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Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to

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Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He

participated in several workshops on research methodology and teaching and learning.

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Critical Analysis of the offence of Rape under IPC

Authored by - Sameedha Reddy

INTRODUCTION

According to **Article 21** of the Indian Constitution, rape violates the victim's fundamental right. Because it violates the victim's body, mind, and privacy, it is the most morally and physically abhorrent crime in society. A rapist destroys and defiles a vulnerable female's soul, whereas a murderer destroys the victim's physical form. Rape uproots the individual who is subjected to it's entire life. In no way can a rape victim be considered an accomplice. Rape leaves a permanent mark on the victim's life, so a rape victim is held in higher regard than an injured witness. Rape is a heinous crime against society that violates the victim's human rights. Rape, as the most despised crime, has devastating consequences. Rape, as the most despised crime, strikes at a woman's highest honour and offends both her esteem and dignity. It causes psychological and physical trauma to the victim, leaving indelible marks on her. Consent and will are two essential ingredients when performing any act. The ingredients have been interpreted differently by different courts. The plain meaning of consent states that the act must be voluntary and willing. Many authors and researchers continue to confuse willingness and consent. Through various court decisions, this article explains the clear distinction between will and consent in relation to Section 375 of the Indian Penal Code. When considering Section 375 of the Indian Penal Code, both clauses must be satisfied in order to avoid liability for rape. As time passed, cultural beliefs and norms shifted, resulting in a significant shift in the definition of rape as a crime. The Indian rape laws are based on English common law, and the anti-rape laws were first mentioned in the Indian Penal Code in 1860. However, the seventeenth-century jurist Sir Matthew Hale's description of rape as "an accusation easily made and hard to prove, and harder to be defended by the party accused, though never so innocent"³ demonstrates the colonial courts' prejudiced attitude toward victims. Because the women were assumed to be lying, the trial courts focused on proving the victim's credit rather than the accused's guilt. ⁴ The focus on her previous sexual relations or her virginity determined the outcome of the case. Eventually, the anti-rape laws strengthened over the decades because of some brutal cases that led to several major amendments in laws.

The need for change in laws gathered momentum with the growth of the Women's Movement which brought about awareness and change in attitude of the society. This paper discusses several cases namely the Mathura rape case, the Delhi rape case, the Unnao and Kathua rape case which led to the criminal law amendments of 1983, 2013, 2018 respectively. It also analyzes the recommendations made by the Justice Verma Committee, which was constituted after the Delhi rape case to suggest reforms in the anti-rape laws. It looks closely into the several changes made in the definition and punishments of anti-rape laws. It focuses specifically on the changes brought about by these amendments in the rape laws under the Indian Penal Code

DEFINITION OF RAPE:

Rape comes from the Latin term *rapio*, which means "to seize." As a result, rape literally means "forced seizure." In common parlance, it refers to "the ravishment of a woman without her consent, by force, fear, or fraud" or "the carnal knowledge of a woman by force against her will." In other words, rape is a violation of a woman's private person with violence.

Section 375 of the Indian Penal Code defines rape.

Taking note of the inadequacy of the law of rape and its failure to protect the rights of innocent victims against the heinous crime, the Parliament extensively amended the law of rape in 1983 and 2013 to make it more realistic. Act 43 of 1983 changed the heading of Chapter XVI of the Indian Penal Code, 1860, from "Of Rape" to "Sexual Offenses." Rape has been expanded to include non-penile penetration, though it remains gender-specific when committed against a female.

Old Provision of S.375:

S.375 "Rape." A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:

- ❖ First - Against her will.
- ❖ Secondly - Without her consent.
- ❖ Thirdly - With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

- ❖ Fourthly - With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
- ❖ Fifthly - With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
- ❖ Sixthly - With or without her consent, when she is under sixteen years of age.
 - Explanation - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
 - Exception - Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.”



Previously in ***INDEPENDENT THOUGHT vs. UNION OF INDIA***,


The Supreme Court held that the provision is illegal insofar as it affects girls between the ages of 15 and 18. Exception 2 must now be read as follows: "sexual intercourse or sexual acts by a man with his own wife who is not under the age of eighteen are not rape." Section 375 of the Indian Penal Code, 1860, is a gender-specific provision for the protection of women, as rape can only be committed by a man. The Section is divided into two sections: Clauses (a) to (d) in the first section simply state what acts performed by a man with a woman would constitute rape if committed in any of the seven situations specified in the second section. While Section 375 permits consenting penetrative actions (including oral and anal intercourse), Section 377 prohibits the same acts of penetration regardless of consent. As a result, there is a legal schism. The prohibition on consensual sexual relationships in Section 377 is based on no recognised or logical grounds. Adults' consensual sexual expression and intimacy in private cannot be considered "carnal intercourse against the natural order." It should be noted that the provision has now been repealed following the Supreme Court's landmark decision in *Navtej Singh Johar vs. Union of India, 2018*

