

## Challenges Faced by Rape Victims in India

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On the 13<sup>th</sup> of August 2017, an interim bail was granted to Vikas Garg, Karan Chhabra and Hardik Sikri, the three accused in what is commonly known as the 'Jindal rape case'<sup>1</sup>, where it was alleged that the three, on multiple occasions, committed rape, gang rape and blackmailing of a fellow student of O.P. Jindal Global University. This order granted by the Punjab and Haryana High Court has backtracked all developments made in the Indian legal framework to break the patriarchal shackles to transform into a slightly more inclusive space. Rape victims face a plethora of challenges if they wish to get justice, ranging from the biases of the judiciary and the executive to the character shaming of the victims. And one of the primary challenges they face as a result is to prove that a rape occurred in the first place, and the fundamentally patriarchal nature of the justice system is to blame. The Mathura rape case<sup>2</sup> of 1972 and the Jindal rape case of 2015 will prove this claim.

The primary reason for my claim is that there is a massive disparity between the different definitions of rape. The definition of rape under Section 375 of the Indian Penal Code<sup>3</sup> is different from the definitions offered by feminist scholars like Catherine MacKinnon. MacKinnon's feminist theories define rape not as an isolated event or a moral transgression, but as an act of torture and terrorism, within a systematic context of group subjection<sup>4</sup>. When looked within the context of riots, wars and prisons, Susan Brownmiller<sup>5</sup> explains that women are raped by guns, by supremacist tendencies, by the state, and only derivatively by the penis. This helps us understand that since coercion has become such an integral part of

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<sup>1</sup>Vikas Garg & Others v. State of Haryana, Cr. M 23962 & 26930 Of 2017 (High Court Of Punjab And Haryana 2017).

<sup>2</sup>Tukaram And Anr vs State Of Maharashtra, 810 SCR 1 (Supreme Court of India 1978).

<sup>3</sup>"The Indian Penal Code," ACT NO. 45 OF 1860 § 375 (1860).

<sup>4</sup>Catharine Mackinnon, "Rape: On Coercion and Consent," *Writing on the Body: Female Embodiment and Feminist Theory*, 1989, 42–58.

<sup>5</sup>Susan Brownmiller, "Against Our Will: Men, Women and Rape (1975).," 2005.

male sexuality, rape is seen as a sexual act instead of a violent act because it is coercive<sup>6</sup>. The Criminal Law Amendment Act of 2013<sup>7</sup> defines rape as having sex with a woman without her will or consent. However, many exceptions and explanations are associated with this definition, the crime centers around the penetration. The statutory interpretations of rape appear more to be a crime against female monogamy than against the sexual integrity and dignity of a woman<sup>8</sup>. Due to this, women aren't able to prove that they were raped since what is rape for them is not rape before the law.

Since the courts do not abide the feminist definitions of rape, there is no consensus between the victims and the court. Due to this, rape victims play a secondary role in the Indian judicial system. According to India's criminal justice delivery system, rape is not a crime against an individual but an offence against the state<sup>9</sup>. A state-appointed prosecutor argues on behalf of the state, and the victim is merely the prosecution's witness. The victim lies entirely at the mercy of the state during the investigation and the trial, and the victim is thus rendered powerless. In the Mathura case, the victim was a young tribal girl who was socially and economically disadvantaged. The courts held her to be a 'shocking liar', and just because she had a consensual sexual history before the rape, the court deemed the intercourse between her and the accused to be consensual as well<sup>10</sup>. In the Jindal case, the court went ahead to question the victims' habit of consuming alcohol and cigarettes and deemed that her sexual conduct was not 'gut-wrenching' enough to hold the accused persons liable for rape<sup>11</sup>. The court did not consider the testimony that "under the influence of alcohol, forceful sex becomes a little more bearable."<sup>12</sup> Therefore, according to the court, it is not the man's failure to respect a 'NO!' but the woman's character that decides the rape conviction. "A woman, victim of rape, is raped twice-first by the culprit and then by the criminal justice system."

