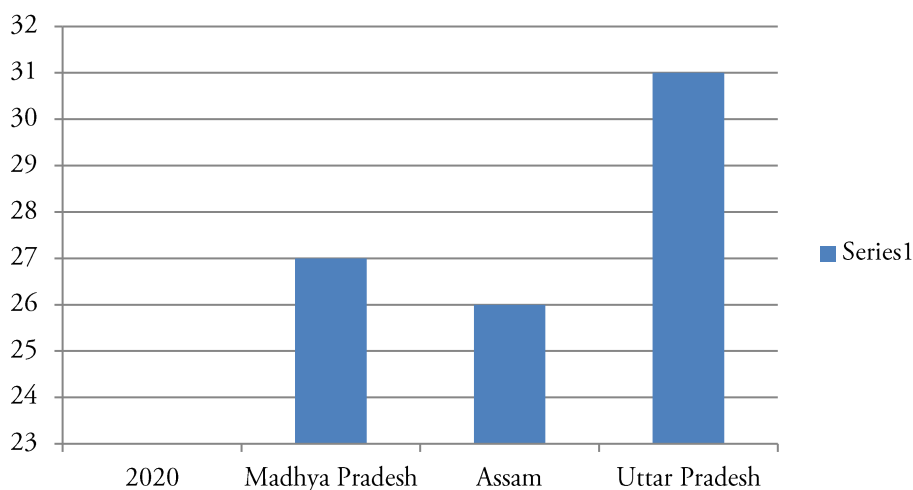
d) City-wise Data

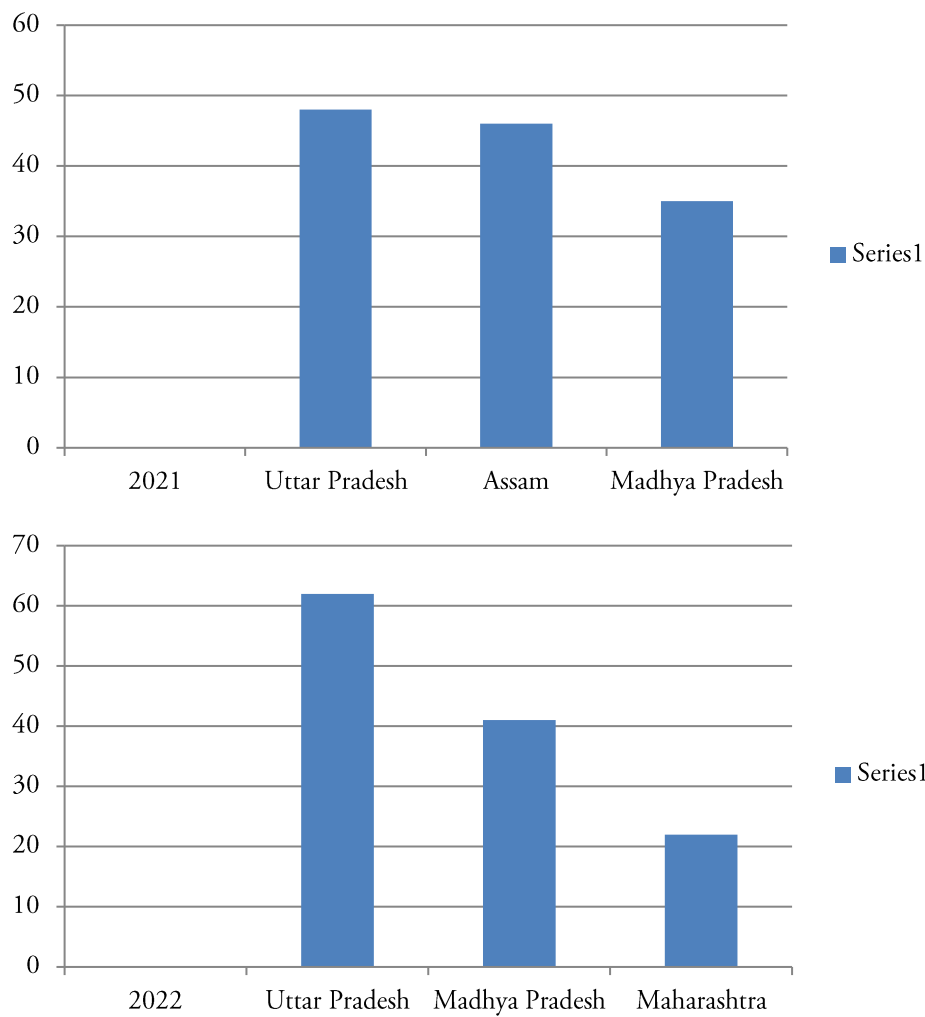


In terms of major cities, Delhi reported the highest number of rape cases, followed by Jaipur and Mumbai, from the year 2020 to 2022. Among these years, Delhi and Jaipur had the lowest number in 2020, which increased in 2021 and again decreased in 2022, while in Mumbai, the cases increased from 2020 to 2022.

e) Murder with Rape (State-wise Data)

In the last decade, India has witnessed not only rape cases but also rapes followed by murder so that no evidence is left behind, and this also works for many accused because in India not all rape cases are reported and not all reported cases are solved.

