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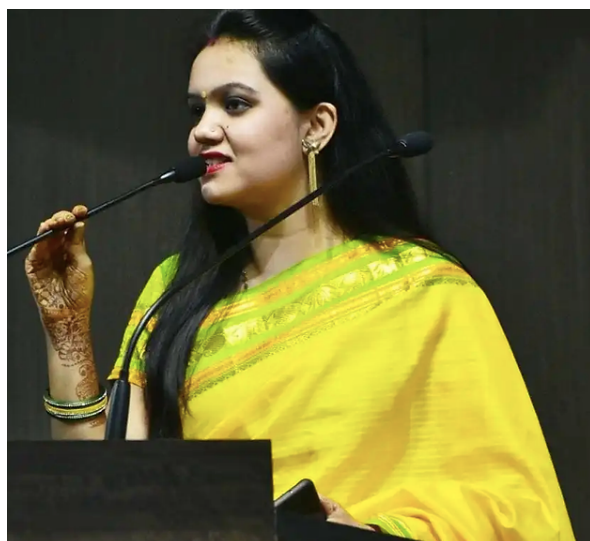


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“Ma’am is an Assistant Professor in Bharati Vidyapeeth New Law College, Pune. She has been a former Advocate at the Jharkhand High Court and has her specialisation in Corporate Laws. Ma’am has numerous publications and is an ardent researcher. With an inclination towards researching and writing upon Grey areas of Law, ma’am believes students shall look into matters which would help the existing and upcoming lawyers in a practical manner. In her opinion, students should be focused on prioritizing things in life. They should do things with full zeal and vigour.

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“Ma’am is an Assistant Professor in Christ Academy Institute of Law. She believes that for someone to excel in a professional course like Law one is expected to focus not only on the textbook knowledge but should also focus on shaping their overall personality by participating in extracurricular activities. As per ma’am most of the students are of the view that they can take benefit only from Moot Courts, competitions, however, any activity in which you participate will help you in your professional development. Just like learning calligraphy helped Steve jobs in creating apple’s typography.

Ma’am urges the young researchers to focus on the topics which are innovative and most importantly any field which interests their legal acumen.

Ma’am says that that research is at a very nascent stage in India, especially in the field of law and wishes to students that they should start focusing on improving their research skills and publishing quality papers.”

ABOUT US

The Legal Vidya is a student(s) initiative run online journal (Two Issues Per Year) started in 2020 with the aim of reaching youths of the nation, budding lawyers, students and academicians to bring forth the legal knowledge at your fingertips.

We are here to provide you with a lucid way of learning law with the help of daily blogs pertaining to the latest/other legal issues going on in the country.

We also provide legal advice and needed legal awareness to the masses with a pioneering objective of reaching the underprivileged and serving the idea of Free Legal Aid to them. (Article 39A of the Constitution of India).

We would be appraised to welcome blogs from the readers too. Readers can submit their blogs at contact@thelegalvidya.com.

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**DECIPHERING THE CONTOURS OF DIGITAL RAPE: A CRITICAL DIVE
INTO THE REFORMATORY NEED**

MS. KHUSHI SHAH

Student, Institute of Law, Nirma University, Ahmedabad

Abstract: Every country adopting the modern standard of society is nowadays operating as a “welfare state”. Duty of a welfare state is establishment of law and order in the society. Specifically, talking about India, it reflects women sensitive society where there is a need to adopt transformative laws to secure the interest of women and accord them protection against sexual predators. This paper intends to make the readers aware of the term digital rape, which has recently been highlighted in a few landmark decisions of the Indian courts. Digital rape is one of the classifications of rape. It becomes necessary to define this term and understand its meaning so as to include it under the conventional meaning of rape and broaden the same. With the knowledge and awareness that this paper creates, the author aims at bringing about proper recognition of this offence under “the Indian Penal Code, 1860” and widen its scope. The Law Commission Report on discussions and suggested amendments has also been highlighted in this paper.

Key Words: Digital rape, law commission reports, Justice Verma committee, rape laws.