After Amendment S.375 and its clauses

Under Section 375, a man is said to commit rape if he;

1. Penetrates his penis into a woman's vagina, mouth, urethra, or anus to any amount, or forces her to do so with him or anybody else; or
2. Inserts any object or portion of the body, other than the penis, into the vagina, urethra, anus, or any other part of her body, or forces her to do so with him or another person; or (commonly known as digital rape)
3. Manipulates any part of a woman's body to produce penetration into the vagina, urethra, anus, or any other part of her body, or forces her to do so with him or anybody else; or
4. Applying his tongue to a woman's vagina, anus, or urethra, or forcing her to do so with him or another person, or
5. Any of the seven clauses laid down under Section 375 of the Indian Penal Code, 1860. The provision embraced with seven clauses that majorly lays down circumstances that if takes place, can be quoted to be amounting to the offence of rape. .

❖ First Clause: **against her will**

If a man has sexual relations with a woman against her will, it is rape, unless it falls under one of the exceptions listed in the section. According to the prosecutrix in  *Deelip Singh vs. State of Bihar, 2005*, the initial illegal conduct was carried out despite her opposition, but she later became a consenting participant as a result of frequent promises of marriage. She admitted in the FIR that she gave in to him even before the first act because of marriage promises. The Supreme Court ruled that her version of events was untrustworthy and that the charge against the accused was unfounded.

❖ Second Clause: **without consent**


If a man engages in sexual activity with a woman without her consent, it is rape under the second clause unless it falls within one of the exceptions listed in the Section. It should be noted that if the girl claims she did not consent to the


rape while in custody, the court will assume she did not, as stated in the case of

 *Sohan Singh vs. State of Rajasthan*, 1998.

❖ **Third & Fourth Clause: passive non-resistance or consent obtained by fraud**


According to the third clause, rape occurs when a woman's consent is acquired by putting her or anyone she cares about in fear of death or harm, even if the act is done with her permission. If a girl does not object to intercourse because she is misled, she does not give her consent. A medical man who was sent for professional advice by a fourteen-year-old girl was found to have a criminal relationship with her, and she made no resistance because she believed he was treating her medically, was found to be guilty of rape. The prosecutrix's submission of her body out of fear or anxiety is not a consenting sexual act.

 In *State of Himachal vs. Mange Ram, 2000*. the Supreme Court held that the fact of consent can only be determined after a thorough examination of all relevant circumstances. Clause 4 concerns a rapist who is aware that he is not his victim's spouse and obtains her consent because she believes he is another man to whom she is or believes she is lawfully married. In another case,

 *Reg vs. R*, Due to marital problems, a wife left the matrimonial home and returned to live with her parents, informing the husband of her intention to file for divorce. The husband forced his way into the house while the wife was staying with her parents and attempted to have sexual relations with her, during which he assaulted her. His convictions for attempted rape and assault causing actual bodily harm were upheld.

❖ **Fifth clause: sexual intercourse with insane & drunken person**

According to the fifth clause of Section 375, acts done with the victim's consent when she is unable to appreciate the nature and consequences of that to which she consents due to unsoundness of mind or intoxication, or the administration of any stupefying or unwholesome substance by the accused

directly or through another, will amount to rape. In  *R vs. William Camplin, 1849*, it was held that rape occurred when a man had carnal knowledge of a girl of imbecile mind and the jury found that it occurred without her consent, she being unable of giving consent due to a defect of comprehension. This act was committed when the perpetrator made a woman very inebriated and then violated her person while she was unconscious. These instances will now fall under the fifth clause of Section 375 of the Indian Penal Code, 1860.

❖ **Sixth and Seventh clause: With or without her consent, when she is under eighteen years of age & she is unable to communicate consent.**

As per the sixth clause, if the offensive act is done with or without the consent of the girl and the girl is under the age of eighteen, it is termed rape. The seventh clause states that if the offensive act is performed on a woman who was not in a position to consent at the time of the intercourse, the same will also be considered to be rape.

Prosecutrix not an accomplice

Following the incident, a prosecutrix who claims to have been a rape victim is not an accomplice. There is no rule of law that her evidence cannot be relied on without material particulars confirmation because she is on a much higher pedestal than a wounded witness. A woman who is the victim of sexual assault is not a co-conspirator in the crime, but rather a victim of another's lust, and thus her evidence does not need to be scrutinised to the same extent as that of a co-conspirator. According to the Indian Evidence Act of 1872, her testimony cannot be accepted unless it is corroborated in material particulars. Under Section 118, she is unquestionably a competent witness, and her testimony must be given the same weight as that of a victim of physical violence.