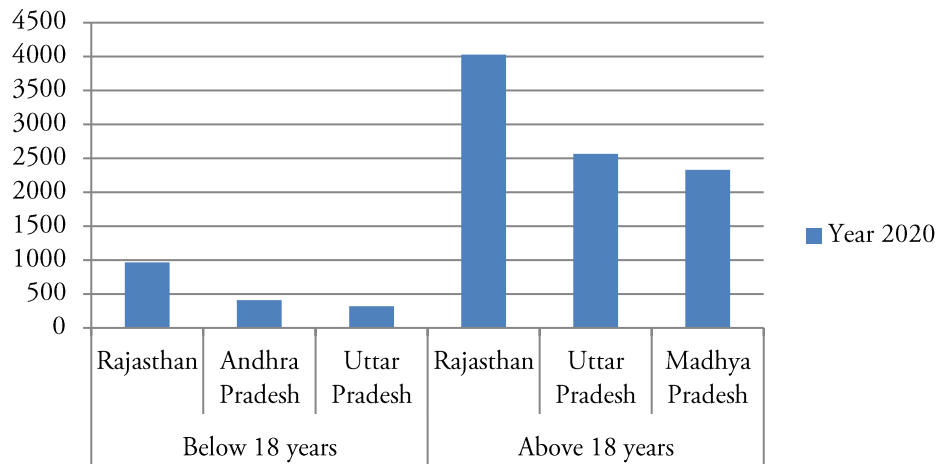




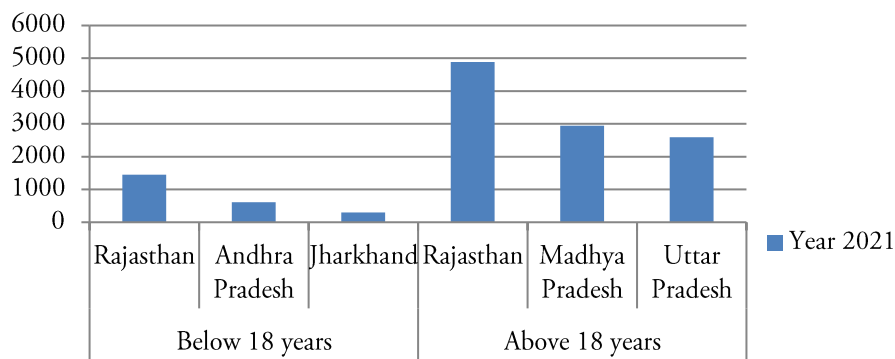
In the cases of murder with rape, Uttar Pradesh recorded the highest number from the year 2020 to 2022. The second highest number state was Madhya Pradesh in 2020, Assam in 2021, and again Madhya Pradesh in 2022. The third highest number state was Assam in 2020, Madhya Pradesh in 2021, and Maharashtra in 2022.

f) Age-wise Data

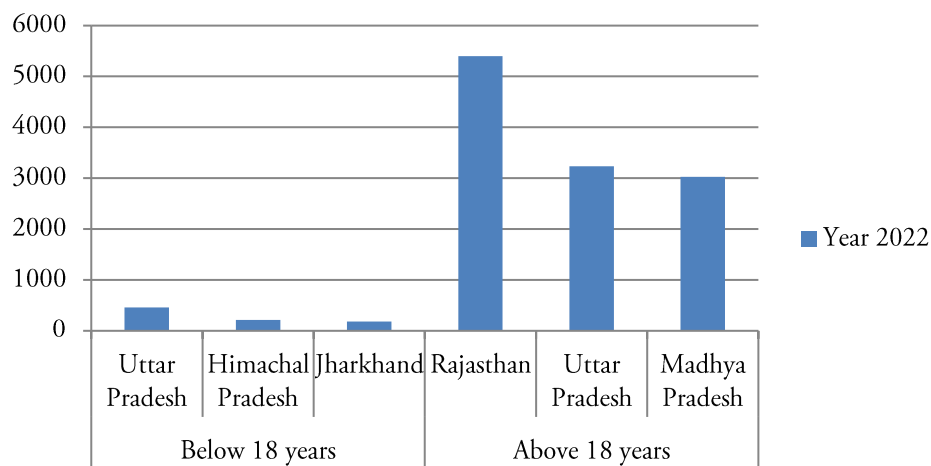
Year 2020



Year 2021



Year 2022



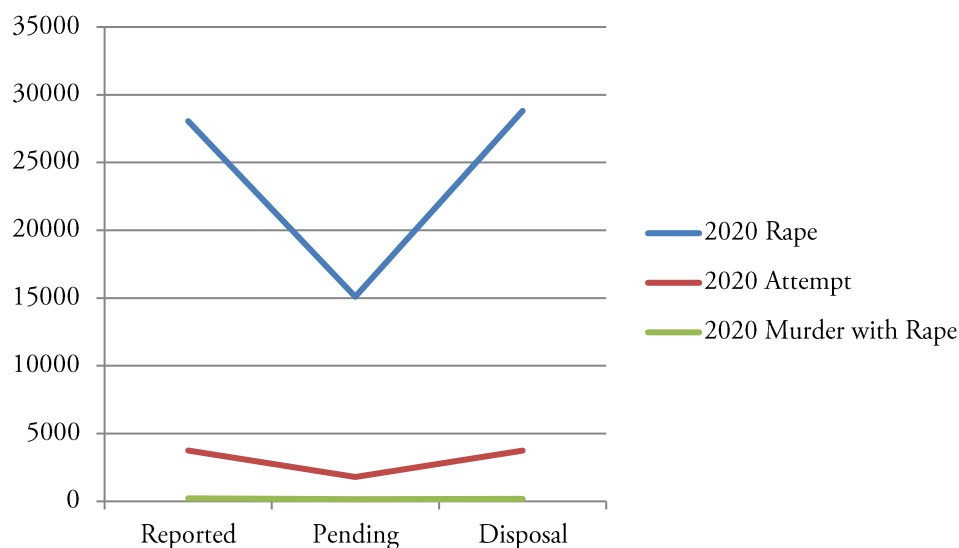
In India, rape cases are increasing day by day, and there is no classification of age for the victims. It has been witnessed that rapes are being committed with any age of female, i.e., from infant to old-aged woman. While categorizing the woman into below 18 years and above 18 years, Rajasthan recorded the highest number in both categories in the years 2020 and 2021.