INTRODUCTION

“Rape is not rape unless there is sexual intercourse.” Such defences have been employed for years to exonerate offenders charged with sexual assault when the victim's vagina was forcefully penetrated with any object or other bodily parts, such as fingers and toes. However, the Indian legal system has now caught up and expanded its knowledge of sexual offences, even encompassing crimes like digital rape. Rape is a despicable crime. And this phrase was coined to safeguard women from being compelled to use straightforward language. Although, prior to 2013, the Apex Court lacked any legislation that offered victims of digital rape justice. This was so because before 2013, there was no such thing as "digital rape." A breach of a woman or girl's dignity was involved in the crimes perpetrated under the heading of "digital rape," which was not a crime under any law. The recorded cases of this offence did not result in convictions.

A GLANCE AT MEANING AND JURISPRUDENTIAL ASPECT OF DIGITAL RAPE

Digital rape is not related to electronic devices such as laptops, smartphones, tablets, or Meta- owned networks. Although the term "digital rape" may suggest a sexual offence carried out electronically or virtually, it essentially pertains to the act of forcible penetration with the toes or fingers without the victim's consent. The term "digital rape" refers to the crime because the word "digit" indicates a finger, thumb, or toe. Here even though the term “victim” is a gender-neutral term which covers both male and female, legislations operating in Indian and associated with criminal law only define female victims and male offenders.

Rape was traditionally thought of as a “crime against property” rather than a “crime against the victim”. The ownership of women who were meant to belong to their spouses or fathers was in question. The Latin root of the word rape which is "reperere," denotes "to grab or take anything" and once again refers to property. In the past, fathers or spouses were compensated for crimes. The Hebrews, who interpreted "an eye for an eye" literally, adhered to similar laws. As retaliation for the rape, the father of the victim was given permission to rape the rapist's wife. The Celtic rules were respected in pre-British England. One of the oldest laws known to man, the *Hammurabi Code*, classified rape against women as a criminal act against women, differentiating between having no consent and being incapable of giving consent, such as when intoxicated. If you committed a rape on a virgin and the victim was married to the offender, compensation was paid to the father. On the contrary, these limitations remained the exception and not the rule in the early rape statutes. Rape was not regarded as an offense against the victim until the 12th century. In the “*Indian Penal Code*”, "Rape" was created as a legally defined offence in 1860. The British Parliament approved the “*Charter Act of 1833*”, which resulted in the creation of the first Law Commission, and

it was under Lord Macaulay's leadership that the first Law Commission was founded. The first to be incorporated into law was the “*Indian Penal Code*”, which established substantive criminal law.

The “*Indian Penal Code*” was passed in October 1860, but it didn't take effect until January 1st, 1862, until barely 15 months later. The first “*Code of Criminal Procedure*” was created in 1861, codifying the guidelines for the creation of criminal courts and the process to be used in the investigation and trial of offences.

“CONUNDRUMS”: IDENTIFYING THE ISSUES WITH DIGITAL RAPE

There are various problems related to digital rape, few of which are mentioned below:

Commission by close ones: As per few reports, nearly 70% of the time, the perpetrator of this crime is a person who is known to the victim, either as a relative or family friend or is at a position of authority such as a teacher, parent, etc.

Unreported cases due to social stigmas: In many instances it so happens that such cases are not reported due to the social stigma attached to it as well as the social embarrassment that comes with it.

Effect on mental health of victim: Digital rape is no less than rape. Just because penile penetration is not done in cases of digital rape, does not mean that it is any less harmful and traumatic on the physical as well as mental health of the victim. Offences like rape break the very core of the victim who goes through it. It not only destroys the body but also the soul of a person. The mental effect of this offence should be taken into consideration while deciding punishment and punishment should not be given leniently by only taking into account the gravity of physical injuries on the victim.

RECENT INSTANCES AND CASE LAWS ON DIGITAL RAPE

In a landmark judgement¹ passed by Surajpur District and Sessions Court in September 2022, a man named Akbar Ali, aged 65 years was sentenced to imprisonment for life for the digital rape of a three-year-old girl. Apart from life imprisonment, this man was also ordered to pay a fine of Rs. 50,000/-. The conviction was made under Section 4 of the POCSO Act² and Section 376 of IPC³.