Another obstacle women face is the reluctance and ignorance of the police to report rape cases. Many times, the police are not just indifferent but hostile towards the victims. Police officers are obsessed with the criminal records in their areas. They do not want these limits to

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<sup>6</sup>Supra note 4 at 173.

<sup>7</sup>"The Criminal Law (Amendment) Act, 2013," NO. 13 OF 2013 § 375 (2013).

<sup>8</sup>Supra note 4 at 172.

<sup>9</sup>Vibhuti Patel, "Campaign against Rape by Women's Movement in India," *Deportate, Esuli, Profughe: Rivista Telematica Di Studi Sulla Memoria Femminile* 24 (2014): 36-47.

<sup>10</sup>Geetanjali Gangoli, "Controlling Women's Sexuality: Rape Law in India," *International Approaches to Rape*, 2011, 101-20.

<sup>11</sup>Shalu Nigam, "From Mathura to Farooqui Rape Case: The Regressive Patriarchy Found Its Way Back," *Available at SSRN 3049756*, 2017.

<sup>12</sup>Supra note 1.

exceed as this will jeopardize their chances of promotion, and thus are reluctant to record the statements of rape victims<sup>13</sup>. Furthermore, the police tend to incorporate their own values and morals into the proceedings. They try to facilitate and negotiate a compromise between the parties and try to settle disputes themselves without the registry of complaints<sup>14</sup>. Nigam shows how the court and the police have more than often acted in a regressive manner by curtailing the rights of the victims, the women, and favouring the accused<sup>15</sup>. Research has shown that although the 2002 amendment to the Indian Evidence Act<sup>16</sup> makes evidence on the character of the victim inadmissible, it has found its way into the sentencing of the accused<sup>17</sup>.

The rate of conviction has been extremely low for rape cases, and this is indicative of the impunity for sexual offences<sup>18</sup>, as seen in the suspension of the sentence of the accused in the Jindal case and the acquittal of the accused in the Mathura case. According to the 2019 reports of the National Crime Records Bureau (NCRB) of India, the conviction rate for rape cases in India lied as low as 28%<sup>19</sup>. Studies on jury nullification have shown that juries often lean to acquit defendants, driven solely by their sense of justice or fairness. They believe that the defendant does not deserve the prescribed punishment<sup>20</sup>. Requirements of mandatory minimum punishments, which take away the judges' discretion to impose a lesser sentence, have also contributed to the drop in the conviction rates. Judges who believed that the accused deserved less than seven years' imprisonment would rather refrain from convicting the accused than impose a higher punishment<sup>21</sup>. Introducing a severe minimum sentence has had two negative impacts: a fall in the convictions and stagnation of complaints, thereby not fulfilling its intended purpose<sup>22</sup>. Therefore, it is

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<sup>13</sup>Supra note 9.

<sup>14</sup>Ann Stewart, "Debating Gender Justice in India," *Social & Legal Studies* 4, no. 2 (1995): 253–74.

<sup>15</sup>Shalu Nigam, "Fighting for the Justice in the Patriarchal Courts," Available at SSRN 3028829, 2017.

<sup>16</sup>"The Indian Evidence Act 1872," ACT NO. 1 OF 1872 § (1872).

<sup>17</sup>Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* (Cambridge University Press, 2016).

<sup>18</sup>Pratiksha Baxi, "Carceral Feminism's Judicial Bias: The Discontents around State v Mahmood Farooqui," *Hyderabad: Council for Social Development*, 2016.

<sup>19</sup>Kanu Sarda, "Under 30 per Cent Conviction Rate in Rape Cases in India, Says NCRB Data," *The New Indian Express*, October 3, 2020, <https://www.newindianexpress.com/nation/2020/oct/03/under-30-per-centconviction-rate-in-rape-cases-in-india-says-ncrb-data-2205090.html>.

<sup>20</sup>Andrew D Leipold, "Rethinking Jury Nullification," *Virginia Law Review*, 1996, 253–324.

<sup>21</sup>Preeti Pratishruti Dash, "Rape Adjudication in India in the Aftermath of Criminal Law Amendment Act, 2013: Findings from Trial Courts of Delhi," *Indian Law Review* 4, no. 2 (May 3, 2020): 244–66, <https://doi.org/10.1080/24730580.2020.1768774>.