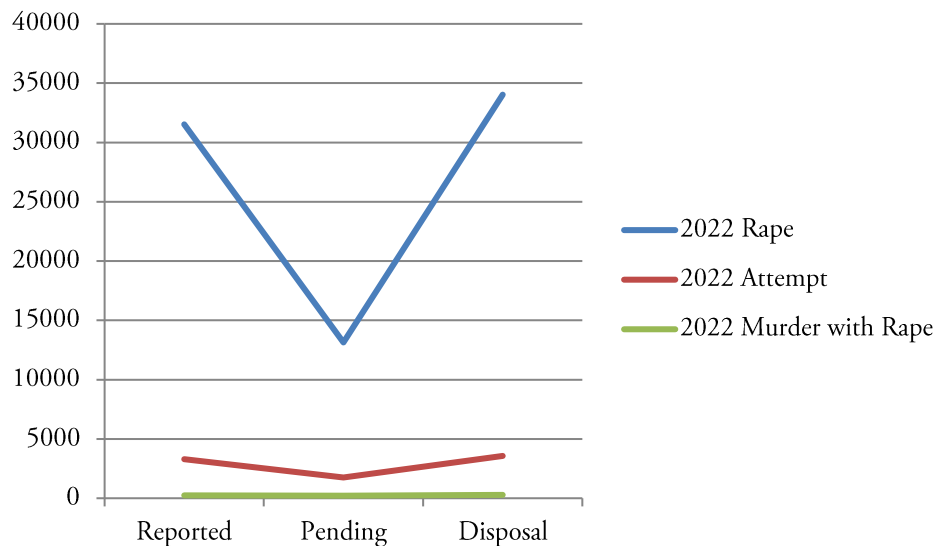
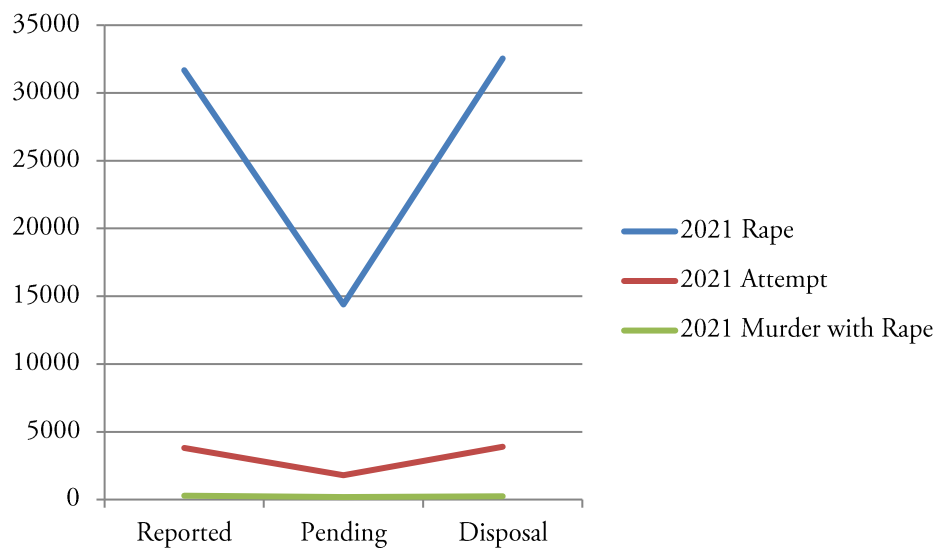
In the below 18 years category, in the year 2022, Uttar Pradesh recorded the highest number but less than the previous data of Rajasthan. In the years 2020 and 2021, Andhra Pradesh recorded the second highest number, while in 2022, Himachal Pradesh recorded the highest number but less than the previous year's data. The third highest number was taken by Uttar Pradesh in 2020 and Jharkhand in both 2021 and 2022.

In the above 18 years category, in the year 2022, Rajasthan had the highest number of rape cases. The second and third highest numbers were taken by Uttar Pradesh and Madhya Pradesh interchangeably from 2020 to 2022. Overall in this category, there was only an increase in the number of cases, no matter which state it was.

g) Disposal of Rape cases by police

In India, there are lots of pending cases when all crimes are not reported. We cannot think of a situation when each and every crime gets reported. Not all cases are reported here, and not all the reported cases are disposed of here. Here are the statistics of reported, pending, and disposed rape, attempted rape, and murder with rape cases.