¹ Mukesh V. State (NCT of Delhi), (2017) 6 SCC 1

² The Protection of Children From Sexual Offences Act, 2012, § 4, No. 32, Acts of Parliament, 2012 (India)

³ The Indian Penal Code, 1860, § 376, No. 45, Acts of Parliament, 1860 (British India)

As per the facts of the case, the victim was lured by the man, who was a neighbour with sweets or something like that. This man was living at the home of his married daughter and he was alone at home when he had lured the little girl and committed the crime against her. After the girl's parents came to know about the said incident, they filed a written complaint with the police. Any interim bail was denied to him and he has been in jail ever since.

This is one of the first cases in India where conviction for the offence of digital rape has been given. Generally, in other instances, as we will see below, either the case does not move forward or conviction is not given or a lenient punishment is given.

In another instance ⁴of a minor girl from Noida aged 17 Years came into light for being digitally raped by a 81 Year old sketch artist, who was her teacher. This person had committed the offence against this girl for 7 long years and finally the girl gathered courage and informed her parents about such multiple encounters she had with the so-called teachers of hers. A gruesome incident ⁵of a 50 year old man in Noida who digitally raped a 7 month old girl also came to light and this man named Manoj Lala was eventually arrested by the police. A barbaric act⁶ of a father digitally raping his own 5 year old daughter in a well known society in Noida extension also hit the headlines after the mother of the little girl lodged a complaint when her daughter complained of genital pain, on the basis of which an FIR was made by the police. In a shocking instance⁷, a 2 year old girl from Mumbai had been taken to the hospital bleeding, where doctors found that her vagina had ruptured. However, there was no proof of rape or sexual assault. It was eventually discovered that her father had been penetrating the girl with his fingers. Although he was taken into custody, Section 376 of the IPC ⁸was used to punish him and not provisions of the POCSO Act. In another incidence, a 60 year old woman was attacked sexually by an auto-rickshaw driver who forced an iron rod into her while she had gone to attend a relative's wedding. The driver was arrested but was not found guilty in accordance with Section 376 of the IPC⁹, underlining the section's flaws.

⁴ Awasthi, A. (2022) *Know what is 'digital rape' for which Noida man gets life in prison*, Firstpost. Firstpost. Available at: <https://www.firstpost.com/india/know-what-is-digital-rape-for-which-noida-man-gets-life-in-prison-11155141.html#:~:text=Digital%20rape%20is%20not%20a,been%20called%20'digital%20rape'>.

⁵ Id.

⁶ Yadav, L. (no date) *A Scenario of Digital Rape in India*, Legal Service India. Legal Service India. Available at: <https://www.legalserviceindia.com/legal/article-8589-a-scenario-of-digital-rape-in-india.html>.

⁷ Id.

⁸ The Indian Penal Code, 1860, § 376, No. 45, Acts of Parliament, 1860 (British India).

⁹ Id.

PUNISHMENT FOR DIGITAL RAPE AND OTHER RAPE LAWS IN INDIA

The “IPC” and “POCSO Acts” elucidates the penalty for the commission of certain offences. According to the “POCSO Act”, the criminal will be awarded five-year prison sentence, and if the offence is covered by “Section 376 of the IPC”, the sentence may be increased from 10 years to life in prison. The clauses governing POCSO's penalties are as follows:

“Section 3 of POCSO Act¹⁰”

Even though the definition of rape was altered in 2013 under “Section 376 of the IPC” and “Section 3 of the POCSO Act”, “*any penetration of a child's vagina, urethra, or anus with*” “*any object or a part of the body, not being the penis, or forcing the child to do so with him or any other person*” was already regarded as ‘*penetrative sexual assault*’.

“Section 5(m) and 6 of POCSO Act”

While Section 3¹¹ of the POCSO Act talks about ‘penetrative sexual assault’, Section 5 of the same Act covers ‘aggravated penetrative sexual assault’, which is defined as “committing penetrative sexual assault against a child below the age of twelve.”

According to this provision, the penalty for ‘*aggravated penetrative sexual assault*’ can be anything from “a rigorous 20-year sentence to life in prison “(which includes the rest of the natural life) or “even the death penalty”. There is also an additional fine.

“Section 6: (1) Whoever commits aggravated penetrative sexual assault 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 the natural life of that person and shall also be liable to fine, or with death.