<sup>22</sup>Laxmi Murthy, "Comments by Laxmi Murthy to Criminal Law Amendment Bill 2000," *Partners for Law in Development*, April 2013, <https://pldindia.org/law-reform/law-reform-advocacy/comments-by-laxmi-murthy-to-criminal-law-amendment-bill-2000/>.

extremely difficult in the Indian justice system to prove to the judges that a rape took place.

The Supreme Court's decision on the Mathura case was followed by a nationwide

movement against custodial rape<sup>23</sup>, and an open letter by four legal scholars<sup>24</sup>, namely, *Upendra Baxi*, Lotika Sarkar, Raghunath Kelkar, and Vasudha Dhagamwar to the then Chief Justice of India, condemning the decision in *Tukaram v. State of Maharashtra* in 1979. The letter describes the judgement in Mathura as one which is sacrificing the human rights of women under the Indian Constitution. The national anti-rape campaign not only demanded reopening of the Mathura case and amendments to the laws related to rape in the country<sup>25</sup> but also called for compulsory courses on gender sensitisation for state and judicial employees. Demands to amendments in the laws revolve around numerous issues centred around the social construction of sexuality, like the past sexual history of the victims of rape, procedures of the criminal justice system-First Investigation Report (FIR), medical examination, inquest, rights of women in custody in India<sup>26</sup>. In light of these movements, another challenge staring at women was the unrepresentative nature of the demands put forward by the feminist organisations. They face a dichotomy between traditions and modernity. The movement was associated with the urban middle class due to its legal engagement with rights, and it was seen to be tied to a modern, secular, and occidental desire to create a pan-Indian identity<sup>27</sup>. The proposals and demands put forward by the movement were irrelevant to the plight of the traditional, poor, tribal, and rural women, who form the majority. The movement could be seen to be created under the Western eye, and the discussion on rape must recognize the fact that the issue emerges not from an analysis of the politics of heterosexuality, but from an understanding of brutality that focuses on the exploitation of the poor by the powerful groups<sup>28</sup>. Thus, not much progress was made to deliver justice to women not a part of the mainstream feminist movements.

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<sup>23</sup>Geetanjali Gangoli, *Indian Feminisms: Campaigns against Violence and Multiple Patriarchies* (Aldershot: Ashgate, 2007).

<sup>24</sup>Upendra Baxi et al., "An Open Letter to the Chief Justice of India," September 16, 1979, <https://aud.ac.in/uploads/1/admission/admissions2014/open%20letter.pdf>.

<sup>25</sup>Neera Desai and Vibhuti Patel, *Indian Women Change & Challenge in the International Decade 1975-1985* (Popular Prakashan, 1985).

<sup>26</sup>*Supra* note 9 at 38.

<sup>27</sup>*Supra* note 15 at 254.

<sup>28</sup>Rajeswari Sunder Rajan, *Real and Imagined Women: Gender, Culture and Postcolonialism* (London: Routledge, 2003).

It is also important to look into the debate around the age of consent and the pre-marital sexual activity of women, as it was common in both the Jindal as well as the Mathura case. According to the 2015 National Family Health Survey 4<sup>29</sup>, 11% of girls had their first sexual experience before the age of 15, and 39% before 18, and according to a 2015 study by *The Hindu*<sup>30</sup>, cases of consensual sex registered as rape amounted to 23% of the total rape cases. The cases are usually filed by the parents of the girl, and the victims are not supportive of the prosecution of a case of sexual assault since there was no complaint of rape from their end<sup>31</sup>. These cases, where a case of rape is filed just because of the parents' opposition to the consensual sexual relationship, might amalgamate with genuine cases of rape, which causes the court to inspect the sexual history of the victims and give a biased judgement. The age of consent, which is set at eighteen years, provides an automated script of non-consent, and this provision is misused by guardians, which makes it difficult for the court to differentiate cases of rape alleged by the parents and by the victims. The legal avenues enable sex to act as property allowing women to claim material privileges of heteronormative conjugality and often the prosecutrix receives the benefit of doubt if the victim is seen to be 'innocent and virginal'<sup>32</sup>. The lack of 'chastity' would not warrant the same protection to the victims, evident from the chosen cases. Therefore, since women's sexual activities are exposed before the law, they are not too keen to appear before the court and this further acts as a roadblock in proving rape cases.