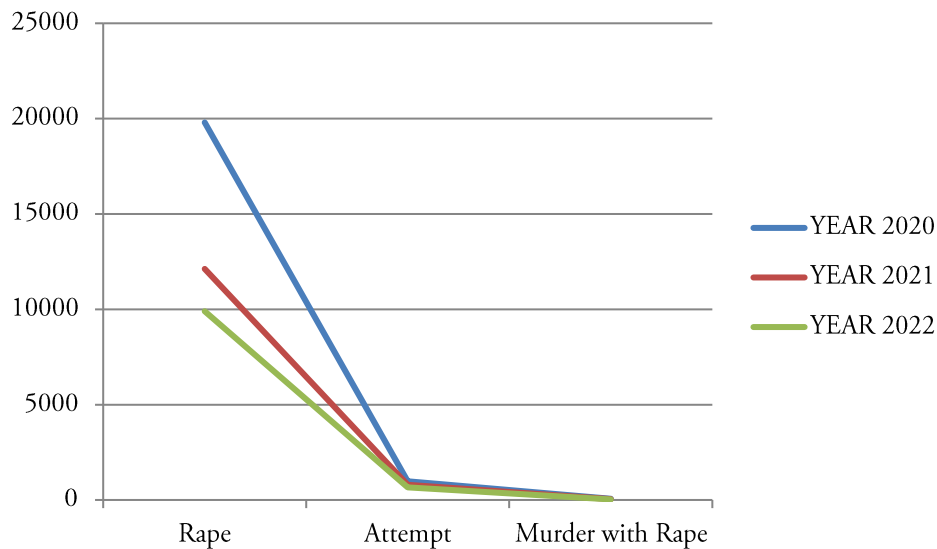




From the above statistics, it is clear that a good number of cases are pending with the police. Each year new cases are reported, some previous cases remain pending, and some cases get disposed of. With reference to rape cases, the maximum number of rape cases was reported in the year 2021, followed by 2022 and 2020. Likewise, maximum cases were reported in murder with rape also in the year 2021, followed by 2022 and 2020. In attempted rape cases also, the maximum cases were reported in the year 2021, followed by 2020 and 2022. Taking into consideration the pending cases with police, the numbers increased from 2020 to 2022 in the cases of rape, attempted rape, and murder with rape, but the disposal of cases has also increased from 2020 to 2022 in all three cases.

h) Cases disposed by Court

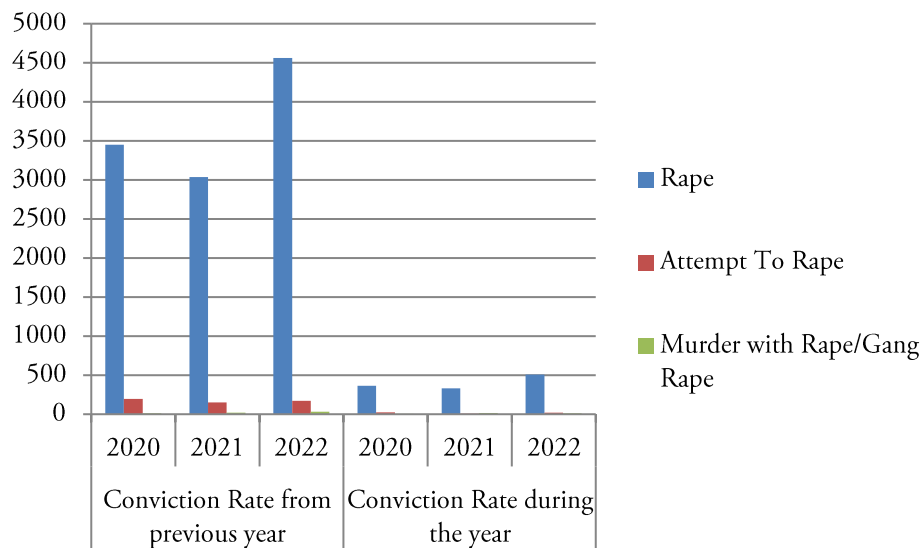
Indian courts are burdened with cases, and the number is increasing day by day, comparing which very few disposals of cases are done in which categories of rape, attempt to rape, and murder with rape are also mentioned.



In the above graphic representation, it is evident that the disposal of cases by court has been decreased from 2020 to 2022 in the cases of rape, attempted rape, and murder with rape.

i) Conviction Rate

Conviction rate is calculated by dividing the number of convictions by the total number of trials completed and multiplying by a hundred. The conviction rate during the year represents the conviction rate of that particular year, while the conviction rate from the previous year represents the conviction rate in the present year, considering the data from the previous year.



In rape cases, the conviction rate from the previous year was not much in the year 2020, which also got decreased in the year 2021, and then it increased in the year 2022. The same trend can be seen in the conviction rate during the year. Likewise, in an attempt to rape cases, the conviction rate from the previous year and during the year was not uniform, while in murder with rape or gang rape, the conviction rate from the previous year has increased from 2020 to 2022, and the conviction rate during the year increased from 2020 to 2021 but again decreased in 2022.

The cases of rape, especially the cases of murder with rape, have increased year by year, the brutality of which has also increased day by day. The reporting of rape cases has seen an upward trend due to heightened media coverage of several incidents, which have sparked public outcry at both regional and national levels. The woman in our country is scared to travel alone, especially in Delhi, Rajasthan, Uttar Pradesh, and Madhya Pradesh, based on the NCRB statistics. The government of these states and UT must take stringent steps to reduce the number of cases. The woman is not even safe at home, as reports say that in 96% of the cases, rape is committed by persons known to victims.⁵⁰ The NCRB data also reveals that every 16 minutes, a rape is committed.⁵¹ The old criminal laws were not effective in dealing with these brutal incidents of rape, and so the criminal amendments. Therefore, new criminal laws have been enforced with the objective of bringing a change in society.