Consent

Consent is defined as an activity performed by a person in a free state of mind. According to Merriam Webster, consent is a person's act of giving assent and approval. According to Section 375, consent is defined as an unequivocal voluntary agreement when a woman expresses her willingness to commit a specific act through verbal or nonverbal communication. Consent is defined by choice rather than will. It is necessary to prove consent in order to interpret it:

- ✓ The person can give consent; and
- ✓ The person, with his free choice, has accepted the act.

Capacity to Consent

The person is said to be capable of giving valid consent when:

- a) the person is of sound mind: the person claiming this right bears the burden of proof. For example, if A agrees to sell his property to B while in an unsound state of mind and later withdraws from the agreement, it cannot be enforced because the consent was obtained while he was not in a sound state of mind.
- b) The individual must have reached the age of majority: Minors are thought to be incapable of giving consent under the law. For example, if A and B are in a sexual relationship where B is a minor girl, though the sexual activity is consensual, it would still amount to the offence of rape.

Types of Consent

The definition of free consent is mentioned in **Section 90 of the Indian Penal Code**. When a person is put in fear of injury or has a misunderstanding of facts, consent is not said to be free.

There are two types of Consent:

- **IMPLIED CONSENT:**



It is a type of consent expressed by the person through actions. Consent can be expressed through gestures or other nonverbal communication methods. The legal dictionary defines implied consent as "consent inferred from signs, actions, or

facts, or by inaction or silence." As an example, A owns a firework store. When B enters his shop, he gives his implied consent to purchase products from him.

- **EXPRESS CONSENT:**

It is a type of consent that can be given either orally or in writing. If it is expressed consent, it is easier to prove in court. For example, if A asks B to buy a house for him, and he agrees and says yes, that is expressed consent.

Consent on the Promise of Marriage

Consent can be expressed or implied, coerced or deceived, freely given or obtained through deception. Consent is a rational act followed by contemplation, with the intellect like a balance weighing the good and evil on each side. The difference between rape and consensual sex is significant, and the court must carefully consider whether the accused had a genuine desire to marry the victim or had made a false promise to that effect solely to satisfy his libido, as the latter falls under the category of cheating or deception. There is a distinction between simply breaking a commitment and failing to keep a false promise. As a result, the court must decide whether the accused made a false promise of marriage early on, and whether consent was obtained after fully comprehending the nature and implications of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse with the accused due to her love and passion for him rather than solely due to the accused's misrepresentation, or where an accused was unable to marry her despite having every intention to do so due to circumstances he could not have predicted or were beyond his control. Only if the Court finds that the accused's intent was malicious and that he had hidden motives, as in  *Dhruvaram Murlidhar Sonar vs. State of Maharashtra*, can the accused be found guilty of rape. A complaint under Section 375 would be unworkable if a man and woman were living together, sometimes at her home and sometimes at the man, and the evidence indicated that it was not a case of passive submission in the face of psychological pressure, and there was tacit consent that was not based on any misconception created in her mind. As the Supreme Court stated in the landmark case of  *Uday vs. State of Karnataka, 2003*. if the accused's promise is not false and was not made with the express purpose of seducing the prosecutrix into engaging in sexual acts, the act would not be considered rape. As a result, if the prosecutrix submits to the accused's passion because she

believes the accused will marry her, such a false act cannot be considered consensual in terms of the accused's offence.


Where Consent need not be obtained

There is no need to wait for the person's consent if it is not possible for the person to give consent and the other person acts in good faith, according to Section 92 of the Indian Penal Code. For example, if A is suffering from epilepsy and bleeding, he is unable to consent. Then, if B, a surgeon, operated without A's consent and A was declared dead during the operation, B cannot be held liable for his actions because it was an emergency and the patient was unable to give consent.

Will

The term refers to the mind's reasoning ability to determine whether or not to perform an act. 'Will' is defined by Merriam Webster as "something done with desire or choice." In other words, an act of will is a person's desire to participate without being pressured or influenced by anyone else. For example, A instigated B to shoot C, and B willingly agreed and shot C. In this scenario, B had a clear desire to shoot C, despite the fact that he had a clear choice to say no.


Act committed against the Will

Will is an important concept in proving a rape offence. According to Section 375(1), rape occurs when sexual intercourse is performed against the will of the other person. The Supreme Court defined the concept in the case of  *State of Uttar Pradesh vs. Chhotey Lal, 2011*, stating that an act committed by a man against a woman despite her resistance or opposition.

Law against the Will and without Consent

Section 375 of the Indian Penal Code includes both components: an act committed against one's will and an act committed against a woman's consent. Rape is mentioned in this section. Rape is derived from the Latin word "rapio," which means "to seize," and refers to the ravishment of women without her consent. In 2013, an amendment to the rape laws was passed to protect the interests of innocent victims.