(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of the victim.”¹²

¹⁰ The Protection of Children From Sexual Offences Act, 2012, § 6, No. 32, Acts of Parliament, 2012 (India).

¹¹ Id.

¹² The Protection of Children From Sexual Offences Act, 2012, § 6, No. 32, Acts of Parliament, 2012 (India).

- According to “Section 228A¹³ of the IPC”, it is unlawful to reveal the identity of a rape victim, and if one does, they could be sentenced for upto two years of imprisonment and fine.
- In some rape prosecutions, a presumption regarding the absence of consent may be made pursuant to “Section 114A¹⁴ of the Indian Evidence Act.”
- According to “Section 53(1)¹⁵ of the Criminal Procedure Code”, it is legal for a registered medical professional acting at the request of police officer not below the rank of sub-inspector and for anyone acting in good faith to examine a person who has been arrested on suspicion of committing an offence of such a nature and alleged to have been committed in such circumstances that there are reasonable suspicions for believing that the examination will provide evidence as to the commission of an offence.
- “Section 164A¹⁶ of CrPC” mentions provisions for “medical examination of a rape victim.”
- According to “Section 327(2)¹⁷ of CrPC”, the trial for victims of rape is to be conducted in-camera.

ROLE OF LAW COMMISSION AGAINST SEXUAL VIOLENCE AND RAPE: “JUSTICE VERMA COMMITTEE” REPORT

The "*Law Commission of India*" issued its "*172nd report*", which addressed the reform of the country's then-existing rape laws, in March 2000, with guidance from the Supreme Court in response to a PIL filed by a non-governmental organisation. The report from the Law Commission-

I. sought to broaden the definition of Section 375 offences.

¹³ The Indian Penal Code, 1860, § 228A, No. 45, Acts of Parliament, 1860 (British India).

¹⁴ The Indian Evidence Act, 1872, § 114A, No. 1, Acts of Parliament, 1872 (British India).

¹⁵ The Code of Criminal Procedure, 1973, § 53(1), No. 2, Acts of Parliament, 1974 (India)

¹⁶ The Code of Criminal Procedure, 1973, § 164A, No. 2, Acts of Parliament, 1974 (India).

¹⁷ The Code of Criminal Procedure, 1973, § 327(2), No. 2, Acts of Parliament, 1974 (India).

- II. aimed to make the laws against sexual assault and rape which were then strongly biased in favour of women, more gender neutral.
- III. Aims to outlaw the exploitation and mistreatment of children sexually. A child's psyche may be traumatised and have lasting effects from a sexual offence.

The "*Law Commission of India*" once more attempted to alter the rape and sexual violence legislation after the horrifying "Nirbhaya gang rape case"¹⁸ in 2012. To examine the current laws and offer reformed recommendations, a committee under the direction of "*Justice J.S. Verma*" was created. "The Criminal Law (Amendment) Act of 2013" was passed as a result of the committee's findings, strengthening the rape and sexual assault laws.

The Law Commission report suggested the following amendments on rape and made certain recommendations. The committee recommended that the IPC continue to employ its method of grading sexual offences in order to determine the responsibility of rape. The crime of rape cannot be limited to the penetration of private parts since it involves more than simply the simple satisfaction of desire. Any penetration that is not consensual must qualify as rape. The IPC defines rape as a non-consensual exercise of authority under section 375. However, occurrences of marital rape are not covered in this section. Consent is presumed to be prevalent when the victim and the accused are married. Since marriage does not automatically imply permission to rape, it was suggested that marital rape be made a crime.

On the topic of sexual assault, the committee said that if penetration was not proven, the criminal should be punished under Section 354 of the IPC¹⁹. In accordance with this clause, anybody who uses coercion or criminal violence against a woman with the mental state to outrage her modesty faces a sentence of either not more than "two years in prison, a fine, or both". It recommended that sexual contact of any kind be classified as sexual assault. The committee also called for tougher penalties for sexual assault, such as five years in prison, a fine, or both. When a male uses force to disrobe a woman, he must receive a sentence of three to seven years in prison.