Criticism of the Amendments Done in Old Criminal Laws & New Criminal Laws

The Justice Verma Committee focused on defining consent, increasing the definition of rape, enlarging the actus reus in rape, and the age for consent. Though the Justice Verma Committee made some excellent recommendations for inclusion in the substantive and procedural law, Parliament ignored some of them, missing an opportunity to include important provisions such as gender neutrality in rape laws, lowering the age of consent, and so on.⁵² Undoubtedly,

⁵⁰ Snigdha Choudhury, *Over 96% Rapes In India Committed By Persons Known To The Victims: NCRB Report*, INDIA.COM (Sept. 5, 2022, 4:07 pm IST), *Over 96% Rapes In India Committed By Persons Known To The Victims: NCRB Report* (accessed on May 10, 2023).

⁵¹ *A rape every 16 minutes: The shocking numbers on crimes against women in India*, FIRSTPOST (Aug. 14, 2024, 12:14 pm IST) *A rape every 16 minutes: The shocking numbers on crimes against women in India – Firstpost* (accessed on Nov 22, 2024).

⁵² Abhishek Gupta, *Supra* note 5 at 14-36.

the Verma Committee's recommendations were progressive, but they were not fully adopted by Parliament.⁵³ Keeping into consideration the inefficiency of the criminal laws, the government decided to replace the old criminal laws with the new criminal laws named “*Bhartiya Nyaya Sanhita (BNS) 2023, Bhartiya Nagrik Suraksha Sanhita (BNSS) 2023, and Bhartiya Sakshya Adhiniyam (BSA) 2023*,” but regarding the rape laws, no amendment has been done.

A. Intensifying the Latitude of Rape Offence

The Verma Committee recommended that the definition of rape should be expanded to cover even non-penetrative conduct like violation of a woman's sexual and physical integrity, and the parliament embraced this recommendation. The idea of rape in India is very different from that in the UK.⁵⁴ When we examine the idea of rape in its entirety, we may conclude that, despite changes, the definition of rape in criminal law is limited in scope because it focuses on penetration. This focus ignores the bodily integrity and sexual independence of a victim, as it is based on a masculine perspective of sex.

B. Consent or Non-Consent

One of the concerns prior to the 2013 amendment was that when the prosecution pled non-consent to a sexual act, judges would ask for further evidence from the prosecution to verify the non-consent, such as bruise marks on the body. Although the Supreme Court, in its several judgments, held that injuries on the body of a woman cannot be proved to identify her consent, therefore, some courts ask for further corroboration.⁵⁵ However, in the 2013 Amendment, the meaning of consent has been interpreted in a way that less resistance on the part of a woman does not mean she consented.⁵⁶ This gradual change in the meaning of consent has resolved all disputes related to it, but does this solve the contemporary issues of consent? Under the current definition of consent, which was amended in 2013, consent can be obtained for "particular

⁵³ Aaron Karp, Sonal Marwah and Rita Manchanda, *Unheard and Uncounted: Violence against Women in India*, Small Arms Survey pp. 2-4 (2015), <http://www.jstor.com/stable/resrep10686>.

⁵⁴ Sexual Offences Act, 2003, Section 2-4 (U.K.).

⁵⁵ Rukmini Sen, *Law Commission Reports on Rape*, Vol. 45, No. 44/45 Economic and Political Weekly p. 84 (2010), <https://www.jstor.org/stable/20787533>.

⁵⁶ Indian Penal Code (amended in 2013), No. 45, Acts of Parliament, 1860 Section 375, proviso to Expl. 2 (now *Bhartiya Nyaya Sanhita*. No. 45, Acts of Parliament, 2023 Section 63, proviso to Expl. 2).

sexual acts" only.⁵⁷ If she willingly had oral sex with him, this does not infer that she agreed to penile-vaginal penetration as well.⁵⁸ The same provision is given in BNS, 2023, with no changes in it. This illustrates that nonetheless dynamic legislation would be enacted in India, but the conventional behaviour towards women would not be modified.

C. Decision as regards to Age of Sexual Consent

The "age of sexual consent" was one of the points of contention between the Verma Committee and the Parliament. POCSO and IPC were at variance since one administered eighteen years of age for sexual consent and the other as sixteen years. The Justice Verma Committee, in keeping with its contemporary worldview, advised against raising the limit to eighteen years. This proposal was rejected by the Parliament, and the age was set as eighteen years old for sexual consent.⁵⁹ Finding the right way to cope with juvenile sexual activity is a current concern of the hour.

Due to societal changes and attitudes, adolescents are more curious about sexual knowledge, particularly in urban regions. Earlier to the 2013 amendment, if a seventeen-year-old guy and girl indulged in sexual activity with consent, it was not a crime; however, after 2013, it is now a rape offence. Parliament has entirely failed because they believe that raising the age will rescue society's morality, but it will also cause excessive harassment and meddling in the lives of young people. The justification cited by parliament for raising the consent age is that it will prevent all underage sexual activity⁶⁰; however, this is absolutely erroneous, as today's adolescents are so well informed of their sexuality- all thanks to the internet and other media. Legislative parenting is not required, especially where a consenting adolescent is involved in sexual behaviour.⁶¹

⁵⁷ Indian Penal Code (amended in 2013), No. 45, Acts of Parliament, 1860 Section 375, Expl. 2 (now Bhartiya Nyaya Sanhita. No. 45, Acts of Parliament, 2023 Section 63, Expl. 2).

⁵⁸ Durba Mitra And Mrinal Satish, *Testing Chastity, Evidencing Rape: Impact of Medical Jurisprudence on Rape Adjudication in India* Vol. 49, No. 41 Economic and Political Weekly p. 52 (2014), <https://www.jstor.org/stable/24480853>.