Difference between 'against her will' & 'without her consent'

Despite the fact that the expressions against her will and without her consent may occasionally overlap, the two expressions in Section 375 Clauses one and two have distinct connotations and dimensions. Typically, the phrase "against her will" refers to a man having sexual relations with a woman despite her protests and refusal. An act of reason, on the other hand, accompanied by deliberation, would be included in the statement "without her consent." It should be noted that the courts followed the tests for establishing consent outlined in Section 90 of the IPC. As per Section 90, a consent is not such as is intended by any section of this Code if it is given out of fear of injury or a misunderstanding of facts, and the person doing the act knows, or has reason to believe, that the consent was given as a result of such fear or misunderstanding; or if it is given out of unsoundness of mind or intoxication, and the person doing the act knows, or has reason to believe, that the consent was given as a result of such fear or misunderstanding; or if the consent is given by a person who is under twelve years of age.  In *Holman vs Queen, 2010*. It was stated that willingness must not be required to constitute consent. If a woman giving consent is reluctant, hesitant, and grudging, but she consciously permits it, such consent is considered valid. Consent given in protest and tears is still consent.

ESSENTIALS OF RAPE

- Against her will;
- Without her consent;
- Consent is obtained by force or putting a person of her interest under fear of death
- Consent obtained by misconception
- Consent was obtained when the person was unsound, intoxicated, or under undue influence
- Women under the age of eighteen with or without her consent
- A woman who is unable to communicate her consent

EXCEPTIONS TO S.375

Section 375 of the Indian Penal Code, 1860 contains two exception clauses, the first of which states that a medical procedure or intervention shall not constitute rape, and the second of

which states that sexual intercourse or sexual acts by a man with his own wife, if the wife is not under the age of eighteen, is not rape.

❖ **Exception ONE: medical procedure or intervention shall not constitute Rape**

A medical procedure or intervention does not constitute a rape offence. This exception clause states that any medical intervention against women is not a rape offence in a court of law.

❖ **Exception TWO: sexual intercourse or sexual act by man with his own wife, the wife not being under eighteen years of age, is NOT rape**

The age limit was raised from 15 to 18 years by the 1949 Amendment to the Indian Penal Code, 1860. There may be times when a legal check is required to prevent males from prematurely exercising their marital rights. This clause will cover the husband's abuse in such cases. The Supreme Court ruled in *Independent Thought vs. Union of India* (2017) that sexual intercourse with a girl under the age of 18 is rape, regardless of whether she is married or not. According to the Court, Exception 2 creates an unnecessary and artificial distinction between married and unmarried girl children and has no rational nexus with any specific goal sought. This artificial distinction violates Article 15(3) of the Constitution's spirit and ethos, as well as Article 21 of the Constitution. It also contradicts the idea behind some statutes, such as the girl child's bodily integrity and reproductive choice.

LANDMARK JUDGEMENT UNDER S.375

TUKARAM AND ANR V. STATE OF MAHARASHTRA

In this case, Mathura was an 18-year-old orphan girl who was called to the police station on an abduction report filed by her brother. Mathura was kept late. She was forcefully taken to the toilet and was raped by a constable Ganpat and Molested by Tukaram they had bottled the door from inside. In the sessions court the accused were acquitted naming it as consensual sex. The decision was challenged in the Bombay High court which reversed the decision distinguishing between consent and passive submission and claimed that there was no consent and was a mere passive submission therefore they are liable. In the Supreme Court, they were acquitted with their charges and claimed that there were no marks and it was a

peaceful affair. This judgment of the Supreme Court was heavily criticized thus after this judgment in an inquiry it was held that marks in the victim's body are not important. Recently the case that shook the whole country is the Nirbhaya rape case four decades ago the case that shook was the Mathra rape case. This case highlighted the flaws existing in the existing criminal laws. A criminal law amendment was passed to nullify the effect of the judgment. Legal Changes

- Changes were made in **Section 376** of the Indian Penal Code.
- Custodial Rape provision under **Section 376(2)** was added.
- The Punishment was prescribed to a term not less than 10 years
- **Section 228A** Indian Penal Code was added not to reveal the identity of the rape victims.

CONCLUSION

Women in India have a high social status, but we still lack strict protections for them. We have several laws in place to protect their lives, but they appear to be riddled with loopholes. Rape is considered the most heinous crime against women, and statistics show that it is extremely common in India. The distinction between will and consent is significant. The Indian Penal Code provides a proper definition of consent. On the other hand, the will is still not well defined. Section 375 of the Indian Penal Code is one of the most discussed sections due to the increase in the number of rape cases in India in the last few years have brought significant changes in the section but there are still quite a few existing flaws that need to be addressed. We have numerous regulations in place to control such heinous crime, but when it comes to implementation, we either lack somewhere or must make an effort. As a result, the crime is interpreted differently, which can result in a miscarriage of justice. Significant changes are required, which can be accomplished by changing legislative minds.

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