¹⁸ Mukesh V. State (NCT Of Delhi), (2017) 6 SCC 1

¹⁹ The Indian Penal Code, 1860, § 354, No. 45, Acts of Parliament, 1860 (British India).

On “Section 509 of IPC²⁰” which covers verbal sexual assault under the ambit of outraging the modesty of a woman, the committee suggested repealment of this section and to cover such instances of making threats of sexual assault, saying obscene words and making such gestures under the offence of sexual assault.

In instances where the accused was employed under “The Armed Forces (Special Powers) Act (AFSPA)” at the time of the sexual offence, the law in place was that the central government must first adopt a sanction before a prosecution may be brought against that person. The committee requested that the requirement for such sanction be dropped. It also worked to get chemical castration dropped since it failed to act as a restraint against the core causes of sexual assault. The death sentence for rape crimes was also urged to be abolished because it had not been shown to effectively deter the crime over time. The committee suggested life imprisonment as an alternative.

The committee recommended that since the practice of two-finger test on rape victims has been shown to be unreasonable from a scientific standpoint, it should be banned. As per this test, in order to ascertain if the female is a virgin or not, the test is used to measure the suppleness of the vaginal muscles. It has been established that a variety of factors may contribute to the flexibility of the vaginal muscles. Furthermore, the outcomes of this test are frequently misinterpreted in order to determine the woman's moral character based on her past sexual behaviour.

Very recently, the SC reiterated to the application of the "two-finger test". The judgement²¹ also ordered the state and union bodies to take steps to get the aforesaid test eliminated from the course of study and said that any medical practitioners caught to be administering the test would be held accountable for their actions. In 2013, the SC had ruled that the “two-finger test”, also referred to as the “virginity test” or “per vaginum” test, was unconstitutional. The exam “violates the right of rape survivors to privacy, physical and mental integrity and dignity,” it had been written at the time.

THE WAY FORWARD: CONCLUSION AND SUGGESTIONS

²⁰ The Indian Penal Code, 1860, § 509, No. 45, Acts of Parliament, 1860 (British India).

²¹ *Two-Finger Test: The Indian Supreme Court's Important Reiteration Of Ban (2022) Equality Now*. Equality Now.

Available at: https://www.equalitynow.org/news_and_insights/two-finger-test-the-indian-supreme-courts-important-reiteration-of-ban/.

Despite the full-fledged effort of the law commission to have India's current rape laws modified, it appears that the federal government has not kept up with the situation. The law commission attempted to broaden the scope of rape under section 375 of the IPC in its 172nd report, which was dated March 25, 2000. The panel made an effort to lessen the gender bias in the rape legislation because there had been a significant increase in the sexual abuse of boys. The current statute has not yet been amended in accordance with these suggestions, nevertheless. Even 20 years later, there is still gender bias in the laws, and it has actually gotten worse recently.

The Delhi High Court has also expressed concern over how poorly the laws are written. It said that the legislation's flaws, as identified by the law commission, have turned out to be rather obvious. It is necessary to change the definition of rape to encompass incidents of sexual assault that do not adhere to the traditional penile-vaginal penetration standard. The 2010 draught Criminal Laws Amendment Bill, passed by "*the Ministry of Home Affairs*" in an effort to change the definition, replaced rape with sexual assault. Another glaring gap in the rape legislation is the non-criminalization of marital rape. The Justice Verma committee made an effort to do away with this exception in 2012. The National Commission on Women further stated that a woman's agreement to a sexual act should not be taken for granted if she is older than 16 years old. The IPC is still plagued by these flaws, though. The current rape and sexual assault laws need to be urgently changed to reflect the current situation.

It is an established jurisprudence of sentencing that the court shall draw a balance sheet of mitigating and aggravating circumstances while awarding a particular sentence in every case. albeit, the practical reality is different and deciding sentencing in most of the cases is mere mechanical procedural step rather than exercise of judicial wisdom in deciding the sentence. When we talk about rape and digital rape, the real conundrum is with respect to considering the commission of rape through digital means as mitigating factor. **My argument** is that commission of rape digitally won't make any difference compared to traditional rape and trauma and sufferings of victim will be at same psychological level. Thus, the sentencing of digital rape shall be at par with sentencing of traditional rape.