⁵⁹ Amita Pitre and Lakshmi Lingam, *Age of consent*, Vol. 29, No. 2 Taylor & Francis, Ltd. p. 462 (Feb. 2021), <https://www.jstor.org/stable/10.2307/48714677>.

⁶⁰ Bharti Ali, *Age of Consent Catastrophe*, THE TRIBUNE (May 21, 2012), Age of Consent Catastrophe- The Tribune Monday, May 21 2012 | HAQ : Centre for Child Rights (haqrc.org) (accessed on Feb. 3, 2023).

⁶¹ Amita Pitre and Lakshmi Lingam, *Supra* note 56, at 467-471.

D. Distorted Grading of Rape

According to Sections 375⁶² IPC (now Section 63 BNS) and 376⁶³ IPC (now Section 64 BNS), rape is classified into two categories: simple rape is punishable under section 376(1)⁶⁴ of the Indian Penal Code (now Section 63(1) BNS), and the crime of aggravated rape⁶⁵ is punishable under section 376(2)⁶⁶ of the Indian Penal Code (now Section 64(2) of BNS). Prior to the amendment of 2018, aggravated rape offenses carried harsher punishment than simple rape cases. Section 376(2) of the Indian Penal Code (now Section 64(2) of BNS) imposes a ten-year imprisonment on those who commit aggravated rape, while the 2018 amendment raised the minimum sentence for simple rape from seven to ten years.⁶⁷ Even while the harsher punishment appears to be appealing and deterrent, a thorough understanding of the present amendment highlights some of its shortcomings, such as the distinction between simple and aggravated rape has been obliterated. The minimum sentence in both situations is ten years in prison. It doesn't seem reasonable to apply the same penalty for simple and aggravated rape.⁶⁸ The same error has been made in Bhartiya Nyaya Sanhita as

⁶² It provides a detailed definition of rape, which has been amended two times, i.e., in 1983 and 2013.

⁶³ Punishment for rape is given as per the nature of the rape.

⁶⁴ “Punishable with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.”

⁶⁵ It can be attributed to specific circumstances:-

- (i) The victim or perpetrator holds a particular status or position, such as rape committed by individuals who have authoritative roles over the victim, like law enforcement officials or prison staff.
- (ii) Rape committed by someone who holds a position of trust with the victim, like medical personnel or family members.
- (iii) The victim's unique situation may also elevate the crime to one of aggravated rape, like cases involving pregnant women, minors, those who cannot give consent, or individuals with physical or mental disabilities.
- (iv) Rape that includes violent acts, such as those committed during communal unrest or that *result in severe injury or endanger the victim's life, may also qualify as aggravated rape.*

⁶⁶ “Whoever commits rape and comes under the thirteen categories of the provision will be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.”

⁶⁷ Ved Kumari and Ravinder Barn, *Sentencing In Rape Case*, Vol. 59, No. 1 Indian Law Institute pp. 3, 5, 7 (2017), <https://www.jstor.org/stable/10.2307/26826588>.

⁶⁸ Cassia C. Spohn and Julie Horney, *The Impact of Rape Law Reform on the Processing of Simple and Aggravated Rape Cases*, *The Journal of Criminal Law and Criminology* (1973) ,

well. The Indian Penal Code distinguishes between two types of rape, and the punishment for each should be different. It would surely have significant ramifications, even though it seems to be the result of careless drafting.

E. Novel Rape Provisions for Minor

Due to an increase in the number of incidences of child rape, three new offences were added under Section 376AB⁶⁹ IPC (now Section 65 BNS), 376DA⁷⁰ IPC (now Section 65(1) BNS), and 376DB⁷¹ IPC (now Section 65(2) BNS). A scenario of egregious injustice may arise if life imprisonment were compelled by law without the use of judicial discretion since, no personalized factors would be considered while handling these cases. Furthermore, because of the mandatory life sentence in question, judges might order strict evidence which would certainly influence the number of convictions and in honest cases, leads to a perversion of justice. While enacting these draconian regulations to address the problems of female child rape, it turns out that the socio-economic realities at the ground level were ignored. It is commonly acknowledged that child marriage is a serious societal issue in India. The prevalence of child marriages in various regions of India indicates that they are not considered void even if they are unlawful. It could result in rape cases where victims would not disclose the crimes due to harsh punishments.

One of the issues that neither the 2018 amendment to the previous criminal law nor even the new criminal laws address is gender neutrality in gang rape incidents. The same problem persists in the 2013 amendment. Detaining female offenders, who have the same intent to rape a victim, alongside their

Vol. 86, No. 3 Northwestern University Pritzker School of Law pp. 864-65, 869, 884 (Spring, 1996), <https://www.jstor.org/stable/1143939>.

⁶⁹ “Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death.”

⁷⁰ “Where a woman under sixteen years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine.”

⁷¹ “Where a woman under twelve years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine, or with death.”

male counterpart is permissible.⁷² However, if a woman participates in or aids in gang rape, she cannot be held responsible. In *Priya Patel vs. State of Madhya Pradesh*⁷³, the Supreme Court held that it is impossible to imagine for a woman to rape another woman. Although the Court had the opportunity of dispelling the notion that only a man may rape a woman, but it opted the opposite narrower position. The Verma Committee contended that all gang rape perpetrators, regardless of gender, ought to be given the same punishment. The flaw still exists because Parliament did not follow through on the proposal at the time, nor did it try to implement in the 2018 amendment and the new criminal legislation.⁷⁴