The Jindal rape case, along with the Mohd. Farooqui case<sup>33</sup>, contains within itself the flashbacks of the Mathura case, and overlooks all reforms brought by Criminal Law Amendments, and from the Nirbhaya case<sup>34</sup>, and reopens the debate on what actually constitutes rape. The courts refuse to accept that it is the cultural constructions of gender

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<sup>29</sup>The Ministry of Health and Family Welfare, Government of India, "The National Family Health Survey 2015-16 (NFHS-4)" (International Institute of Population Sciences, 2015), <http://rchiips.org/nfhs/pdf/NFHS4/India.pdf>.

<sup>30</sup>Rukmini S, "Why the FIR Doesn't Tell You the Whole Story," *The Hindu*, December 22, 2015, <https://www.thehindu.com/opinion/op-ed/rukmini-s-writes-about-the-mumbai-sessions-court-rulings-on-sexual-assault-during-2015-why-the-fir-doesnt-tell-you-the-whole-story/article8014815.ece>.

<sup>31</sup>Amita Pitre and Lakshmi Lingam, "Age of Consent: Challenges and Contradictions of Sexual Violence Laws in India," *Sexual and Reproductive Health Matters* 29, no. 2 (January 10, 2022): 1878656, <https://doi.org/10.1080/26410397.2021.1878656>.

<sup>32</sup>Srimati Basu, "Sexual Property: Staging Rape and Marriage in Indian Law and Feminist Theory," *Feminist Studies* 37, no. 1 (2011): 185-211.

<sup>33</sup>Mahmood Farooqui vs State (Govt Of Nct Of Delhi), Criminal Appeal No. 944 of 2016 (Delhi High Court 2017).

<sup>34</sup>Mukesh & Anr vs State (Nct Of Delhi & Ors), Criminal Appeal No. 607-608 OF 2017 (Supreme Court of India 2017).

difference that constitute rape, and not mere biological determination<sup>35</sup>. The court had set high standards for vitiating consent, and only the ‘fear of death or hurt’ could be used by the victims<sup>36</sup>. Women are sexually violated by men every day, but men do not know the meaning of their acts. To them, the allegations of rape are fallacious, because the facts describe sex. They fail to acknowledge the existence of a reality outside their own, and thus the women’s reality is assumed to be maliciously invented. Since to the men, the rape is not rape, but sex; to the law as well, the rape is sex. It is important to be cognizant of the role of caste in rape cases, and women are married off at an early age so that they do not become sexually active before marriage. Virginity becomes one of the most prized possession of an unwed girl and she would not willingly part with it<sup>37</sup>. Rape laws do not exist to enforce women’s right over their sexuality, because if it did, the Delhi HC would not say that “a feeble no may mean a yes”<sup>38</sup>. It is also true that the existing laws on rape do not acknowledge the unequal power relations and the unfair power dynamic between the rapist and the victim, and it is rightly said that rape is not prohibited, but regulated. Thus, due to the reasons put forward which discuss the inherently patriarchal nature of the justice system, it is extremely onerous for victims of rape to prove that they were raped.

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<sup>35</sup>Christine Helliwell, “‘ It’s Only a Penis’: Rape, Feminism, and Difference,” *Signs: Journal of Women in Culture and Society* 25, no. 3 (2000): 789–816.

<sup>36</sup>Vasudha Dhagamwar, *Law, Power and Justice: Protection of Personal Rights under the Indian Penal Code* (New Delhi: Sage Publications, 1992).n

<sup>37</sup>Flavia Agnes, “Protecting Women against Violence? Review of a Decade of Legislation, 1980-89,” *Economic and Political Weekly*, 1992, 19–33.

<sup>38</sup>*Supra* note 34.

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