F. Is Death Penalty Deterrent?

In India, it is acknowledged that the death sentence serves a significant role in crime deterrence. Therefore, it was anticipated that the death sentence would lessen the ongoing issue of rape in India if it were implemented in rape cases. The death penalty was introduced in rape cases involving women under the age of twelve by the 2018 amendment. The Supreme Court of India has never contested the constitutionality of the death penalty, but it has confined its applicability to the most extreme of circumstances⁷⁵. There might be some instances where a judge acknowledges incorrect evidence, and the capital punishment is imposed. Another argument could be that the victim could testify against the accused for rape, and being afraid of the death penalty, he might kill the victim. Rather than delivering the death penalty in rape cases, the Malimath committee⁷⁶ proposed that procedural improvements in the criminal justice system are needed. There is no doubt that the frequency of rape cases involving criminals who are either relatives or reside in the neighbourhood is on the rise. It was contended by the senior advocate Indira Jai Singh that in the majority of rape cases, the offender belongs to the victim's family, in which

⁷² Justice Verma Committee Report Summary, *Supra* note 35.

⁷³ (2006) 6 SCC 263.

⁷⁴ Gitanjali Gangoli, Six Controlling women's sexuality: rape law in India, *International approaches to rape* 103, 116-17 (Nicole Westmarland & Geetanjali Gangoli April 6, 2011), <https://doi.org/10.1332/policypress/9781847426208.001.0001>.

⁷⁵ *Bachan Singh v. State of Punjab*, AIR 1980 SC 898; *Machhi Singh v. State of Punjab*, 1983 AIR 957.

⁷⁶ Government of India, Ministry of Home Affairs, *Committee on Reforms of Criminal Justice System*, Report Vol. 1 p.193 (March 2003), Dr. Justice V.S. Malimath Report First pages.doc (mha.gov.in) (accessed on Mar. 18, 2023).

the victim either does not want to report the incident or is compelled to do so since the punishment might be fatal in rape cases.⁷⁷

G. Modifications in Indian Evidence Act (IEA)

As per the proviso of Section 146⁷⁸ IEA (now Section 149 BSA) and 53A⁷⁹ IEA (now Section 48 BSA), when evaluating the question of consent in a rape case, the victim's prior sexual history and personality should not be taken into account.⁸⁰ Following the 2018 amendment, these clauses were introduced to cover cases when a woman under the ages of 12 or 16 is the victim of rape or gang rape. A presumption in favour of the prosecutrix is established by section 114A⁸¹ IEA (now Section 120 BSA) that there is no consent for sexual

⁷⁷ Indira Jaising, *Stringent punishment to score political points*, DECCAN HERALD (Sep. 21 2018, 17:16 IST), Stringent punishment to score political points | Deccan Herald (accessed on Apr. 28, 2023).

⁷⁸ "In a prosecution for an offence under section 376 (now S. 64 of BNS), section 376A (now S.66 of BNS), section 376AB (now S.65 of BNS) section 376B (now S.67 of BNS), section 376C (now S.68 of BNS), section 376D (now S.70(1) of BNS), section 376DA (now amended under S.70(2) of BNS), section 376DB (now amended under S.70(2) of BNS) or section 376E (now S.71 of BNS) of the Indian Penal Code (45 of 1860) or for attempt to commit any such offence, where the question of consent is an issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to the general immoral character, or previous sexual experience, of such victim with any person for proving such consent or the quality of consent.

⁷⁹ In a prosecution for an offence under section 354 (now S.74 of BNS), section 354A (now S.75 of BNS), section 354B (now S.76 of BNS), section 354C (now S.77 of BNS), section 354D (now S.78 of BNS), section 376 (now S. 64 of BNS), section 376A (now S.66 of BNS), section 376AB (now S.65 of BNS) section 376B (now S.67 of BNS), section 376C (now S.68 of BNS), section 376D (now S.70(1) of BNS), section 376DA (now amended under S.70(2) of BNS), section 376DB (now amended under S.70(2) of BNS) or section 376E (now S.71 of BNS) of the Indian Penal Code (45 of 1860) or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent."

⁸⁰ Sarbani Guha Ghosal and Sarbani Guha Ghosa, *Socio-Political Dimensions Of Rape*, Vol. 70, No. 1 Indian Political Science Association p.115 (2009), <https://www.jstor.org/stable/41856499>.

⁸¹ "In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m) or clause (n) of sub-section (2) of section 376 (now under Sub-section (2) of S.64 of BNS) of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been

intercourse. The aggravated rape cases were mentioned under Section 114A of the IEA (now Section 120 of the BSA), but due to a lack of appropriate drafting in the 2013 amendment, gang rape cases were not included, and therefore, the prosecutrix of gang rape was not given a statutory presumption of no consent.⁸² Instead of addressing the issue, the 2018 amendment has increased the number of cases that are not governed by the statutory presumption. Undoubtedly, the victim's consent is crucial to the rape proceedings. The lack of the statutory presumption outlined in Section 114A of the Indian Evidence Act (now Section 120 of the BSA) compromises the prosecutrix's rights.⁸³ No modifications have been done in the Bhartiya Sakshya Adhiniyam of 2023.

H. A discord between POCSO & IPC for gender inclusiveness

The introduction of new offences in the IPC, set in place by the Criminal Law (Amendment) Act of 2018, prompted the revision in POCSO. Section 42⁸⁴ of the POCSO was revised to broaden the increased punishments under the IPC to crimes falling under POCSO, and new offences like sections

raped and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent.”

⁸² Tamara Abdelwahed, *Supra* note 27, at 485-486.

⁸³ Ved Kumari, *Supra* note 64, at 3-4.

⁸⁴ “Where an act or omission constitutes an offence punishable under this Act and also under sections 166A (now S.199 of BNS), 354A (now S.75 of BNS), 354B (now S.76 of BNS), 354C (now S.77 of BNS), 354D (now S.78 of BNS), 370 (now S.143 of BNS), 370A (now S.144 of BNS), 375 (now S.63 of BNS), 376 (now S.64 of BNS), 376A (now S.66 of BNS), 376AB (now S.65 of BNS), 376B (now S.67 of BNS), 376C (now S.68 of BNS), 376D (now S.70(1) of BNS), 376DA (now amended under S.70(2) of BNS), 376DB (now amended under S.70(2) of BNS), 376E (now S.71 of BNS), section 509 (now S.79 of BNS) of the Indian Penal Code or section 67B of the Information Technology Act, 2000 (21 of 2000), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.”

376AB⁸⁵ (now S.65 of BNS), 376DA⁸⁶ (now S.70 of BNS), and 376DB⁸⁷ (now S.70 of BNS) were instituted. However, the Amendment Act of 2018 failed to take into account that POCSO is a gender-neutral statute, whereas the IPC's and so the BNS's legal structure of rape is gender-specific. To put this into context, POCSO refers to victims and perpetrators as "persons," whereas section 375 (now S.63 of BNS), 376 (now S.64 of BNS), and subsequent clauses refer to victims and offenders as "woman" and "man," respectively. By virtue of section 376AB (now S.65 of BNS) with reference to section 42, POCSO, persons who commit penetrative sexual assault on a girl under the age of 12 years will be given imprisonment for life or a death sentence. However, because there is no corresponding clause in the IPC (now BNS) for the rape of man, a milder punishment of 10 years or life imprisonment will be imposed for penetrative sexual assault on a boy. The same contradiction will apply to legislation on gang rape, with the identical offence perpetrated against a boy and a girl being handled differently. The amendment violates Article 14 of the Constitution and discriminates against women with reference to punishment. To add up, it is in the public interest to converse on implementing gender-neutral criminal laws for sexual offences, along with proper mechanisms to prevent their abuse⁸⁸.

Conclusion

The successive legislative responses to sexual violence in India, from the Criminal Law (Amendment) Act, 1983, through the amendments of 2013 and 2018, to the Bhartiya Nyaya Sanhita, 2023, reveal a pattern of reactive reform that addresses public outrage without resolving the structural deficiencies of the

⁸⁵ "Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death."

⁸⁶ "Where a woman under sixteen years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine."

⁸⁷ "Where a woman under twelve years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine, or with death."

⁸⁸ Abhishek Gupta, *Supra* note 5, at 153-154.

legal regime. This paper has demonstrated that the problem is not the absence of stringent law, but the presence of poorly calibrated, inconsistently applied, and doctrinally incoherent law.

The doctrinal analysis establishes at least three substantiated failures. First, the 2018 amendment erased the sentencing distinction between simple and aggravated rape by setting a uniform minimum of ten years for both categories under Sections 376(1) and 376(2) IPC, a drafting error reproduced without correction in Sections 64(1) and 64(2) of the BNS, 2023. The proportionality principle, long recognized in Indian constitutional jurisprudence, demands graduated punishment calibrated to the gravity of the offence; its absence here is not merely a legislative oversight but a constitutional concern. Second, the gender-specific construction of rape under the IPC and BNS stands in unresolved tension with the gender-neutral framework of POCSO, 2012, producing the anomaly, identified in this paper, whereby identical acts of penetrative sexual assault are punished differently depending solely on the sex of the victim, in apparent violation of Article 14. Third, despite the Supreme Court's consistent expansion of Article 21 to encompass bodily integrity, sexual autonomy, and the right to live with dignity, as affirmed in *State of Karnataka v. Krishnappa*, *Suchita Srivastava v. Chandigarh Administration*, and *Justice K.S. Puttaswamy v. Union of India*, these constitutional standards have not been translated into coherent statutory language or consistent institutional practice. The NCRB data analysed in this paper reinforces this conclusion empirically. Conviction rates in rape cases have remained low and uneven across the three years studied; pendency with both police and courts has risen year on year; and the data confirms that in 96% of reported cases, the perpetrator is known to the victim, a fact that directly undermines the deterrence logic of the death penalty, since such offenders are statistically unlikely to be deterred by, and victims are less likely to report against, a punishment of terminal severity. The Malimath Committee's observation that procedural reform of the criminal justice system is more effective than escalating punishment thus finds empirical support in the very data the paper presents.

The claim that deterrent law is a necessity must therefore be qualified. What the evidence supports is not simply harsher punishment, but a coherent and enforceable legal framework, one that correctly grades offences, removes the gender inconsistency between BNS and POCSO, operationalizes the statutory presumption of non-consent uniformly across gang rape and aggravated rape cases under Section 120 BSA, and is supported by institutional reforms in first-response investigation and judicial sensitization. The Kolkata case of August 2024, occurring a month after the BNS came into force, demonstrates that the

re-nomenclature of criminal law without substantive revision of its rape provisions has produced no meaningful change in either deterrence or institutional response. The liberty of women under Article 21, judicially recognized as encompassing dignity, privacy, and freedom from sexual coercion, will remain formally proclaimed but practically unprotected until legislative reform is guided by constitutional principle, doctrinal coherence, and evidence, rather than by the episodic pressure of public outrage.

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There is no tool for
development more
effective than the
empowerment of women.”

Kofi Annan

*Former Secretary-General of the United Nations
and Nobel Peace Prize laureate.*

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